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# Moral Damages in Mexican Law: A Comparative Approach

EDITH FRIEDLER\*

## I. INTRODUCTION\*\*

*A California resident is severely injured while vacationing in a small Mexican resort. The airline that operates the only flight to Los Angeles at the time of the accident refuses to fly the injured person home, disregarding the serious condition and possible threat to human life. In an action for wrongful death against the airline by the spouse, one of the issues likely to be raised will be whether under Mexican law punitive damages are recoverable.*

Situations like this occur rather frequently, raising numerous legal issues under foreign law. Although the preceding fact situation may raise conflict of laws issues and issues under the Warsaw Convention,<sup>1</sup> this article deals exclusively with the governing tort liability and damages. In particular it focuses on "moral damages"<sup>2</sup> under Mexican law.

The geographical proximity between California and Mexico provides opportunities for commercial and non-commercial interaction between citizens of Mexico and citizens of the United States. The relationships thus created often involve legal issues that may eventually result in litigation. Conflict of laws issues are likely to arise and application of foreign law is frequent, in spite of modern theories of

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1. The Warsaw Convention, formally titled Convention for the Unification of Certain Rules Relating to International Transportation by Air, was created on October 12, 1929, and was adhered to by the United States on June 15, 1934. The official text of the treaty is in French and is published at 49 Stat. 3000 (1934). An English translation is published at 49 Stat. 3014 (1934) and reprinted in T.S. No. 876, 137 L.N.T.S. 11 and 49 U.S.C. app. § 1502 (1976). For a comprehensive comment, see Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

2. Moral damages are damages that can be recovered for a non-pecuniary or non-material loss or injury. See *infra* text accompanying notes 91-93.

interest analysis.<sup>3</sup> Therefore, the California practitioner benefits from a basic knowledge of civil law and Mexican law.

While Mexico and the United States are geographically close, socially and culturally they are light years apart. Mexico is part of the third world. The differences between the United States and Mexico have many significant implications on legal relations between Mexicans and Americans who visit Mexico. For example, because many Americans do not realize the hazards of life and business in Mexico, they cannot anticipate potential problems. Once such problems are encountered Americans may misjudge what Mexican law can and will do for them. Americans tend to assume that the moral principles and value hierarchy that govern life in the United States also govern the lives of people everywhere. This ethnocentric view of the world presents a great problem when Americans have dealings in Mexico.

The law of punitive damages is one of the best illustrations of the diverging values and expectations concerning the law between Mexico and the United States. This article will show that while the concept of moral damages under Mexican law has nothing to do with the notion of punitive damages present in American jurisprudence, it is similar to the United States' practice of awarding damages for emotional distress.

Since Mexico is a civil law, rather than a common law country, Section II will discuss fundamental civil law concepts, including a brief discussion of torts and damages. Section III will explore basic theories of tort liability according to Mexican law, and deals with the notion of moral damages in Mexico and applies this concept to specific fact situations. Section IV discusses the relationship between moral damages in Mexico and the United States' practice of awarding damages for emotional distress.<sup>4</sup>

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3. Professor Brainard Currie developed the "governmental interest analysis approach" to choice of law. This approach examines the policies expressed in the respective laws that may govern a case and the circumstances in which it is reasonable for the respective states to assert an interest in the application of these policies. If after going through the analysis that Currie suggests, a court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply forum law. See generally B. CURRIE, *SELECTED ESSAYS ON THE CONFLICTS OF LAWS* (1963). However, in a recent case between a California grower and a United States corporation the California Supreme Court held that Mexican law rather than California law should apply. *Wong v. Tenneco, Inc.*, 39 Cal. 3d 126 (1985). In *Wong* the California grower was conducting farming operations in Mexico that were illegal under a Mexican law which prohibited foreign ownership and control of farming operations. He sued the United States corporation for anticipatory damages for breach of a marketing agreement concerning crops grown in Mexico. *Id.*

4. Civil law and common law evolved from different sources and in different ways.

## II. BASIC CIVIL LAW CONCEPTS RELATING TO TORT LIABILITY AND DAMAGES

### A. Fundamentals of Civil Law

The term "civil law" originated from the latin words *jus civile*, the law of the *civitas*. *Civitas* was a Roman city where only Roman citizens or *cives* could assert legal rights and privileges under the Roman law.<sup>5</sup> The *ius gentium*, "principles of law . . . common to mankind (*gentes*) applied to all other free inhabitants of the Roman Empire."<sup>6</sup>

The system of civil law is commonly believed to have originated at the time of the publication of the Law of the XII Tables in Rome in 450 B.C. Today, civil law is the dominant body of law throughout most of Western Europe, all of Central and South America, many parts of Asia and Africa, and even in a few enclaves in common law countries. For example, the United States is a common law country, but Louisiana and Puerto Rico are civil law jurisdictions. Similarly, though Canada is a common law country, Quebec is a civil law jurisdiction.<sup>7</sup>

The term "civil law" refers to the Roman law as set forth in the Justinian Code in the 6th Century A.D.<sup>8</sup> as reinterpreted by the

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There are terms like "tort" in common law and "fault" in civil law that cannot be translated from one legal system into the other because the concepts themselves are different. Therefore, an effort is made to provide the reader with a basic explanation as to the meaning of unfamiliar terms. To aid in the understanding of the paper, the author uses some conventional terms with a given meaning. For example, instead of talking about *civil delicts* and *quasi delicts* which together are the closest equivalent in civil law to the common law "tort," the word "civil tort" is employed. Each term is defined in the section in which it appears.

5. Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 420 (1967).

6. The *ius gentium* may be defined as the universal element, in antithesis to the national peculiarities (*ius civile*), to be found in the positive law of every state. . . . In a practical sense *ius gentium* covered only those rules, institutions and principles of actual Roman Law which, owing to their simplicity and correspondence with the general practice of mankind, were applied to *cives* and *peregrini* indifferently, the *ius civile* describing, in this antithesis, those not so extended.

F. DE ZULUETA, *THE SCIENCE OF LAW IN THE LEGACY OF ROME* 201-02 (1962).

7. J. MERRYMAN & D. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN-AMERICAN LEGAL SYSTEMS, CASES AND MATERIALS* 3 (1978).

8. Roman law was the law of the Roman citizens from 450 B.C., the date of the publication of the Law of the Twelve Tables, until 565 A.D., the date of the death of the emperor Justinian. This emperor codified the existing Roman law, including his own legislative enactments in a monumental work, *The Corpus Juris Civilis*. With the fall of the Roman Empire, *The Corpus Juris Civilis* fell into disuse and systems of Roman Vulgar Law (Roman law in a cruder version) took its place together with Germanic legal customs as the law of the peoples settling in Western Europe. In the 11th century, with the founding of the University of

Glossators, Commentators, Humanists and Natural Law exponents, and ultimately recodified in the nineteenth century.<sup>9</sup> Modern civil law has also been influenced by Canon Law and Germanic customary law.<sup>10</sup>

There are three fundamental differences between civil law and common law: (1) the sources of law; (2) the role of the judge; and (3) the nature of the proceedings.

In a civil law system the primary source of law is codified legislation, whereas a common law system relies primarily on *stare decisis*, or case law. Civil law codes usually differ from common law statutes in the following ways:

A [civil law] code is not a list of special rules for particular situations; it is rather, a body of general principles carefully arranged and closely integrated. A [civil law] Code achieves the highest level of generalization based upon a scientific structure of classification. A [civil law] Code purports to be comprehensive and to

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Bologna, *The Corpus Juris Civilis* of Justinian was not only the subject matter of legal education, but it became the law of the Holy Roman Empire. The law courses at Bologna attracted students from all over Europe. These students in turn, applied Roman law in their own countries. New universities were founded in the image of Bologna and, so, Roman law became the *ius commune* (the common law) of Western Europe.

There were different opinions as to the right way of approaching the study of Justinian's *The Corpus Juris Civilis* and so, Glossators, Post Glossators, Humanists, Natural Law exponents and scholars of the Historical school all left their mark in this system of law. With the growth of the concept of nation and sovereignty in the 15th Century, the idea of *ius commune* faded and Roman law was "received," that is incorporated as a binding body of law in the national law of each country. Eventually, in the 19th Century the principal states of Western Europe enacted civil codes (and other codes) of which the French Civil Code of 1804 is the archetype. *Id.* at 72-73.

The subject matter of these civil codes was almost identical with the subject matter of the first three books of the *Institutes* of Justinian and the *ius commune* of medieval Europe. . . . A European or Latin American [Mexican] civil code of today clearly demonstrates the influence of the Roman law and its medieval revival.

*Id.* at 73.

The French Civil Code together with its legal institutions and scholarship has influenced a majority of civil law countries. The armies of Napoleon carried French law throughout Europe and later this influence took place under French Colonialism. When the Spanish Empire in Latin America dissolved in the 19th Century, it was to the French Civil Code that the law makers of the new nations turned for inspiration. The French Civil Code remains in effect to this day with revisions, *inter alia*, in the Spanish Civil Code of 1888. M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS. TEXT, MATERIALS AND CASES* 55 (1985). Thus, mentions to the French Civil Code and to French scholarship are frequent in this paper.

9. Schiller, *The Nature and Significance of Jurists Law*, 47 B.U.L. REV. 20, 37-38 (1967).

10. For a very good study of the influence of Roman Law on Western law see P. KOSCHAKER, *EUROPA UND DAS ROMISCHE RECHT* (1947).

encompass the entire subject matter, not in the details but in the principles, and to provide answers for questions which may arise.<sup>11</sup>

Common law statutes do not maintain the same level of generality as civil law codes do, nor do they purport to be all embracing. They do not have the conceptual and terminological consistency found in the codes. The legislature resorts to statutes to respond to current particularized needs, i.e., rent control, environmental regulation, labor practices, etc. Statutes outside of the codes are more easily amended and, therefore, more appropriate as circumstances change.

Civil law codes tend to be more general and encompass a broader range of circumstances than do common law statutes. In civil law, legal scholars' views and treatises are treated as a primary source of law, while in common law the legal scholars' views are given less weight. In spite of the differences between common law and civil law, the growing importance of case decisions in civil law and the greater tendency to rely on statutes in common law has begun to create an area of convergence between common law and civil law.<sup>12</sup>

The role of the judge in civil law differs from the role of the judge in common law. This is due in part to the difference in the source of law between the two systems. Civil law judges must apply codified law by means of a process of deduction, in which general codified principles are applied to a specific case before the judge.<sup>13</sup> For instance, in an action for wrongful death brought in a French court, a judge must look at the specific fact situation and decide whether there is a tort which is actionable under section 1382<sup>14</sup> of the French Civil Code.<sup>15</sup>

Civil law codes attempt to cover a wide range of unforeseen fact situations by way of substantive provisions of utmost generality and

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11. Dainow, *supra* note 5, at 424.

12. For a good analysis of the role of statutes in modern civil law and common law, see Glendon, *The Sources of Law in a Changing Legal Order*, 17 CREIGHTON L. REV., 663, 668-69 (1984).

13. For a good discussion of the role of a judge in civil matters in France, see Perrot, *The Judge: The Extent and Limit of His Role in Civil Matters*, 50 TUL. L. REV. 495 (1976).

14. In France and most civil law countries including Mexico, the code sections are numbered using the term *article* or *artículo*. These terms have been translated into English as "articles" or "sections." Since the term "article" is more appropriate for use in constitutional and international law, for the purposes of this paper, the word "section" will be used where referring to the codes.

