

3-1-2005

Issues in Cross-Border Tort Litigation: Forum Non Conveniens, Choice of Law, and Other Matters

Carlos Loperena

Follow this and additional works at: <http://digitalrepository.unm.edu/usmexlj>

Recommended Citation

Carlos Loperena, *Issues in Cross-Border Tort Litigation: Forum Non Conveniens, Choice of Law, and Other Matters*, 13 U.S.-Mex. L.J. 77 (2005).

Available at: <http://digitalrepository.unm.edu/usmexlj/vol13/iss1/11>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in United States - Mexico Law Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

ISSUES IN CROSS-BORDER TORT LITIGATION: *FORUM NON CONVENIENS*, CHOICE OF LAW, AND OTHER MATTERS

LIC. CARLOS LOPERENA*

INTRODUCTION

Regarding Mexican law and practice, I will address the theoretical field, what the law says, and the practical issues in tort cases for litigation in Mexico. But first of all, what is the content of the Mexican Civil Code? I refer specifically to the Federal Civil Code, although most of the codes of the different states in Mexico have similar provisions.¹ While these have some variations regarding tort liability, my main focus is the Federal Code (the Code), as it governs the entire country in federal matters.

LIABILITY UNDER MEXICAN LAW

In the Code, there is a very old principle that says the person who causes a harm is liable for the reparation of the damage.² The Code says that liability consists of restoring the injured party to the position he or she was in prior to the illicit behavior.³ But what is illicit behavior? The Code says that it is behavior that goes against public policy, law, or good custom.⁴ Good custom may cover many, many things. Some people think that a cause of action for tortious interference falls within this main frame of illicit behavior. However, I still have not heard of any case of tortious interference in Mexico. The action is not known in Mexico.

Created Risk

Not only does illicit behavior give rise to civil liability, but there is also another kind of civil liability derived from the use of dangerous objects, substances, or devices.⁵ For example, suppose you drive a car with due caution, obeying the law, driving the speed limit, without being intoxicated or under any kind of influence, and having a valid driver's license. But then you experience a problem, any kind of problem. If an accident occurs because you experience a sudden pain or make an unintentional mistake, even without fault you are liable. If you have a gas tank in your house with the valves completely closed, yet something starts a fire, you are liable for the damages caused by the gas because you have that substance in your

* Lic. Carlos Loperena is a partner in the firm of Loperena, Lerch y Martin del Campo, Campeche 315 Piso 3, México, D.F. 06170. Lic. Loperena's practice includes corporate law, civil litigation and arbitration in domestic and international cases. He has acted as party-appointed arbitrator and was also appointed by the Court of Arbitration of the ICC. He has taught Civil Procedure for the last twenty-five years at *Escuela Libre de Derecho* in Mexico City where he also teaches International Commercial Arbitration in the graduate program. He has taught Commercial Arbitration at *Universidad Panamericana* in Mexico City in the graduate program. His legal training and education include the following: Law degree from *Escuela Libre de Derecho*; Academy of American and International Law, The Southwestern Legal Foundation, Dallas, Texas, 1982. He is a member of the 2002 NAFTA Committee on Private Commercial Disputes. He is a member of the Board of Directors of the United States-Mexico Law Institute, Inc. He is Vice President of the Mexican Bar Association.

1. Each of the states of Mexico has a Civil Code. There is also a Federal Civil Code.
2. Federal Civil Code, art. 1910 (Mex.).
3. *Id.* art. 1915.
4. *Id.* art. 1910.
5. *Id.* art. 1913.

house, even if you have taken every possible care. The rule means there is civil liability even without fault of the liable person. This is because you assume the risk, the risk of having a car, an electrical current, or a flammable or explosive substance. In Mexico, this is called “created risk,” because one assumes the consequences of taking a risk.

Damages and Losses

All of these situations give rise to civil liability, or the payment of losses and damages. In Mexico we have “*daños y perjuicios*.” There is a distinction between the two. *Daños*, literally “damages,” means the loss of value of a given asset, such as the loss of value of the estate of the person who suffered the damage.⁶ The other concept, *perjuicios*, is a loss of gain or profit. It is the loss of any licit gain that could have been obtained but for the illicit behavior.⁷ The system is very strict in Mexico for obtaining the payment of losses and damages, as the law says that these losses and damages must be a direct and immediate consequence of illicit behavior.⁸ They cannot be speculative.

For example, you cannot sue for damages if someone did not pay you a given amount of money on a given day that you were going to use to buy a lottery ticket. This is so even if you have proof that you bought the same lottery number every week and this was the only day you did not buy it, and this was the day that number won. While that person was going to give you 10,000 Pesos, the lottery prize was a million dollars. Can you claim that he is liable for a million dollars? No, of course this is not permissible under Mexican law. The damage has to be an immediate and direct consequence of the illicit behavior.

“Moral Damages”

This principle of losses and damages is also applicable to contract liability, but our focus is on torts. In addition to this principle, about three decades ago the Code established what is known as “moral damages.” Some people have translated it as “pain and suffering.” Whatever you call it, it refers to the damage inflicted on a person’s belief, physical appearance, self-esteem, feelings, or other intangibles.⁹ One recent issue in the federal courts in Mexico was whether legal entities may suffer moral damages. Some courts say that a commercial entity only suffers monetary damages, while others argue that if a business loses prestige, it loses money, its good name, clientele, etc. The Supreme Court of Mexico has determined in a recent judgement that legal entities are entitled to moral damages as well as individuals.

Applications

The main theory is this: Who is liable when a product is explosive, flammable, or otherwise dangerous? Not only is the person who is handling the product liable, but liability has also been extended to the owner of the substance. It is very important to keep that in mind; I will raise it in a couple of case studies.

6. *Id.* art. 2108.

7. *Id.* art. 2109.

8. *Id.* art. 2110.

9. *Id.* art. 1916.

For example, when a rented airplane or a rented car causes damages, the person may have insurance for a given amount of money, but if the damage is catastrophic, the amount of liability may be higher. If the driver does not have enough money to pay, and the insurance does not cover the entire amount, the injured party can go after the owner. Although there is one precedent that releases the owner of liability, I have seen other precedents that consider the owner liable, even if the material that caused the damage is not under the owner's control, and even if it is rented to a third person, or the owner is abroad.

LITIGATING MEXICAN TORTS IN THE UNITED STATES

In Mexico, torts are rarely litigated. Parties prefer to settle or to sue the insurance company. In car accidents, the insurance company is usually the one who pays. Or through a criminal action, a party may sometimes obtain payment. But this is not the most common action in Mexico. I have been called as an expert witness on Mexican law for some cases in the United States where Mexican plaintiffs try to obtain jurisdiction against the American parent company, against the manufacturer, or against anybody, even though the accident or damage was caused in Mexico to a Mexican individual or to a Mexican company.

First Case Study

Why do Mexican plaintiffs try to go to the United States to litigate the case? It is very simple. In the first case I want to mention, another very good lawyer served with me as an expert witness. The case involved tires that were causing damage to the various owners of a specific car. Some accidents occurred on Mexican roads, and there was discussion between the manufacturer of the car and the manufacturer of the tire: Who was the liable one? Even though the individuals who suffered the damages, or in some cases death or very serious injury, had the accident in Mexican territory, they found a way to sue the manufacturer of the car and the manufacturer of the tires in the United States.

What problems were there? The first problem was jurisdiction, specifically, how American courts assume jurisdiction over a Mexican defendant. As I understand it, American courts are very open to assume jurisdiction over any person residing in the United States. They even assume jurisdiction over foreigners just because they have some business there, or sometimes just because they have a bank account in the United States. It differs from jurisdiction to jurisdiction. Now, the second issue was concerning the applicable law for that tort case. Was it Mexican law, since the accident occurred in Mexico? Or was it American law, since the tire was manufactured in the United States, or by a Mexican subsidiary of an American parent company?

Contrasts between Forum Non Conveniens in the United States and Mexico

I have dealt with the *forum non conveniens* issues, although this concept does not exist in Mexico. However, they litigate *forum non conveniens* in the United States, and they call us, and they ask us as Mexican practitioners: Is there a system of justice in Mexico open to foreigners? Or do they think that Mexico does not really have a system of justice? Of course there is, although it is not perfect. It has its share

of defects. But American courts ask if treatment in the Mexican system of justice is the same for a foreigner as it is for a Mexican national, and yes, it is. Do Mexican nationals have access to courts? Yes.¹⁰ Do foreigners? Yes, as well.¹¹ But is there localism? Mexico City is so big that localism does not exist. Mexico City is not for its residents only, but for all the residents of the country. There are also foreign banks, foreign companies, and foreign industries that litigate there very often, and the judges do not consider citizenship or national origin. We have equal protection of the law, whatever that means. Sometimes we think that it means there is no protection of the law, but equally so for everyone.