15. CIVIL CODE [C. CIV.] § 1382 (amended July 1, 1976) (J. Crabb trans. 1976) (Fr.). Section 1382 is the most important statute on tort liability in French law. In very general terms it provides that: "Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation." *Id.*

flexibility. These so called "general clauses" of the codes may provide, for example, that all immoral transactions are void or that every obligation must be performed in good faith.<sup>16</sup> Thus, in an action for damage of goods in a civil law country which has not enacted anti-trust legislation, an exclusion of liability clause in a contract will most likely be considered immoral or *contra bonos mores*,<sup>17</sup> and the judge will declare the exclusion clause void and find for the plaintiff.<sup>18</sup>

If there are gaps or *lacunae* in the code (that is, there are no statutes which specifically pertain to the particular case), the judge must nevertheless decide the case, either by use of general clauses, by analogy, or by applying general principles of law. A judge cannot refuse to decide a case simply because there is no applicable law governing the case.<sup>19</sup>

For example, the French legislature in 1804 did not envision liability for automobile accidents. The only code section that by analogy could be said to apply to automobiles was section 1384 of the Civil

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16. Section 242 German Civil Code: "The obligor is bound to perform the obligation in such a way as is required by the principles of bona fides with due regard to existing usage." THE CIVIL CODE. [C. CIV.] § 242 (amended Jan. 1, 1976) (W. Ger.) (J. Forrester, S. Goren & H. Ilgen trans. 1976). The German Civil Code enacted in 1896 and in effect as of January 1, 1900 as amended, remains the law of the German Federal Republic (West Germany). All references to the German Civil Code in this paper refer to the 1896 (West German) Code as amended.

17. Section 138 Subdivision (1) German Civil Code: "A jural act which is *contra bonos mores* (violative of the commands of morality) is void." C. CIV. § 138 SUB. 1 (amended Jan. 1, 1976) (W. Ger.) (J. Forrester, S. Goren & H. Ilgen trans. 1976).

18. Many civil law countries use *contra bonos mores* (against good morals or against good customs or simply immoral) as a "general clause" that allows a judge great flexibility in deciding whether a particular conduct is immoral and, therefore, becomes a basis of liability. For example, Section 1133 of the French Civil Code states: "A *causa* is illicit when it is prohibited by law, or when it is contrary to morality or public policy." C. CIV. § 1133 (amended July, 1976) (Fr.) (J. Crabb trans. 1976). The same idea is reflected in Section 1910 of the Mexican Civil Code: "He who acting illegally or against good customs causes damage to another, is obliged to repair it, unless he proves that the damage occurred in consequence of the fault or inexcusable negligence of the victim." (M. Gordon trans. 1980). Mexico, like the United States, is a Federal Republic with twenty nine states, two territories and a federal district like the District of Columbia. All references to the Mexican Civil Code in this paper are directed to the Civil Code for the Federal District and Territories, promulgated August 30, 1928, effective October 1, 1932. This Code has served as a model to the civil code of the individual states and is also used as a "back up" code for interpreting federal case law. See Butte, *Strict Liability in Mexico*, 18 AM. J. COMP. L. 805 n.2 (1970).

19. "The judge who refuses to judge, on pretext of the silence, obscurity or insufficiency of the law, may be prosecuted as guilty of a denial of justice." C. CIV. 4 (amended July 1, 1976) (J. Crabb trans 1976) (Fr.). "The silence, obscurity or insufficiency of the law do not authorize the judges or courts to refrain from deciding a controversy." Mexican Civil Code 18. (M. Gordon trans. 1980).

Code which states: “[e]veryone is responsible not only for the damages caused by his own acts, but also for damage caused by acts of persons for whom he must answer or by objects in his custody.”<sup>20</sup> In 1930 the highest French court (Cour de Cassation) decided that this section established an independent basis of liability and that the custodian (owner or driver) of an automobile (or other instrumentality) which causes an accident, is presumptively liable.<sup>21</sup>

The preliminary titles of most civil codes, with the exception of the German Code, contain directions on interpretation and application of the code.<sup>22</sup> The codes normally order judges to base their decisions on specific code sections.<sup>23</sup> Normally, a judge may not base his/her decision on prior case law. To do so would convert a prior judicial decision into a “general rule of conduct”<sup>24</sup> (*stare decisis*), which is not normally permitted in a civil law system.

Civil law judges must cite at least one statutory provision as a basis for their decision. A decision based solely on case precedent will be reversed for “lack of legal basis.”<sup>25</sup> However, in some civil law countries, including Mexico, a court decision may become law. This occurs when a particular legal issue is decided by the highest court, or another specified tribunal, in an appreciable number of cases. The uniform judicial decisions become *juris prudencia constante* or *jurisprudencia* (Mexico), which may become binding law in future cases. Resort to *jurisprudencia constante* is particularly helpful in situations where there are very few legislative provisions, as in France in con-

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20. C. CIV. § 1384 (J. Crabb trans. 1976) (Fr.).

21. R. SCHLESINGER, *COMPARATIVE LAW, CASES AND MATERIALS* 514-15 (4th ed. 1980).

22. “When there is no law exactly applicable to the point in controversy, the customs of the place shall be observed, and in the absence thereof, the general principles of law.” Spanish Civil Code § 6, *quoted in id.* at 228. “Juridical controversies of a civil nature shall be decided in accordance with the letter of the law or its juridical interpretation. In the absence of a law, they shall be decided in accordance with general legal principles.” Mexican Civil Code § 19 (M. Gordon trans. 1980).

23. “Judges are forbidden to pronounce decisions by way of general and regulative disposition on causes which are submitted to them.” C. CIV. § 5 (J. Crabb trans. 1976) (Fr.). A judge who violates this prohibition is, theoretically, guilty of a criminal offense. CODE PENAL [C. PEN.] 127 (Fr.) *quoted in* R. SCHLESINGER, *supra* note 21, at 578.

24. R. SCHLESINGER, *supra* note 21, at 578.

25. The traditional style of French decisions has historical roots. After the Revolution of 1789, the French people deeply distrusted judges because of the experiences under the royal regime. Also, Montesquieu had proclaimed the doctrine of separation of powers and only the legislature could make law in a general way. H. CAPITANT, *LES GRANDS ARRETS DE LA JURISPRUDENCE CIVILE* (7th ed. 1976) *reprinted in* H. LIEBESNY, *FOREIGN LEGAL SYSTEMS, A COMPARATIVE ANALYSIS* 56-59 (4th ed. 1981).



nection with tort liability.<sup>26</sup>

The final difference between civil law and common law is found in the nature of the judicial proceeding. In civil law there is neither a "trial," nor a jury. The civil law system prefers documentary evidence over witness testimony, with the latter receiving very little weight.<sup>27</sup> In addition, in a civil law court, only the judge cross-examines witnesses. Civil court proceedings consist of a series of isolated hearings. Further, there is no formal pre-trial discovery.

### B. *The Concept of Tort in Civil Law*

In order to comprehend the notion of tort liability under Mexican law, and in particular, moral damages, a brief explanation of the civil law counterpart of common law tort liability is necessary. The statements that follow refer to the civil law in general. The basic principles of civil law tort liability apply to Mexican law. Any general differences between Mexican law and civil law will also be discussed below.

There is no equivalent civil law term for the common law term "tort." The common law term "tort" is extremely difficult to translate into civil law terminology because of the fundamental division of civil law into "public law" and "private law."<sup>28</sup> As a consequence of this division, tort liability belongs to the category of private law and is part of the law of obligation or a source of an obligation.<sup>29</sup> The law of

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26. It is interesting to observe that out of a total of 2283 sections in the French Civil Code, only five (1382-86) are devoted to what the common law calls tort liability. Most of the French law on this subject was developed by the French highest court, the Cour de cassation, acting very much like a Common Law court. Tunc, *The Twentieth Century Development and Function of the Law of Torts in France*, 14 INT'L & COMP. L.Q. 1089, 1091 (1965).

27. Documentary evidence is similar to common law "writings" which are one category of demonstrative evidence. MCCORMICK ON EVIDENCE 524 (E. Cleary 2d ed. 1972).

28. Roman law and continental European legal doctrine and its offspring divide all law into public law and private law. Public law is understood to be that body of law which governs the affairs of the community (state, municipalities, etc.). Private law regulates such legal relations in which persons (without any display of authority, that is, on the basis of equality) stand against each other as individuals. M. KASER, ROMAN PRIVATE LAW 22 (R. Sannenberg & Butterworths trans. 1965).

29. An obligation is a bond by which the one party is bound to perform and the other entitled to receive some act or forbearance. The term *obligatio* sometimes denotes the right, oftentimes the duty, but more properly it denotes the whole relationship. B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 158 (1962). This concept of obligation is derived from the Roman Law as found in *Digest* 44.7.1 and *Inst.* 3, 13.2. (These references are to the *Digest* and the *Institutes* which comprise two parts of Justinian's *The Corpus Juris Civilis*. See *supra* note 8). The other two parts are the *Code* and the *Novels*. *Id.* For a good summary of Roman sources and explanations as to their conventional citation, see A. SCHILLER, ROMAN LAW

obligations covers all acts or situations which can give rise to rights or claims and is customarily divided into three parts: the law of contracts, the law of torts, and the law of unjust enrichment.<sup>30</sup>

There are two civil law terms which relate to the common law concept of tort. They are *delict* and *quasi-delict*.<sup>31</sup> These terms apply to both criminal and civil causes of action. *Penal delicts* and *penal quasi-delicts* are governed exclusively by the penal codes and therefore are not pertinent to this discussion of tort liability.

The terms *civil delict* and *civil quasi-delict* parallel the common law notions of intentional and negligent tort.<sup>32</sup> Generally, a *delict* is an unlawful or illicit act committed with intent to harm and a *quasi-delict* is an unlawful or illicit act committed without intent to harm.<sup>33</sup>

In civil law there are no torts, there is only a law of tort.<sup>34</sup> This means that in civil law there are no specific torts such as false imprisonment, assault or battery. Section 1382 of the French Civil Code is a good example of a civil law code concerning the law of tort. It provides: "Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation."<sup>35</sup> The section is drafted in a very general manner. There are no specific torts and therefore even the distinction between negligent and intentional torts becomes irrelevant. The only distinction among the different theories of liability is reflected in the amount of damages awarded.

chapter II (1978). The situations that give rise to an obligation according to the Romans were contracts, quasi contracts, *delicts* and *quasi-delicts*. *Inst.* 3, 27, 4, 5 respectively.

30. "The distinction between contractual and delictual (tort) responsibility has been treated as fundamental in civil law theory, even though both contract and delict are regarded as parts of the single field of obligations." M. GLENDON, M. GORDON & C. OSAKWE, *supra* note 8, at 262.

31. As an example, one person may have a claim against another because he or she gave a sum of money to another as a loan. This claim arises from a *contract*. A person may also have a claim against another because someone wrongfully damaged a thing belonging to that person. This claim against the wrongdoer arises from the *delict*. Today, this would be a claim for damages. M. KASER, *supra* note 28, at 135.

32. The term "civil tort" will be used in this paper to refer to civil law torts, that is *civil delicts* and *civil quasi-delicts* (intentional and negligent tort).

33. A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 577 n.44 (2d ed. 1977).

34. Speaking of French law, Tunc says: "We have no specific torts. We have a general law of tort, based on the general principles of Articles 1382 and 1383." Tunc, *supra* note 26, at 1091. The use of the word in the singular is deliberate. "The common law knows not tort but torts—a bag of nuts and bolts." Catala & Weir, *Delicts and Torts: A Study in Parallel Part I*, 37 *TUL. L. REV.* 573, 580 (1963). "The French law of tort is essentially judicial application of five articles of the civil code. In contrast, the common law systems know not contracts, but contract." H. DE VRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER* 367 (1973).

35. C. CIV. § 1382 (J. Crabb trans.) (Fr.).

Tort law in most civil law countries, including Mexico, is founded on sections 1382 and 1383 of the French Civil Code.<sup>36</sup>

Sections 1382 and 1383 are derived from the famous *Lex Aquilia* enacted by the Romans in 286 B.C.<sup>37</sup> The *Lex Aquilia* with its extensions provided the most comprehensive and important tort remedy available in Roman law. A brief look at the Roman notion of "tort" is necessary to understand the modern civil tort.

Roman law was also divided into public and private law.<sup>38</sup> Consequently, the Romans distinguished between crimes against the community or state, called *crimina publica* and wrongs against the individual, his family or his property, called *delicta privata*. *Crimina publica* were litigated by the state and typically involved treason and assaults on government officials. The *delicta privata*, from which today's civil law concepts of *delict* and *quasi-delict* originated, could be litigated in a private suit only by the victim. The wrongdoer was treated as the debtor of the victim, which meant that the victim was entitled to a sum of money from the wrongdoer. Thus, the Roman law *delict* action gave rise to an obligation to pay a sum of money (*poena*)<sup>39</sup> to the victim, in addition to any other damages awarded to the victim.<sup>40</sup>

For example, *delictal* actions were classified as penal (*actio ex*

36. "Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation." C. CIV. § 1382 (J. Crabb trans.) (Fr.). "Everyone is responsible for the damage he causes, not only by his act, but also by his negligence or his imprudence." *Id.* at § 1383.

37. The *Lex Aquilia* allegedly of 286 B.C. was voted as a plebiscite, that is by the *consilium plebis*, the assembly of the Plebeians. Initially it would only have been enforced amongst the Plebeians, but in the same year the *Lex Hortensia* was passed and it gave plebiscites general force of law over Patricians and Plebeians alike. JORS & KUNKEL, *DERECHO PRIVADO ROMANO*, 364-65 (1965). The text of the *Lex Aquilia* as extended by the Praetor (the Roman magistrate in charge of judicial affairs) and with the comments of the jurists is found in *Digest*, 2, 1-11. See *supra* note 29.

38. See *supra* note 28.

39. The *poena* (punishment) is pecuniary and its purpose is to benefit the victim. This is a residue of the primitive concept that the sanction for every wrong was private vengeance from which the wrongdoer could not escape unless the victim or his family would accept ransom money. That the punishment was a sum of money and that the cause of action belonged to the victim does not prevent it from being primarily a way of inflicting punishment. V. ARANGIO-RUIZ, *LAS ACCIONES EN EL DERECHO PRIVADO ROMANO* 127-28 (1945). The same line of thought is found in W. BUCKLAND & A. MCNAIR, *ROMAN LAW AND COMMON LAW* 344 (1952).

40. B. NICHOLAS, *supra* note 29, at 210. R. MONIER, *MANUEL DE DROIT ROMAIN. LES OBLIGATIONS* 38 (1954).

*delicto*).<sup>41</sup> In contrast, all other private law actions, whether *in rem*<sup>42</sup> or *in personam*,<sup>43</sup> were classified as compensatory actions (*rei persecutory* or *ad rem persequendam*).<sup>44</sup> One of the *delicta privata* was theft (*furtum*), and the appropriate action for theft was the *actio furti*, a penal action. It allowed for the recovery of double, triple, or quadruple the value of the stolen thing according to certain distinctions in the law. If the stolen thing was in the hands of a third party, the victim could use the *actio furti* as *rei persequendam* to recover the stolen property or its value.<sup>45</sup>

Unlike civil law today, Roman law did not use the terms *delict* and *quasi-delict* to distinguish between intentional and negligent actions. However, the terms *delict* and *quasi-delict* did exist in Roman law. In Roman law, *delict* referred to four fact patterns which constituted a private offense. These four private law delicts (*delicta privata*) were: (1) theft (*furtum*), (2) robbery (*rapina*), (3) damage unlawfully caused (*danum iniuria datum*), and (4) insult (*iniuria*).<sup>46</sup> A *delict* in Roman law could consist of either intentional or negligent conduct.

There were also only four fact situations which comprised the Roman law *quasi-delict*. These were: (1) judicial acts contrary to the law (*iudex, qui litem suam fecerit*); (2) things thrown or poured into the street from a dwelling (*directum vel effusum*); (3) something placed on, or suspended from, a building which fell and injured someone (*positum vel suspensum*); and (4) loss to a customer by thievery or by damaging the customer's property caused by an innkeeper's assistants (*nauta, caupo* and *stabularius*).<sup>47</sup> Thus, Roman law *quasi-delicts* could consist of either intentional or negligent conduct. Furthermore, the last three situations actually gave rise to actions based on what the common law would consider strict liability. The criteria for categorizing the aforementioned fact patterns as either *delicts* or *quasi-delicts* remains unclear.

41. Examples of these *actiones delicto* are: *actio furti* (theft), *actio iniurarum* (bodily injury and insult to person). B. NICHOLAS, *supra* note 29.

42. Typical actions *in rem* were *reivindicatio* (protection of property) and *vindicatio servitutis* (protection of easement). *Id.*

43. Frequently used actions *in personam* were *actio certae creditae pecuniae* (recovery of money loaned) and *actio venditi* (action of the seller to obtain payment for the thing sold). *Id.*

44. "A *rei persecutory* action commonly results in the payment of compensation, and a penal action in the payment of more than compensation, but the essential distinction is to be found in the punitive or vindicative character of the penal action." *Id.* at 210.

45. *Id.* at 212-13.

46. *Gaius, Institutes* 3, 182. See *supra* note 29 for reference to Roman sources.

47. *Digest* 44.7.5; *Inst.* 4, 5. See *supra* note 29.

The concept of fault or *culpa*, the cornerstone of civil tort liability, originated from the *Lex Aquilia* which introduced extra-contractual fault<sup>48</sup> for the first time (although the concept of fault existed in contract actions prior to the *Lex Aquilia*). The *Lex Aquilia* essentially made the defendant liable for damages if the defendant acted *iniuria*, that is, *non iure* or without a right.<sup>49</sup> The Roman law concept of "fault" was referred to as *Aquilian* or *delictal* in order to differentiate it from contractual fault. *Aquilian* or *delictal* fault formed the basis of French civil tort liability<sup>50</sup> which in turn formed the basis of Mexican civil tort liability.

The French Civil Code does not define fault. However, section 1382 of the French Civil Code alludes to the concept of fault. Section 1382 provides that: "[a]ny act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation."<sup>51</sup> The French scholar Toullier, stated that:

The true meaning of our article 1382 is, therefore, that one who causes damage to another by doing something which he does not have the right to do or by neglecting to do what he ought to do, is obligated to make reparation for the damage that has occurred through his fault.<sup>52</sup>

In common law terms, French civil law "fault" exists when there is a breach of a duty of care. Modern civil law scholars Von Mehren and Gordley stated that "besides duties imposed by the criminal law and by specific texts from the civil or other codes, it [French civil law "duty of care"] includes a general duty not to act in such a way as to injure others."<sup>53</sup>

This duty of care is owed to all the world and therefore the de-

48. It originated in actions not involving a contract.

49. "To act without a right came to mean to act with *dolus* or *culpa*, that is, willfully or negligently." A. VON MEHREN & J. GORDLEY, *supra* note 33, at 567.

50. OURLIAC ET MALAFOSSE, L'HISTOIRE DU DROIT PRIVE. LES OBLIGATIONS 375 (1961).

51. The French Civil Code merges the *delict* and *quasi-delict* under the generic term "fault." "The idea of fault includes all; it is the unjustified injury which gives rise to the obligation to indemnify; it matters little in what manner the injury was caused." 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DU DROIT CIVIL 442, Part I, No. 827 (Louisiana State Law Institute trans. 1959).

52. Toullier, *Le Droit Français*, in A. VON MEHREN & J. GORDLEY, *supra* note 33, at 576.

53. A. VON MEHREN & J. GORDLEY, *supra* note 33, at 581. The well-known contemporary French scholar André Tunc uses the same language: "The duty of care is owed not to certain people or to certain circles of people. It is a general duty to the public at large." Tunc, *supra* note 26, at 1091.

fendant will almost always be found at fault with respect to someone.<sup>54</sup>

### C. "Damages" in Civil Law

In order to understand the notion of "moral damages" in Mexican law, it is important to understand the civil law concept of damages. The term "damages" is often used to refer to two distinct concepts: "injury," which constitutes grounds for a suit, and "recovery," what the court awards to the plaintiff. To avoid confusion, the words "damage" and "damages" will be used herein to refer to the civil law injury, loss, or violation of rights suffered by the plaintiff. The term "recovery" will be used, instead of "damages," to denote the civil law recovery awarded by the court to the plaintiff.

Most civil law scholars define damage as any loss of a person's "patrimony."<sup>55</sup> The word "patrimony" is a term of art which, like many other civil law terms, does not have an equivalent term in common law.<sup>56</sup> There is some disagreement as to the definition of patrimony. Some scholars define patrimony as the *totality* of a person's legal rights and assets<sup>57</sup> which include: (1) real and personal property (referred to in civil law as "material" property), and (2) rights (referred to in civil law as "moral rights" or "rights of personality"). "Rights" include such things as the right to be free from emotional distress, the right to maintain and protect one's honor and reputation, and rights comparable to those espoused in the United States Constitution Bill of Rights.

Some civil law scholars who disagree with the view that patrimony consists of both material property and moral rights<sup>58</sup> define patrimony as consisting of only the totality of a person's personal property and real property rights ("material" property). These scholars use the term "extra-patrimony" to refer to the totality of one's moral rights.

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54. *Id.*

55. R. ROJINA VILLEGAS, *DERECHO CIVIL MEXICANO* 117 (3d ed. 1976); E. GUTIERREZ Y GONZALEZ, *DERECHO DE LAS OBLIGACIONES* 640 (5th ed. 1974).

56. The term patrimony is a legal fiction which is separate and independent from its individual components. In a sense, the notion of patrimony is similar to the common law concept of a corporation which is a legal fiction independent from its individual shareholders.

57. E. GUTIERREZ Y GONZALEZ, *supra* note 55, at 642.

58. M. BORJA SORIANO, *TEORIA GENERAL DE LAS OBLIGACIONES* 427 (7th ed. 1971). See also PLANIOL, *supra* note 51, at 471.

#### D. Moral Damages in Civil Law

Most civil law scholars define moral damage in a negative sense as any loss which does not affect material property.<sup>59</sup> More accurately, moral damage is a loss to the "rights of personality" (*droits de la personnalite*), or moral rights, which involve an affront to one's honor, reputation, feelings, emotions, or peace of mind.<sup>60</sup>

Civil law scholars classify moral damages into three categories. These are: (a) injuries involving social concerns, such as one's honor, prestige, or reputation in the community; (b) injuries involving a person's feelings (similar to common law emotional distress and pain and suffering injuries); and (c) physical injuries which have an emotional impact on the victim (such as scars, disfigurement and the like, which might not involve physical disability, but cause emotional distress).<sup>61</sup> Material damage, unlike moral damage, occurs when there is loss or injury to one's real or personal property ("material" property).

Civil law scholars are in disagreement as to whether the courts should award recovery for moral damages. Civil law scholars can be divided into three groups on this point: (1) those who do not believe there should be any recovery at all for moral damages; (2) those who believe there should be recovery for moral damages only if there is proof of material damage; and (3) those who believe that there should be recovery for moral damages even if there is no proof of material damage. The argument of the first group of scholars against awarding any recovery for moral damages is similar to common law arguments that negligent infliction of emotional distress should not be an independent cause of action due to the difficulty of measuring and proving loss, and the likelihood of abuse. The second group of scholars would require, for example, that moral damage recovery be awarded to a widow for the wrongful death of her deceased husband only if the widow established that she had been financially dependent upon her husband and that her relationship (marriage) with her husband prior to his death was sanctioned by law. Finally, the third group would permit recovery for the interference with a person's religious or patriotic feelings and beliefs.<sup>62</sup>

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59. R. BREBBIA, *EL DANO MORAL* 75 (1967); M. BORJA SORIANO, *supra* note 58; Y. AVILA RAMIREZ, *LA REPARACION DEL DANO MORAL* 30-34 (1960).

60. R. ROJINA VILLEGAS, *supra* note 55, at 128.

61. M. BORJA SORIANO, *supra* note 58, at 427.

62. The following discuss all three scholarly arguments: PLANIOL, *supra* note 51, at 471; R. TOULEMON & J. MOORE, *LE PREJUDICE CORPOREL ET MORAL EN DROIT COMMUN*. 135 (3d ed. 1968); Catala & Weir, *Delicts and Torts: A Study in Parallel Part III*, 39 TUL. L.R. 663,

French courts previously adhered to the view that there should not be any recovery for moral damages. French courts would not allow recovery unless the loss or injury constituted material damage, and could be measured in monetary terms. Since moral damages consist of violations of moral rights, such as the right to free exercise of religion, the French courts would not grant recovery because of the difficulty of putting a price tag on such damage. Therefore, French courts only permitted recovery for loss to one's "material" property. Recently, the French courts adopted the third view and began awarding recovery for moral damages without requiring proof of material damage.<sup>63</sup> However, the majority of civil law jurisdictions still follow the second view and allow recovery for moral damage only if there is proof of material damage.

Civil law scholars are well aware of the difficulty of putting a price tag on moral damage injuries. Under the French Civil Code, determination of awards for moral damages is extremely subjective because there are no specific code guidelines or limitations. French Civil Code<sup>64</sup> section 1382 simply requires the wrongdoer "to make reparation."<sup>65</sup> French scholars, acutely aware of the subjective, vague nature of the French Civil Code's provision for awarding moral damages recovery, often facetiously quote French writer Anatole France's statement that "justice is giving each one his due: to the wealthy, his wealth and to the poor, his poverty."<sup>66</sup>

### III. TORT LIABILITY AND RECOVERY UNDER MEXICAN LAW

#### A. *General Theories of Tort Liability*

An overview of the fundamental concepts of tort liability under

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701 (1964). E. GUTIERREZ Y GONZALEZ, *supra* note 55, at 646-49; M. BORJA SORIANO, *supra* note 58, at 428-30; A.M. VERA CID, *EL DANO MORAL* 37-42 (1966); and Y. AVILA RAMIREZ, *supra* note 59, at 37.

63. This change of attitude is clearly noticed by Toulemon and Moore when they say: "La jurisprudence, a fini par admettre le prejudice sentimental sans aucun alliage de dommage pecuniare et pour ainsi dire a l'etat pur." Judicial decisions have finally accepted the idea of sentimental (non-pecuniary) damage without any relationship to a finding of material damage, in a pure state, so to speak (translation by the author). R. TOULEMON & J. MOORE, *supra* note 62, at 138.

64. See *supra* text accompanying note 15.

65. In the words of Touleman and Moore, "*le judge lorsqu'il applique l'article 1382 a pour fonction, non de punir la faute, mais d'ordonner la reparation du dommage. Le Prejudice Corporel et Moral*," R. TOULEMAN & J. MOORE, *supra* note 62, at 115. The judge in applying Section 1382 has the task, not of punishing the negligent act, but of decreeing the reparation of the damage that has been caused (translation by the author).

66. R. TOULEMON & J. MOORE, *supra* note 62, at 119.



Mexican law will assist in the comparison of Mexican moral damages with the common law notion of punitive damages. The fundamental basis of tort liability in Mexican law, as in French law, is the occurrence of an unlawful or illicit act causing injury which necessitates reparation. This is known as the "subjective" theory of tort liability which is based on fault (*culpa*). Section 1910 of the Mexican Civil Code sets forth the obligation to repair and reads as follows: "[h]e who acting illegally or against good customs, causes damage to another, is obliged to repair it unless he proves that the damage occurred in consequence of the fault or inexcusable negligence of the victim."<sup>67</sup>

This section, like section 1382 of the French Civil Code, bases civil tort liability squarely on fault.<sup>68</sup> The term "illegally" in section 1910 refers to illegal conduct, whether intentional (*dolosa*) or negligent (*culposa*). Although today's civil law term *delict* refers to intentional conduct and *quasi-delict* refers to negligent conduct, under section 1910 of the Mexican Civil Code (and section 1382 of the French Civil Code) there is no distinction between intentional and negligent conduct.<sup>69</sup> For example, a defendant driving a car commits the illicit act of hitting the plaintiff in the crosswalk as the plaintiff crosses the street. The defendant is at "fault" regardless of whether the defendant intentionally hit the plaintiff or negligently failed to notice the plaintiff crossing the street.

In 1928, Mexican Civil Code section 1913 introduced for the first time an additional theory of tort liability which is still in effect in essentially its original form.<sup>70</sup> This additional form of liability focuses exclusively on whether there has been injury due to the defendant's use of a dangerous instrumentality. This theory, called "objective" or "created risk" liability, abandons the Roman law tradition of looking to "fault" as the source of civil tort liability. Under section 1913, objective liability is quite similar to the common law notion of strict liability, and in particular, strict liability for ultrahazardous activity.<sup>71</sup>

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67. Mexican Civil Code § 1910 (M. Gordon trans. 1980).

68. See *supra* text accompanying notes 54-55.

69. With respect to the distinction between *delict* and *quasi-delict*, Planiol says:

On closer analysis, there appears to be no reason for maintaining two distinct categories of the sources of obligations, both are illicit acts, both obligate their authors in the same manner to repair the damage they cause. It would seem then that the distinction should disappear, it not being founded on any practical difference.

PLANIOL, *supra* note 51, at 443.

70. Mexican Civil Code § 1913 (M. Gordon trans. 1980).

71. *Id.*

Section 1913 of the Mexican Civil Code provides as follows:

When a person makes use of mechanisms, instruments, apparatus or substances which are dangerous in themselves, by reason of velocity which they develop, their explosive or inflammable nature, the strength of the electric current they conduct, or for other analogous causes, he is liable for the damage he causes although he does not act illegally, unless he proves that such damage was produced by the fault or inexcusable negligence of the victim.<sup>72</sup>

Under section 1913, the defendant who hit the plaintiff crossing the street will be held liable (unless the plaintiff was contributorily negligent), regardless of whether there was civil fault, because the defendant caused injury to the plaintiff by using a dangerous instrumentality, a car.<sup>73</sup>

Whether or not a plaintiff can recover for moral damage depends upon whether or not the plaintiff must prove fault. Proof of fault is required under section 1910, but is not required if the cause of action is based on section 1913. Proof of fault is an essential prerequisite to obtaining moral damages recovery.<sup>74</sup>

### *B. Mexican Law Civil Tort Recovery*

Section 1910 of the Mexican Civil Code provides the fundamental basis for Mexican tort liability and recovery.<sup>75</sup> Most Mexican scholars follow the civil law majority view that a plaintiff can recover for "material" and "moral" damage.<sup>76</sup> This view is based on the fact that section 1916 of the Mexican Civil Code<sup>77</sup> specifically refers to moral damages.

The general rule for Mexican civil tort recovery is found in section 1915, subdivision (1) of the Mexican Civil Code, which provides

72. *Id.*

73. *Id.*

74. *Id.* § 1910.

75. "He who acting illegally or against good customs causes damage to another, is obliged to repair it, unless he proves that the damage occurred in consequence of the fault or inexcusable negligence of the victim." Mexican Civil Code § 1910 (M. Gordon trans. 1980). See also M. BORJA SORIANO, *supra* note 58, at 409.

76. M. BORJA SORIANO, *supra* note 58, at 409, 428-30.

77. The statutory basis for the award of moral damages in Mexico is § 1916:

Independently of the damages and losses, the judge may grant in favor of the victim of an illegal act, or of his family if the victim dies, an equitable indemnity as a moral reparation to be paid by the person responsible for the act. Such indemnity cannot exceed one-third (1/3) of the amount of civil liability. The provisions of this article shall not be applied to the State in the case mentioned in Article 1928.

Mexican Civil Code § 1916 (M. Gordon trans. 1980).

as follows: "The repair of the damage shall consist, at the election of the injured party, in the restoration of the status previously existing, when this is possible, or in the payment of damages and losses."<sup>78</sup>

Section 1915, as originally enacted, was modeled after the French Cour de Cassation's<sup>79</sup> interpretation of French Civil Code section 1382.<sup>80</sup> According to the Cour de Cassation, section 1382 provided recovery for "the damage, the whole damage and nothing but the damage."<sup>81</sup> Originally, section 1915 of the Mexican Civil Code also provided for complete reparation of loss to the victim, regardless of the nature of damage suffered.<sup>82</sup>

Section 1915 originally provided for two methods of reparation.<sup>83</sup> These were: (1) reparation by restitution, that is, restoration of the item lost (exact reparation), and (2) reparation by providing compensation equivalent in value to that which was lost.<sup>84</sup> Since the purpose of section 1915 was to return the victim to the *status quo ante*, exact reparation was the preferred method of reparation. Normally, the plaintiff would only receive monetary compensation if it was impossible to provide exact reparation.<sup>85</sup>

Section 1915, as amended in 1940, now contains two additional subdivisions. Today section 1915, subdivisions (2) and (3), provide:

(2) When the damage is caused to persons and produces death, total permanent, partial permanent, total temporary or partial temporary incapacity, the amount of the indemnity shall be determined according to the provisions established by the Federal Labor Law. To calculate the appropriate indemnity one shall take as the base four times the minimum daily salary, which is the highest in force in the region and shall be multiplied by the number of days indicated in the Federal Labor Laws for each of the incapacities mentioned.

(3) Credits for indemnity when the victim is a wage-earner are

78. *Id.* § 1915.

79. R. ROJINA VILLEGAS, *supra* note 55, at 130.

80. *See supra* note 36.

81. R. TOULEMON & J. MOORE, *supra* note 62, at 116.

82. The original version of Section 1915 read as follows: "The reparation of damage shall consist in the restoration to the status existing prior to the damage and when this is not possible, in the payment of damages and losses." R. ROJINA VILLEGAS, *supra* note 55, at 130.

83. *Id.*

84. *Id.*

85. A literal reading of this section as originally enacted allowed the Mexican courts to follow the lead of the French *Cour de cassation* and to order the repair of "the damage, the whole damage and nothing but the damage" without any distinction as to the type of injury suffered by the victim. R. ROJINA VILLEGAS, *supra* note 55, at 130 n.17.

not transferable and shall be paid preferentially in a single payment, except when otherwise agreed amongst the parties. The foregoing provisions shall be observed in the case of Article 2647 of this Code.<sup>86</sup>

Subdivision (2), in particular, changed the previous theory of complete reparation. Today section 1915 provides for complete reparation only when the illicit act causes damage to "things."<sup>87</sup> When the injury is to persons, the amount of monetary recovery is limited to the provisions established by the Federal Labor Law.<sup>88</sup> An example of the Federal Labor Law reads as follows:

In case of death of the worker, the indemnification to the persons to which the preceding article refers shall be an amount equal to the sum of seven hundred and thirty-five days of wages, without deducting the indemnification received by the worker during the period in which he was subject to the rules for temporary disability.<sup>89</sup>

This is why personal injury awards in the United States are often much higher than Mexican personal injury awards.

Other factors contribute to the significant difference between United States and Mexican personal injury awards. First, the absence of a jury in the Mexican judicial system means that the judge alone will hear and decide all aspects of the case. Second, most countries which adhere to civil law principles, including Mexico, do not have compulsory insurance, such as mandatory car insurance. Therefore, there is no "deep pocket" from which to recover. In most cases, the defendant will bear the entire financial burden of the award. Third, punitive damages for tort liability are not permitted. Only a criminal law judge can award punitive damages in Mexico.<sup>90</sup>

### C. *Mexican Moral Damages*

Most Mexican scholars agree with the civil law view that there are two types of damage: "material" damage, also referred to as "patrimonial" damage, and "moral" damage, also referred to as "extrapatrimonial" damage. However, one of Mexico's best known legal

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86. Mexican Civil Code § 1915 (M. Gordon trans. 1980).

87. See *supra* text accompanying note 78.

88. Mexican Labor Law art. 502 (CCH) 227 (1974), quoted in Kozolchik, *Mexican Law of Damages for Automobile Accidents: Damages or Restitution?*, 1 ARIZ. J. INT'L & COMP. L. 189, 203 (1982).

89. *Id.*

90. See *infra* text accompanying note 99.

scholars, E. Gutierrez y Gonzalez, strongly believes that moral rights should be included as part of one's patrimony, rather than categorized as extra-patrimony.<sup>91</sup> He therefore believes the Court should award recovery for moral damages as well as for material damages under certain circumstances.<sup>92</sup>

Mexican Civil Code section 1916 specifically provides for recovery for moral damages:

Independently of the damages and losses, the judge may grant in favor of the victim of an illegal act, or of his family if the victim dies, an equitable indemnity as a moral reparation to be paid by the person responsible for the act. Such indemnity cannot exceed one-third (1/3) of the amount of civil liability. The provisions of this article shall not be applied to the State in the case mentioned in Article 1928.<sup>93</sup>

Section 1916 raises a number of important issues, such as: (1) whether section 1916 requires a finding of material damage before moral damages recovery will be awarded; (2) whether moral damages recovery is available only upon proof of fault committed by the defendant; and (3) who is liable for moral damages recovery? These will be discussed separately.

#### 1. Whether section 1916 requires proof of material damage before moral damages recovery will be awarded

Most Mexican scholars agree that section 1916 is literally consistent with the civil law view that recovery for moral damage is recoverable only if there is proof of material damage.<sup>94</sup> However, most Mexican scholars also agree that section 1916 should be amended to allow moral damages recovery regardless of whether there is proof of material damage.<sup>95</sup>

The Mexican courts seem to share this view. The landmark case *Constructora Cross, S.A.*<sup>96</sup> dealt with the issue of whether the father of

91. E. GUTIERREZ Y GONZALEZ, *supra* note 57, at 642.

92. *Id.*

93. Mexican Civil Code § 1916 (M. Gordon trans. 1980).

94. M. BORJA SORIANO, *supra* note 58, at 428-30; E. GUTIERREZ Y GONZALEZ, *supra* note 55, at 651.

95. M. BORJA SORIANO, *supra* note 58, at 428-30. "It is only objectionable in our view, that the amount of the moral damage is limited to one-third of the material damage since this appears to state that there is necessarily a relationship between patrimonial and moral damage, which is completely inaccurate." R. BREBBIA, *supra* note 59, at 142 (translation by the author).

96. *Constructora Cross, S.A.*, 15 S/F 6a 4:290 (1958). Decisions of the Mexican Supreme

a minor child killed by a truck driven by an employee of the defendant corporation was entitled to recover for the death of his son even though there was no proof of material damage. The defendant claimed that since the minor was not employed and the father had not been financially dependent upon him, there was no material damage and, therefore, the plaintiff could not recover anything.

The Supreme Court of Mexico said that the theory that a father cannot receive reparation for the death of his minor child because the child did not contribute to the economic welfare of the family,

is devoid of any legal justification and is repugnant to the most basic principles of justice. The greatest asset a father can have is the life of a child and its death results in an obvious damage, that goes beyond—because it has no limit—the notion of damage and loss employed by the law to refer to the responsibility of one of the parties for the breach of an agreed obligation.<sup>97</sup>

The Court suggested that there should be recovery regardless of whether the parents suffered material damage or financial loss. However, the Court did not go so far as to conclude that proof of material damage is not required for moral damage recovery. The Court construed the parents' loss of their son as material damage rather than as moral damage. Nevertheless, the parents were still unable to recover for their son's death as is explained in the next section.<sup>98</sup>

## 2. Whether moral damages recovery is available only upon proof of "illicit" conduct committed by the defendant

According to a literal reading of section 1916, the defendant's conduct must be illegal. Section 1916 states that "the judge may grant in favor of the victim of an *illegal act* . . . an equitable indemnity as moral reparation."<sup>99</sup>

An act is illicit or illegal if there is proof of fault. Fault exists when the wrongdoer has acted without right. The wrongdoer has ac-

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Court are reported in the *Semanario Judicial de la Federacion*, created in 1870 and the only authorized official publication of these reports. Decisions of the Federal Supreme Court are the only court decisions that are regularly published. See Butte, *supra* note 18, at 807 n.5. Professor Butte has created his own method of citing Mexican cases. This same method will be followed throughout this article: volume number, followed by epoch number, followed by part number, followed by page number. For example: 15 S/F 6a 4:290 means that the case is in Volume 15 of the Sixth Epoch of the *Semanario Judicial*, on page 290 of the Fourth Part of the volume. *Id.*

97. *Constructora Cross, S.A.*, 15 S/F 6a 4:290, 296 (translation by the author).

98. See *infra* text accompanying note 101.

99. Mexican Civil Code § 1916 (M. Gordon trans. 1980) (emphasis added).

ted without right when his/her conduct is in violation of law or against good customs. In other words, that conduct is immoral or *contra bonos mores*.

In *Constructora Cross, S.A.*,<sup>100</sup> the Supreme Court of Mexico disagreed with the trial and appellate courts' decision allowing recovery for moral damages. The Court declared that moral damages recovery can only be recovered from the person responsible for the "illicit" act.<sup>101</sup>

In other words, even if the Court in *Constructora Cross, S.A.* concluded that there was proof of material damage, the plaintiff could not recover for moral damages because the alleged cause of action was premised on Mexican Civil Code section 1913.<sup>102</sup> This code section overlooks civil fault and presumes fault by imposing strict liability. Conversely, section 1910 requires proof of fault.<sup>103</sup> If the plaintiff had asserted a cause of action based on section 1910, he might have been awarded a moral damage recovery.

Alternatively, a plaintiff could base his or her action on section 1913, which provides for "objective liability" for injury caused by use of a dangerous instrumentality. However, the Court will not award recovery for moral damages since the defendant's injurious conduct, consisting of the use of a dangerous instrumentality which under Mexican law includes the act of driving a car or flying a plane, normally is lawful.

Section 1913 relieves the plaintiff of the burden of proving fault because of the inherent danger of certain activities which the defendant undertakes knowing full well that he is risking the safety of others. In *Constructora Cross, S.A.*, the Supreme Court of Mexico held:

[S]ince in the present case there was no finding of any fault whatsoever on the part of the defendant corporation, nor was the accident caused by mechanic [sic] defects of the truck, nor due to any other causes attributable to the said corporation, the order [of the lower court] directing the defendant corporation to pay moral damages is in violation of sections 1910 and 1916 of the Civil Code and, therefore, the defendant is entitled to the constitutional protection it

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100. *Constructora Cross, S.A.*, 15 S/F 6a 4:290, 299-300.

101. *Id.*

102. Mexican Civil Code § 1913 (M. Gordon trans. 1980). *See supra* text accompanying note 72.

103. Mexican Civil Code § 1910 (M. Gordon trans. 1980). *See supra* note 75.

requests.<sup>104</sup>

Mexican scholars have criticized the Court for this conclusion. These critics claim there are no grounds which justify requiring proof of illegal conduct in order to recover for moral damages while allowing recovery for material damages regardless of whether or not the defendant's conduct is legal or illegal.<sup>105</sup>

Justice Garcia Rojas articulates this criticism in his dissent in *Constructora Cross, S.A.*<sup>106</sup> He stated that the term "illegal conduct," as used in the Mexican Civil Code, was not intended to limit recovery to instances where there is proof of fault.<sup>107</sup> According to Justice Rojas, although the Mexican Civil Code occasionally refers to "negligent" and "intentional" conduct as "illegal," this does not necessarily mean that there must be proof of fault in order for there to be "illegal conduct."<sup>108</sup> Justice Rojas defines "illegal conduct" as any "conduct done without right that causes damages or loss in someone's patrimony, whether intentional, whether negligent, or without proof of either."<sup>109</sup> Therefore, there is no need to determine whether the defendant's conduct is intentional or negligent. All that is required is a finding of damage. "[H]e who causes injury is acting illegally; it is a fundamental principle of the law not to injure others."<sup>110</sup>

For example, in an action for wrongful death caused by an automobile accident, the plaintiff cannot recover for moral damages because under section 1913 driving an automobile is a dangerous

104. *Constructora Cross, S.A.*, 15 S/F 6a 4:290, 300:

Como en el caso concreto no se ha atribuido culpa de ningun genero a la sociedad demandada, ni el atropellamiento se produjo por defectos del camion materialista o por otras causas imputables a la propia sociedad, la condena a pagar el dano moral que le impuso la autoridad responsable viola los articulos 1910 y 1916 delCodigo Civil por lo que por este concepto debe otorgarsele la proteccion constitucional que solicita.

*Id.* (translation in the text by the author).

105. E. GUTIERREZ Y GONZALEZ, *supra* note 55, at 651.

106. *Constructora Cross, S.A.*, 15 S/F 6a 4:290, 303 (Garcia Rojas, J., dissenting).

107. *Id.*

108. *Id.*

109. *Id.* at 303. "Es acto ilicito todo dano que se causa sin derecho a un patrimonio, haya culpa, haya dolo, o no los haya." *Id.* (translation in text by the author).

110. *Id.* at 305. "[E] que produce un dano obra ilicitamente, es principio basico del derecho: no danar a otro." *Id.* (translation in text by the author). This approach is similar to the one followed by the French courts.

[D]amage must be assessed in its entirety, independently of the fault committed; it is only for the criminal judge to inflict a punishment. The judge in a civil proceeding must award the total reparation of the damage caused by the fault, even if this fault is minimal.

R. TOULEMON & J. MOORE, *supra* note 62, at 131.



activity and fault is presumed. However, if the death is caused by a horse and buggy, there will be recovery for moral damages since such activity is not considered a dangerous activity. In the latter instance, recovery will be premised on section 1920 which does not presume fault.<sup>111</sup>

In spite of Justice Rojas' strong dissenting opinion and scholars' criticism, the Supreme Court of Mexico continues to deny recovery for moral damages in actions based on section 1913 objective liability, as seen in the cases that follow.

In *Pensionarios Unidos del Suroeste de Jalisco, S.A. de C.V.*,<sup>112</sup> the plaintiff, spouse of the deceased victim, requested recovery for both material and moral damages from defendant corporation for the death of her husband. Plaintiff's husband was killed when an employee of the defendant corporation, while driving a company truck, collided with the decedent's car. Plaintiff brought suit under section 1834 of the Civil Code of the State of Jalisco. At the time of suit, section 1834 was identical to section 1913 of the Mexican Civil Code.<sup>113</sup>

The Supreme Court reversed the lower court's award to the plaintiff of recovery for moral damages. The Supreme Court's holding was based on a literal reading of section 1913 (section 1834), the objective liability provision, and section 1916 (section 1837), the moral damages provision. The Court reiterated "that the cause of action founded on objective liability is independent from a finding of legality or illegality of the facts that give rise to it."<sup>114</sup> Therefore, reparation for moral damages will only lie where plaintiff squarely bases his or her action on section 1910 and there is a finding of fault on the part of the defendant.<sup>115</sup>

Although the plaintiff failed to expressly assert a cause of action founded on section 1910, and based her action entirely on section 1913, the Court's decision was suspect since the plaintiff provided evidence of the defendant's negligence.<sup>116</sup> In other words, the Court did not make an independent finding of negligence on the part of the driver (subjective liability under section 1910), although the plaintiff introduced such evidence. The Court denied recovery for moral dam-

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111. *Constructora Cross, S.A.*, 15 S/F 6a 4:290, 303 (Garcia Rojas, J., dissenting).

112. *Pensionarios Unidos del Suroeste de Jalisco, S.A. de C.V.*, 41 S/F 7a 6:83 (1972).

113. *Id.* at 99.

114. *Id.* at 106.

115. *Id.* at 105.

116. *Id.* at 106.

ages basing its decision solely upon section 1913 (objective liability), which does not require proof of fault.<sup>117</sup>

In *Pensionarios Unidos del Suroeste de Jalisco S.A. de C.V.*,<sup>118</sup> the plaintiff provided evidence that defendant's truck was loaded with lumber protruding fifty centimeters from each side of the truck bed, thus preventing vehicles from passing it on the extremely narrow road. The protruding lumber violated section 105 of the Jalisco State Traffic Ordinance. In addition, there was evidence that the truck had stopped where the road curved, which also constituted a State Traffic Ordinance violation.<sup>119</sup> Justice Jose Abitia Arazapalo stated in his dissent that the cause of action should be treated as based on both the objective liability theory of section 1834<sup>120</sup> of the Civil Code of Jalisco and on Jalisco Civil Code section 1831,<sup>121</sup> which provides for liability based on fault and permits moral damages recovery.<sup>122</sup> He argued there is no inconsistency or contradiction in asserting a cause of action based on the objective liability of section 1834 and simultaneously asserting a section 1831 cause of action based on fault. "The coexistence of the moral damage that arises from an illicit act and objective liability, which, as is well known, is independent from a finding of fault on the part of the wrongdoer . . . do not necessarily contradict each other."<sup>123</sup>

The majority of the Court, however, did not elaborate on this point, nor did it mention the possibility of recovery based on fault (violation of statute).<sup>124</sup> The Court might have decided in the plaintiff's favor if the plaintiff had founded her cause of action on section 1910 and proved fault based on the Jalisco Traffic Ordinance violations.<sup>125</sup>

117. *Id.*

118. *Id.*

119. *Id.* at 94.

120. *Id.* at 97.

121. *Id.*

122. *Id.* at 106 (Jose Abitia Arazapalo, J., dissenting).

123. *Id.*

124. This type of negligence is similar to the common law concept of negligence per se. Prosser describes it as follows:

When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate. Within the limits of municipal authority, the same may be true of ordinances.

W. PROSSER, *LAW OF TORTS* 190 (4th ed. 1974).

125. In *Wings, S.A. y Jesus Garcia Moreno*, 75 S/F 7a 7:16 (1983), a case reported in the latest *Semanario Judicial de la Federacion*, *supra* note 96, the Mexican Supreme Court, following the reasoning of the dissent in *Pensionarios Unidos del Suroeste de Jalisco, S.A. de C.V.*, 41

In its decision, the Court did not mention that the truck driver, either in his individual or employee capacity, should be held liable based on "fault" and should compensate the plaintiff for moral damages. This may be due to the fact that the truck driver committed a hit and run offense and could not be found at the time of the trial.<sup>126</sup>

### 3. Liability for moral damages

Mexican Civil Code section 1916<sup>127</sup> states that the judge may grant moral damages "recovery to the victim of an illegal act and such reparation shall be paid by *the person responsible for the act.*"<sup>128</sup> Therefore, only when there is a finding of illegal conduct or fault will the judge consider awarding moral damages recovery. A majority of civil tort cases involve actions based on section 1913 objective liability in which the Court has consistently denied moral damages recovery because objective liability does not require proof of illegal conduct.

The Court articulates its narrow reading of section 1916 in *Constructora Cross, S.A.*,<sup>129</sup> *Pensionarios Unidos del Suroeste de Jalisco, S.A. de C.V.*<sup>130</sup> and in *Octavio Gonzalez*.<sup>131</sup>

In *Octavio Gonzalez*, one of the defendants violated a traffic ordinance and hit the co-defendant's station wagon, which in turn injured

S/F 7a 6:83, stated that liability under Sections 1910 and 1913 of the Mexican Civil Code are not mutually exclusive. In *Wings, S.A. y Jesus Garcia Moreno* the court in deciding an action for wrongful death and personal injuries against the defendant corporation and its employee driver, stated:

Subjective and objective liability, provided by Section 1910 and Section 1913 of the Civil Code for the Federal District, are not mutually exclusive and can co-exist since a person who makes use of mechanisms, instruments, apparatus or substances which are dangerous in themselves, by reason of their explosive or inflammable nature, even if not acting unlawfully, can in addition, perform illicit acts that can cause damage to another person. Therefore, the plaintiff in a suit for civil tort liability can validly base his cause of action on both these sections, so that the objection that they contradict each other will not hold.

*Wings, S.A. y Jesus Garcia Moreno*, at 55-56 (translation by the author). Here, plaintiff had based her action on both these sections and the defendant driver had been sentenced by the criminal judge. However, recovery for moral damages was not at issue.

126. *Pensionarios Unidos del Suroeste de Jalisco S.A.*, at 87.

127. Mexican Civil Code § 1916 (M. Gordon trans. 1980) (emphasis added).

128. Independently of the damages and losses, the judge may grant in favor of the victim of an illegal act, or of his family if the victim dies, an equitable indemnity as a moral reparation to be paid by the person responsible for the act. Such indemnity cannot exceed one-third of the amount of the civil liability. The provisions of this article shall not be applied to the State in the case mentioned in article 1928.

*Id.*

129. See text accompanying *supra* note 96-98.

130. See text accompanying *supra* note 112-15.

131. *Octavio Gonzalez*, 15 S/F 6a 20:197 (1958).

the plaintiff. Both defendants were found jointly liable under the objective liability section 1810 of the Code of Nuevo Leon,<sup>132</sup> which is identical to section 1913 of the Mexican Civil Code.<sup>133</sup> The driver who violated the traffic ordinance and hit the co-defendant's station wagon, was ordered to pay moral damages recovery to the plaintiff. The Court concluded that the co-defendant (whose station wagon was hit) was not at fault because he did not create any risk of harm to the plaintiff. The Court stated:

Section 1810 of the Local Civil Code, identical to section 1913 of the Code of the Federal District, provides for objective liability for the use of mechanisms, instruments, apparatus or substances potentially dangerous, independently of whether damage is caused illegally, whether intentionally or negligently; that is, with respect to the person who suffers the injury, the responsible parties are those who cause it, for the only reason of having created the risk, and therefore, are jointly liable for the damage caused, pursuant to Section 1814. The determination of which of the responsible actors was the direct or immediate cause of the happening of the risk is totally irrelevant to the victim and should be a matter for the wrongdoers to deal between themselves.<sup>134</sup>

In *Quirina de Aguilar Vda de Nino*<sup>135</sup> the Supreme Court once again denied moral damages recovery. There the plaintiff sued a bus company (a corporation) and its insurer. The company owned the bus in which plaintiff's husband had been a passenger and it had employed the driver of the bus. While maneuvering the bus down a curvy road, the driver crashed into the center divider. Both the driver and the plaintiff's husband died as a result.<sup>136</sup>

The defendant corporation and its insurance company were both found liable only for material damages because the suit was based on section 1913. It is unclear from the opinion whether if the bus driver had lived, he would have been liable for moral damages, since evidence suggested the driver was at fault and lacked adequate training.<sup>137</sup> The Court stated:

Moral damages may only be recovered from the person who is liable for the illicit act as provided by section 1910 of the same code, a

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132. *Id.* at 200.

133. *Id.*

134. *Id.* (translation by the author).

135. *Quirina de Aguilar Vda de Nino*, 2 S/F 6a 4:158 (1957).

136. *Id.* at 159-60.

137. *Id.* at 164.

liability that is different from the object one prescribed by section 1913. In the case at bar, only the objective liability of the defendant was proved by the use of a potentially dangerous mechanism, but in the performance of a lawful activity as is the carriage of persons. In order to subject the defendant to the payment of moral damages it is indispensable to prove that the wrongful death of Jose Nino Ruiz was due to an intentional act of the defendant company or to a negligent act of the same, as for example, that the accident occurred due to the lack of maintenance of the vehicle.<sup>138</sup>

The question remains whether the Court would have affirmed the award of moral damages if the plaintiff had proved defendant at fault for selecting an incompetent driver. There is no indication that such an attempt was made in the case.<sup>139</sup>

In his strong dissenting opinion in *Quirina de Aguilar Vda de Nino*,<sup>140</sup> Justice Garcia Rojas points out that the Court should not focus on whether there was an illicit act as defined by section 1910.<sup>141</sup> Section 1910 broadly defines an illicit act as not only an act which is against the law or good morals, but also includes any act which causes physical injury. In addition, he stated that there is sufficient showing of lack of training on the part of the driver and of the driver's fault. Justice Rojas, therefore, agrees with the lower court's order directing the defendant corporation to pay the plaintiff \$1,600.00 (Mexican pesos) as moral reparation.<sup>142</sup>

#### D. Moral Damages Versus Punitive Damages Recovery

As a result of the prerequisite proof of fault or illegal conduct for moral damages recovery, some scholars believe that moral damages recovery is the equivalent of punitive damages in American law.<sup>143</sup> In

138. *Id.* (translation by the author).

139. The plaintiff could have also pursued an action under Section 1924 which creates a rebuttable presumption of fault or negligence in the selection or supervision of one's employees who, while acting within the scope of their employment, injure others. Section 1924 provides a theory of recovery which is separate and distinct from a 1913 cause of action which involves use of a dangerous instrumentality. Section 1924 provides: "Managers and owners of mercantile establishments are liable for the damages caused by their workmen or servants in the exercise of their duties. This liability ceases if they show that in the commission of the damage no fault or negligence can be imputed to them." Mexican Civil Code § 1924 (M. Gordon trans. 1980). See Butte, *supra* note 18, at 813.

140. *Quirina de Aguilar Vda de Nino*, 2 S/F 6a 4:158 (1957).

141. *Id.* at 165-66 (Garcia Rojas, J., dissenting).

142. *Id.* See also *Constructora Cross, S.A.*, 15 S/F 6a 4:290, 303-05 (Garcia Rojas, J., dissenting).

143. "Mexico's Supreme Court has drawn a sharp line between the entitlement to morals,

actuality, moral damages recovery has nothing to do with the common law notion of punitive damages. Proof of fault (willful or negligent conduct) is required in order to establish that the act was illicit, not for the purpose of establishing motivation or malice. Moral damages recovery is not awarded for the purpose of punishing the wrongdoer, although it does ultimately result in decreasing the wrongdoer's assets. The purpose of moral damages recovery in civil law tort actions is to compensate the victim.<sup>144</sup>

Unlike the distinction in tort liability between common law punitive damages and civil law moral damages, in Mexican criminal law, moral damage awards are much like the common law concept of punitive damages. Therefore under Mexican law, the court's approach to resolving criminal disputes differs from its approach to resolving civil tort disputes. In civil tort proceedings the court focuses on compensating the victim. Whereas, in criminal proceedings, the court's primary function is to punish the wrongdoer. This fundamental distinction between criminal and civil proceedings is derived from French law.<sup>145</sup>

It is only for the criminal judge to inflict a punishment. The judge in a civil proceeding must award total reparation of the damage caused by the illegal conduct [or fault] even if this fault is minimal. . . . The function of the criminal judge is to order sanctions; that of the civil judge is to make reparation. . . . In order to insure complete reparation, the [civil] judge must *not* take into consideration those circumstances that may increase or decrease the degree of fault.<sup>146</sup>

The Mexican scholar Rafael Rojina Villegas points out:

In the criminal proceeding, moral damages will be awarded even without proof of material damage, since the former is not determined in function of the latter as unjustly required by section 1916 of the civil code. The amount of both moral and material damages

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or punitive damages in actions based upon 'illicit' acts, i.e. willful or negligent torts and those based upon the strict liability of dangerous mechanisms or instrumentalities." Kozolchyk, *supra* note 88, at 206. Moral damages understood as punitive damages is also found in S. BAYITCH & J. SIQUEIROS, *CONFLICT OF LAWS: MEXICO AND THE UNITED STATES* 149 (1968).

144. M. BORJA SORIANO, *supra* note 58, at 431.

145. Although Roman private law appears to have included a notion of punitive damages in its concept of penal action, the drafters of the French Civil Code did not follow this approach. They left it up to the criminal judge to impose any sanction as punishment on the wrongdoer as opposed to compensation for the victim.

146. R. TOULEMON & J. MOORE, *supra* note 62, at 131, 142.

is left to the judge's discretion and the financial ability of the defendant."<sup>147</sup>

The erroneous equating of moral damage recovery with punitive damages in tort actions may be a cause of a confusion with Mexico's Penal Code. The Penal Code specifically refers to moral damages when discussing punishment to the wrongdoer.<sup>148</sup> However, moral damages in the Civil Code are not punitive. They are limited to damages awarded as satisfaction to the victim.<sup>149</sup>

#### IV. RELATIONSHIP BETWEEN MORAL DAMAGES RECOVERY IN MEXICO AND COMMON LAW DAMAGES FOR EMOTIONAL DISTRESS

##### A. *Comparison Between Common Law Emotional Distress Recovery and Civil Law "Affective Patrimony" Recovery*

The concept of moral damages encompasses a broad range of injuries. It includes such injuries as harm to one's honor or reputation or loss of one's personal freedom, which would normally constitute common law defamation and false imprisonment, respectively.

The term "moral damages" also includes loss of, or interference with, a variety of inherent rights; for example, the right to good health, the right to the pursuit of happiness, and the right to be free from interference with one's personal feelings and intellect.<sup>150</sup> Interference with these interests involves injuries similar to those which form the basis of common law emotional distress actions. This type of injury, detrimentally affecting the plaintiff's feelings, is referred to in civil law as "affective patrimony" damage. Moral damages recovery is most frequently awarded for "affective patrimony" damage. Mexican Civil Code section 1916 specifically provides for such

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147. R. ROJINA VILLEGAS, *supra* note 55, at 129. See also R. BREBBIA, *supra* note 59, at 142. "The amount of reparation shall be determined by the judges in light of the damage that must be repaired according to the evidence presented at trial." *Codigo Penal Para El Distrito Federal* (Penal Code for the Federal District) § 31 (amended 1984).

148. Section 30 of the Mexican Penal Code for the Federal District provides in part: The reparation of injury includes:

1. The restitution of the thing obtained because of the offense, and if this is not possible, then the value of the same, and
2. Repair of the material and moral damages caused by the injury.

149. "Satisfaction is distinct from punishment since it concerns the injured person, not the wrongdoer. While punishment inflicts a wound, satisfaction is intended to heal a wound." Stroll, *Penal Purposes in the Law of Torts*, 18 AM. J. COMP. L. 3, 6 (1970).

150. M. BORJA SORIANO, *supra* note 58, at 427-28.

recovery.<sup>151</sup>

Although there is no equivalent common law term for "affective patrimony" damage, the common law concept of infliction of emotional distress comes the closest to the Mexican law notion of "affective patrimony."<sup>152</sup> As previously mentioned, there are no distinct "torts" in civil law. There is only the Law of Civil Tort.<sup>153</sup> Therefore, it is unnecessary in Mexican civil law to establish whether the conduct causing "affective patrimony" damage was negligent or intentional. However, section 1916<sup>154</sup> implies that there must be material damage in order to recover for affective patrimony damage, just as in many common law jurisdictions the plaintiff must establish physical injury before he can recover for infliction of emotional distress. Section 1916 states that recovery for moral damage (which includes affective patrimony damage) cannot exceed one-third (1/3) of the material damage.<sup>155</sup> Thus, absence of material damage precludes moral damage recovery.

It is unclear why this limitation of moral damages recovery in section 1916 was enacted. Mexican legislators may have intended to adopt the view of numerous scholars that moral damages recovery should not be awarded unless there is proof of material damage.<sup>156</sup> Also, they may have wanted to prevent flagrant abuse and unfair subjectivity in awarding moral damages recovery.<sup>157</sup> Alternatively, these legislators simply may have wanted to provide the judge with definitive, somewhat objective guidelines of determining the amount of moral damages recovery to be awarded.

There seems to be no indication in the treatises as to the exact motivation for the wording of section 1916. However, both Mexican scholars Rafael Rojina Villegas<sup>158</sup> and Ernesto Gutierrez y Gonzalez<sup>159</sup> believe that the Mexican legislature intended to adopt what is called a "mixed theory" award for moral damages recovery which

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151. See *supra* note 77.

152. "Moral damages," which include the things we would call pain and suffering, mental anguish, loss of consortium and so on may be given to the victim, or to his family if he dies, only if he is the victim of an illicit act, which the plaintiff must prove and which brings the case under article 1910 instead of 1913.

Butte, *supra* note 18, at 814.

153. A. VON MEHREN & J. GORDLEY, *supra* note 33, at 577 n.44.

154. See *supra* note 77.

155. Mexican Civil Code § 1916 (M. Gordon trans. 1980).

156. See *supra* text accompanying note 94.

157. See *supra* text accompanying note 62.

158. R. ROJINA VILLEGAS, *supra* note 55, at 137.

159. E. GUTIERREZ Y GONZALEZ, *supra* note 55, at 651.



allows an award for moral damage recovery, but makes such award contingent upon a finding of material damage.<sup>160</sup> Mexican scholar Manuel Borja Soriano states that "with respect to the second part of Article 1916 of our Civil Code, it must be mentioned that there cannot be an award of moral damages without a prior finding of material damage."<sup>161</sup>

Consistent application of the "mixed theory" is hindered by the wording of section 1916 and the fact that civil law judges are bound to strict rules of interpretation of the codes.<sup>162</sup> Judges are forbidden from assuming the role of a legislator.<sup>163</sup> Therefore, normally, when the meaning of a code is clear on its face, the literal meaning of the code shall not be disregarded even though the spirit and intent of the code arguably contradict the literal meaning of the code.<sup>164</sup> Since section 1916 does not specifically provide for an independent cause of action for intentional or negligent infliction of moral damages, courts are unlikely to allow moral damages recovery independent of material damage.

In order for the courts to consistently grant recovery for moral damages, section 1916 must be amended such that: (1) the award of moral damage recovery is mandatory and not permissive as it is now; (2) moral damages recovery is available regardless of the legality of the wrongdoer's conduct; (3) the award for moral damages recovery does not require a prior finding of material damage; and (4) there be no arbitrary limitation upon recovery to one-third of the material damage.<sup>165</sup>

### *B. Mexican Law Actions for Intentional and Negligent Infliction of Emotional Distress*

This section of the Article will discuss possible outcomes in Mex-

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160. *Id.* at 647.

161. "En orden a la segunda parte del articulo 1916 de nuestro codigo Civil, hay que observar que no prodra haber indemnizacion de un dano moral si no acompaña a un dano material". M. BORJA SORIANO, *supra* note 58, at 432 (emphasis added) (translation in text by author).

162. *See supra* note 31 and accompanying text.

163. *See supra* note 18 and accompanying text.

164. Mexican Civil Code § 1916 (M. Gordon trans. 1980). *See also* R. SCHLESINGER, *supra* note 21, at 514-15.

165. However, it is interesting to note that California has adopted this idea of a cap on pain and suffering damages awards in medical malpractice cases. The ceiling placed by the medical Injury Compensation Act of 1975 is \$250,000. *See* *Fine v. Permanents Medical Group*, 38 Cal. 3d 137 (1985).

ican courts of various fact situations which under California law would constitute actions for negligent infliction of emotional distress.

In *Accounts Adjustment Bureau v. Cooperman*,<sup>166</sup> decided July 22, 1984, the California Court of Appeals held that parents could assert a cause of action for negligent infliction of emotional distress against a psychologist who allegedly misdiagnosed their son's learning disability, if the parents established the serious nature of the misdiagnosis.<sup>167</sup> In *Cooperman*, the parents took their son to a psychologist for diagnosis and treatment of his learning problems. The psychologist misdiagnosed the child as suffering from DSMII non-psychotic organic brain syndrome 309.9.<sup>168</sup> The parents argued that a proper diagnosis would have revealed that their son did not have any sort of psychological problem, but was merely going through a typical childhood readjustment phase.

California courts follow the requirements set forth in *Dillon v. Legg*<sup>169</sup> in situations of non-impact injury<sup>170</sup> which is the situation created by the facts of *Cooperman*. In these cases, in order to determine whether a plaintiff is entitled to protection from negligent infliction of emotional distress the foreseeability of risk is the critical inquiry.<sup>171</sup>

In *Molien v. Kaiser Foundation Hospitals*,<sup>172</sup> the California Supreme Court refined *Dillon v. Legg* for application of the non-impact type case.<sup>173</sup> In *Molien*, the court defined Mr. Molien as a "direct victim"<sup>174</sup> of the defendant's negligence, although he was not the primary victim of the diagnosis. By defining the plaintiff as a "direct victim," the court established that a duty was owed to the plaintiff without showing that the plaintiff was foreseeable within the bounds

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166. *Accounts Adjustment Bureau v. Cooperman*, 158 Cal. App. 3d 844, 204 Cal. Rptr. 881 (1984).

167. *Id.*

168. *Id.* at 848.

169. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

170. The factors delineated in *Dillon* with respect to foreseeability of risk are: (1) proximity of the bystander to the scene of the accident; (2) sensory and contemporary observation by the bystander of the accident; and (3) closeness of the relationship between the victim and the bystander. *Id.* at 740-41.

171. *Dillon*, 68 Cal. 2d at 741.

172. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

173. The defendant physicians in *Molien* negligently misdiagnosed Mrs. Molien as having syphilis. Mrs. Molien was advised to inform her husband of the diagnosis. The misdiagnosis created suspicion and tension in the marriage, eventually resulting in dissolution of marriage. Mr. Molien sought damages for negligent infliction of emotional distress.

174. *Molien*, 27 Cal. 3d at 922-23.

set by the *Dillon* factors.<sup>175</sup> The court also noted the difficulty in drawing a line between physiological and psychological injury, and concluded: "the attempted distinctions between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme."<sup>176</sup>

*Molien* held that physical injury is not required for recovery for negligent infliction of emotional distress as long as there is some "guarantee of genuineness"<sup>177</sup> found in the circumstances of the case. Accordingly, *Molien* mandates that courts now leave to the jury questions of whether a plaintiff's claim is genuine and whether a defendant's conduct caused the plaintiff serious emotional distress.<sup>178</sup>

Under Mexican law the analysis would be different. Fundamental civil law concepts help explain how a Mexican court would decide the *Cooperman* case. The codes, in particular the Civil Code, being the main sources of law, must be addressed at the beginning of any analysis of a particular fact situation.<sup>179</sup> These codes are necessarily general to encompass a broad range of circumstances.<sup>180</sup> The judge must interpret these general statutes and by a process of deduction apply the general law to the specific fact situation before him/her.<sup>181</sup>

The specific sections of the Mexican Civil Code which apply in the *Cooperman* case are sections 1910, 1915 and 1916.<sup>182</sup> These statutes pertain to tort liability damages and moral damage recovery. Even though these statutes might not cover a particular fact situation, section 18 of the Preliminary Provisions of the Civil Code states: "[t]he silence, obscurity or insufficiency of the law do not authorize the judges or courts to refrain from deciding a controversy."<sup>183</sup> In addition, section 19 of the same Preliminary Provisions states: "Juridical controversies of a civil nature shall be decided in accordance with the letter of the law or its juridical interpretation. In the absence of a law, they shall be decided in accordance with general legal princi-

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175. *Id.*

176. *Id.* at 929-30.

177. *Id.* at 930.

178. *Id.*

179. *See supra* text accompanying notes 11-24.

180. *Id.*

181. *Id.*

182. *See supra* text accompanying notes 67, 72 and 93.

183. Mexican Civil Code § 18 (M. Gordon trans. 1980).

ples.”<sup>184</sup> This latter section is frequently referred to by courts reviewing lower court decisions because the party appealing the lower court decision usually argues that the lower court erred in its interpretation of the codes.<sup>185</sup> Section 1910 provides for subjective liability by saying that “he who acting illegally or against good customs causes damage to another is obliged to repair it. . . .”<sup>186</sup> As previously mentioned, there are no independent torts in Mexican law. There is only a law of tort.<sup>187</sup> Since there is no independent cause of action for either intentional or negligent infliction of emotional distress, the only significant issue is whether the victim suffered injury due to the “fault” of the wrongdoer.

As in California, to recover for negligence under Mexican Civil Code section 1910, the parents of the misdiagnosed child must prove actual damages to the child and/or parents.<sup>188</sup> This is, of course, in addition to establishing duty, breach, and causation. In *Cooperman*, the child could allege that as a proximate cause of the negligent diagnosis by the psychologist, the child will be prevented from procuring appropriate life and medical insurance and will also be precluded from pursuing certain occupations in the future. The child’s moral damages, arguably, would consist of any detrimental impact caused by the misdiagnosis on the child’s ability to fully enjoy a normal

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184. Mexican Civil Code § 19 (M. Gordon trans. 1980).

185. This review is normally available by filing a “writ of *amparo*.” *Amparo* is a procedure directed at challenging certain acts performed by the authorities in violation of rights recognized by the Constitution of Mexico for the protection of nationals and foreigners. It is also directed to the maintenance of the respect for legality by means of the guarantee of the exact and accurate application of the law. During the 113 years which have elapsed since it was incorporated in article 102 of the Constitution of 1857, *amparo* has evolved into a highly complex and, in some respects, peculiarly Mexican institution performing three distinct functions: (1) the defense of the civil liberties enumerated in the first twenty-nine articles of the Constitution; (2) the determination of the constitutionality of federal and state legislation; and (3) causation. R. BAKER, *JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT* 267 (1971). In the words of C. Schwartz:

The *Amparo* operates formally to protect the individual and social rights guaranteed by the first twenty-nine articles of the Mexican Constitution, the ‘Bill of Rights.’ But because of modern statutory and judicial interpretation of articles fourteen and sixteen of the constitution, the writ may extend to violations of other constitutional limits on governmental activity as well. Article fourteen permits district courts to enjoin officials who fail to follow essential formalities of procedure and statutes issued prior to the controversy. Article sixteen requires officials to demonstrate the competency of their authority and the legal basis and justification for the action taken.

Schwartz, *Rights and Remedies in the Federal District Courts of Mexico and the United States*, 4 HASTINGS CONST. L.Q. 67, 72 (1977).

186. See *supra* text accompanying note 67.

187. See *supra* text accompanying note 34.

188. See *supra* text accompanying notes 67-69.

life.<sup>189</sup> However, in order for the parents to recover damages, most likely a finding of material damage to the parents would be a prerequisite.<sup>190</sup>

In contrast to California case law, Mexican courts do not distinguish between physical and non-physical injury.<sup>191</sup> Therefore, proof of foreseeability of harm to the plaintiff, which is required in California courts in order to establish that the defendant owed the plaintiff a duty of care, would not be required in a case like *Cooperman* in Mexican courts. Additionally, since the prerequisite factors set forth in *Dillon*<sup>192</sup> are not required in Mexican law, lawsuits are arguably more prone to fraudulent claims. One way Mexican courts can guard against fraud, abuse and unfairness is in limiting the award for the moral damages recovery. Section 1916 limits these awards for moral damages to one-third of the award for material damage.<sup>193</sup>

Another way the Mexican courts guard against fraudulent or abusive claims is to only award moral damages recovery "in favor of the victim of an *illegal* act, or of his family if the victim dies. . . ."<sup>194</sup> Unless the victim dies, section 1916 clearly only allows the *victim of an illegal act* to recover moral damages. Therefore, only the child in *Cooperman* could recover moral damages under section 1916. Nevertheless, as the California Court of Appeals points out in *Cooperman*, it is difficult to envision a two-year old child suffering from emotional distress caused by the misdiagnosis of a psychologist. The parents are the ones who are more likely to suffer emotional distress from the misdiagnosis of their child.<sup>195</sup>

Even if the Mexican court concludes that the child's difficulty in pursuing certain types of occupations and obtaining medical and life insurance constitutes moral damage to the parents, the court still might not award the parents moral damages recovery. Section 1916

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189. However, the broad interpretation given by the Supreme Court of Mexico to the term "patrimonial damage" in *Constructora Cross, S.A.*, 15 S/F 6a 4:290, may indicate a willingness to allow recovery for damages even if under the label of "patrimonial" (material) instead of extra-patrimonial (moral).

190. Mexican Civil Code § 1916 (M. Gordon trans. 1980). See *supra* text accompanying note 93.

191. Instead, Section 1916 of the Mexican Civil Code seems to require a prior finding of material damage. See *supra* text accompanying note 93.

192. See *supra* note 170.

193. Mexican Civil Code § 1916 (M. Gordon trans. 1980). See *supra* text accompanying note 93.

194. *Id.*

195. *Cooperman*, 158 Cal. App. 3d 844 (1984).

does not specifically provide that parents (nonvictims) can recover moral damages for harm suffered by their child.<sup>196</sup> However, section 19 of the Preliminary Provisions of the Mexican Civil Code specifically states that the judge must decide judicial controversies “*in accordance with the letter of the law or its juridical interpretation.*”<sup>197</sup> This means the court must consider whether awarding moral damages recovery to the parents would result in reversal by the Supreme Court of Mexico due to such award constituting a mistake of law or misinterpretation of the law. In a civil law country such as Mexico, a judge would be accused of usurping legislative functions were he or she to extend the award of moral damages recovery to the parents under the facts of *Cooperman*.

The only way the parents could recover for moral damages, other than by amending section 1916, is for the court to conclude that section 1916 is inapplicable. There would then, arguably, be a gap or *lacuna*<sup>198</sup> in the law codes and the court could award moral damages recovery to the parents pursuant to section 19 of the Preliminary Title which provides that in the “absence of law,” the court may decide a case “in accordance with general legal principles.”<sup>199</sup> In order to determine what are the applicable relevant “general legal principles,”<sup>200</sup> the court will look to the writings of both Mexican and civil law scholars. It will also, usually, consider the decisions of the highest courts of Mexico and other civil law countries; in particular, the French Cour de Cassation.

If *Molien*<sup>201</sup> had been decided by a Mexican court pursuant to Mexican law, the plaintiff's husband probably would not recover moral damages compensation from the doctors who negligently misdiagnosed his wife as having syphilis, for the same reason the parents in *Cooperman* would not be able to recover for moral damages. The

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196. Mexican Civil Code § 1916 (M. Gordon trans. 1980). See *supra* text accompanying note 93.

197. See *supra* text accompanying note 184 (emphasis added).

198. See *supra* text accompanying note 19.

199. *Id.*

200. There is disagreement as to the meaning of “general principles of law” in the different codes. During the 19th Century, (when codification began) it was believed that these principles derived only from positive norms of a given national system, thus sharply differentiating the “general principles” from natural law. In recent years, “general principles of law,” are found in the enacted law and also outside of it. See R. SCHLESINGER, *supra* note 21, at 602-03. See also R. DAVID & J. BRIELEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 114-18 (1968).

201. 27 Cal. 3d 916.

delegation by the California Supreme Court to the trier of fact of the duty to determine the genuineness of a claim and whether there is reliable proof of serious injury<sup>202</sup> cannot be accomplished under Mexican law since there is no jury.

In *Slaughter v. Legal Process and Courier Service*<sup>203</sup> a process server improperly served the plaintiff by merely dropping a copy of a complaint in the plaintiff's mailbox while the plaintiff was away on vacation. The process server then signed a sworn affidavit of personal service on plaintiff Slaughter. Based upon this affidavit, a default judgment was entered against the plaintiff. In an action by the tenant against Legal Process and others alleging, *inter alia*, intentional and negligent infliction of emotional distress, the California Court of Appeals denied defendant's summary judgment motion only on the issue of negligent infliction of emotional distress.<sup>204</sup>

If *Slaughter* had been decided by a Mexican court under Mexican law, the Mexican court very likely would have awarded to the plaintiff moral damages. The court would reason that the plaintiff was the victim of the defendant's wrongful conduct and suffered material damage (eviction) as a result of the improper service of process. The plaintiff in *Slaughter* might also possibly recover moral damages compensation from the defendant based on the civil law theory of abuse of right.<sup>205</sup> According to this theory, conduct which is per se lawful may<sup>206</sup> become illegal and therefore constitute a civil tort if the conduct constitutes an abuse of right, which in turn constitutes "fault."<sup>207</sup> If there is "fault" or an "illicit act," the court can award moral damages recovery. However, moral damages recovery based on this reasoning has not yet been argued before the Mexican courts. This is strange since section 1912 of the Civil Code expressly provides

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202. The court in *Molien* stated that in emotional distress cases when proof of mental distress is not of a medically significant nature, "the jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience." 27 Cal. 3d at 930.

203. 162 Cal. App. 3d 1236, 209 Cal. Rptr. 189 (1984).

204. *Id.* at 1251.

205. For a good understanding of the civilian notion of abuse of right, see Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22 (1933).

206. That is, the owner of a house erected a tall dummy chimney on his roof for the sole purpose of annoying a neighbor by depriving him of the access of light to certain of his rooms. Although this owner was doing something that he had an absolute right to do (lawful *per se*), the French Cour de cassation held the act to be wrongful as an abuse of right. Gutteridge, *supra* note 205, at 32.

207. PLANIOL, *supra* note 51, at 477.

for a cause of action for abuse of right.<sup>208</sup>

The abuse of rights theory of recovery for moral damages might also be used in instances involving section 1913 strict liability.<sup>209</sup> As has been explained,<sup>210</sup> this section does away with the requirement of fault, making the legality or illegality of defendant's conduct irrelevant as long as it is dangerous, and, thereby, precluding moral damages recovery. However, since a finding of abuse of right carries with it the element of fault (whether intentional or negligent) an argument can be made in favor of a moral damages award even under a strict liability theory as provided by section 1913.<sup>211</sup>

Finally, the fact situation described at the outset of this Article should be examined. A widow of a California resident has a cause of action against a Mexican airline for the wrongful death of her husband who was seriously injured while vacationing in a Mexican resort. The outrageous conduct of the airline in refusing to fly the injured man to Los Angeles raises the possibility of a moral damage award.

The plaintiff could base her action on section 1913<sup>212</sup> (objective liability) since an airline, like an automobile, is considered a dangerous instrumentality. Fault or negligence by the airline will be presumed and the court will order the airline to pay damages. However, the widow will not be able to receive an additional amount as recovery for moral damages. If, on the other hand, the plaintiff bases her cause of action on section 1910<sup>213</sup> (subjective liability) it is very likely that she will be able to prove illegal conduct by the airline on the facts mentioned. This is also one of those few instances in which a cause of action for immoral conduct, or *contra bonos mores*, may be successful, especially if the plaintiff manages to prove monopoly on the part of

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208. "When in the exercise of a right, damage is caused to another, there is an obligation to indemnify such damage, if it is proved that the right was exercised merely for the purpose of causing the damage, without profit to the owner of the right." Mexican Civil Code § 1912 (M. Gordon trans. 1980).

209. See *supra* text accompanying note 72.

210. See *supra* text accompanying notes 103-04.

211. See *supra* text accompanying note 72. This appears to be a novel approach to the problem in strict liability actions. Mexican scholars have not discussed this possibility. Traditionally the theory of abuse of rights was confined to intentional and malicious acts that caused damage without benefit to the actor. Only recently has this theory been extended to negligent abuse of a right. See Bolgar, *Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 LA. L. REV. 1016, 1020 (1975).

212. See *supra* text accompanying note 72.

213. See *supra* text accompanying note 67.



the airline.<sup>214</sup> Assuming that causation is not at issue, there will be a finding of fault and very likely the court will award her recovery for moral damages. An analogy to the reasoning employed by the Supreme Court of Mexico in *Constructora Cross, S.A.*,<sup>215</sup> demonstrates that plaintiff suffered "material damage" by the loss of her husband. In that case, the Court discussed what the death of a minor son meant to a father even though the son did not as yet have an income. Therefore, whether or not plaintiff depended on her deceased husband for support is irrelevant.<sup>216</sup>

The airline would be "the person responsible for the act" under the theory of *respondeat superior* as provided by section 1924 of the Mexican Civil Code.<sup>217</sup> If the victim dies, the widow would qualify as family<sup>218</sup> entitled to an equitable indemnity as moral reparation.

## V. CONCLUSION

Tort liability in civil law countries generally, and in Mexico in particular, developed from historical and legal concepts different from those of the Anglo-American tradition. The characterization of this discipline as the "law of tort" in opposition to that of the "law of torts" leads to sharp conceptual differences in the approach to tort liability in civil law versus common law. The emphasis on liability based on fault in contrast to strict liability also accounts for some of the conceptual differences between the two legal systems. This liability based on fault does not distinguish conceptually between intentional and negligent conduct: either one will trigger fault or illegal conduct under the system.

This approach is totally different from a common law analysis with respect to a cause of action for intentional tort and the analysis that is required in dealing with a cause of action based on negligence. Thus, different results as to liability and damage awards may be easier to understand. The lack of juries, the unsophisticated insurance laws and limitations in the amount of the awards contained in the statutes

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214. See *supra* text accompanying note 18.

215. See *supra* text accompanying note 96.

216. See *supra* text accompanying note 97.

217. "Managers and owners of mercantile establishments are liable for damages caused by their workmen or servants in the exercise of their duties. This liability ceases if they show that in the commission of the damage no fault or negligence can be imputed to them." Mexican Civil Code § 1924 (M. Gordon trans. 1980).

218. Mexican Civil Code § 1916 (M. Gordon trans. 1980). See *supra* text accompanying note 97.

also explain differences in the amount of damages awarded. Additionally, the strict concept of separation of powers in Mexico that prevents a judge from creating law hampers the ability of the judges to decide novel issues in areas like negligent infliction of emotional distress.

With respect to moral damages, the clearly marked role of the judge in a civil proceeding as that of ordering damages to provide satisfaction to the victim, in contrast to the role of the judge in a criminal proceeding, who orders damages as punishment to the wrongdoer, initially explains the absence of punitive damages in tort liability.

This difference in roles between the civil and criminal judges in turn results from the Roman distinction between public law and private law. This division of the law is also expressed in the strict concept of separation of powers that is followed in Mexico and most civil law countries. The statutory scheme that places a limit to the amount of moral damage and requires a finding of material damage further explains the absence of punitive damages in tort law.

All the considerations point to a marked difference in the area of damage award for tort liability between Mexican law and American law. At a time in which much is heard about crisis in our tort system and a need to restructure our insurance laws, it may be useful to learn about the experiences of our neighbors and that of other legal systems in order to arrive at a more realistic determination of damage award for liability in tort.