American courts ask us if in Mexico there is access to the court, whether the court may subpoena witnesses to testify, and if there are means of communication and transportation to be a witness in litigation in the United States. They ask if all kinds of evidence can be introduced. The answer is yes. Usually they also ask us how long a lawsuit takes from the filing of the complaint to the final judgment. A commercial case should last less than two years before the trial court, plus three months in the court of appeals and six months in the *Amparo* proceedings.¹² Of course, we can give only rough estimates, because it is as unpredictable in Mexico as it is in the United States.

Second Case Study

The second case I bring up is about a different manufacturer whose tires were on a passenger bus carrying people on a highway in Mexico. One tire had a problem and blew out, injuring a Mexican passenger on the bus. The passenger was taken to a Mexican hospital, and her counsel called the Mexican subsidiary which sold the tire of an American tire manufacturer and said the passenger suffered the injury in both legs. She had been in the hospital for surgery, rehabilitation, and some other problems, and wanted to be compensated. I was consulted as an attorney for the Mexican subsidiary, and I said, "Please, first settle the case as soon as possible with that lady. Second, pay all the medical expenses she has incurred as a result. Third, promise her in writing to take care of all future medical expenses."

But the company replied, "The insurance company is forbidding us to settle the case." I then asked, "How much has this lady paid for medical expenses? How much do you think it is going to be?" The company estimated around 600,000 Pesos, or about U.S. \$57,000. I then said, "Settle the case with the lady and pay as soon as possible. We do not want to settle with lawyers because when they see lawyers, they bring more of their own lawyers, and the price will increase immediately."

I advised them to ask her, in a very naive manner, to first sign a paper accepting the payment of the expenses already made. Then second, get a commitment to pay the additional medical expenses until she sufficiently recovers. And third, put in a very simple clause saying that in case of any dispute the parties submit to the laws and courts of Mexico. Why? Because it is very important. The accident happened in northern Mexico, very close to the U.S. border, and the tire was manufactured in

10. MEX. CONST. art. 17.

11. *Id.* art. 33.

12. *See id.* art. 103, 107 (as amended (1936)) (The *Ley de Amparo* protects individuals, corporations, foreigners or nationals against the wrongful application of law or lack of due process.).

the United States by an American company. I think I do not need to mention how much the amount of a tort in that case could be, or how much the amount for the injury could be, not only for the medical expenses, but also for the pain and suffering, if you go to a jury trial in the United States. In Mexico we do not have jury trials for these cases. A judge is the trier of fact, and also renders the judgment determining the amount to be paid to the victim.

Third Case Study

To further illustrate, there is a third case, one that is just terrible. It concerned a helicopter accident involving a Canadian helicopter rented to a Mexican company that was carrying tourists from Cancún to the Mayan ruins of Chichén Itzá. On the first trip they took twelve or fourteen passengers, including some Americans and some Canadians. The tourists saw and enjoyed the ruins, but on the flight back to the Cancún area, the helicopter went down when it ran out of fuel. There was a great act of negligence, but it was not known who the liable party was. In Florida, where the trip had been booked, the plaintiffs sued the Canadian company that owned the helicopter, the Mexican company, and some others. The American lawyers sued everybody to cover all possible liabilities. I was called to testify as an expert witness about the civil liability of the Canadian company. I found a precedent stating that the owner was not liable if the car, airplane, or helicopter was not under the control of the owner. There were other precedents saying the opposite, and there is no definite position by the Mexican courts.

Applications

I was really astonished in thinking about rental car companies, for example, because insurance coverage in Mexico is for a very limited amount. If the driver of an Avis rental car kills somebody who is an American citizen, the family of this American citizen will sue Avis in the United States and Avis will say, "Oh no, that was a contract of my subsidiary in Mexico. The accident happened in Mexico, and everything was in Mexico." But American courts are really open to assume jurisdiction over everybody. So the advice for potential defendants is to require that all contracts be subject to Mexican law and Mexican jurisdiction. But problems arise when a third person is injured or harmed and that person did not sign the contract, such as a pedestrian crossing the street.

I have been consulted several times about accidents in Mexican hotels that are subsidiaries of U.S. hotel companies. Americans like to travel. If they are familiar with the Hilton or Hyatt in the United States, they want to go to the Hilton or Hyatt in Acapulco, Mexico City, or Tijuana. So they try to find the same company and make reservations there because they think they have quality control. They think there is no Montezuma's revenge in that hotel, which is absolutely wrong, and they may experience problems in that hotel. And then they will sue for any reason, including if the floor was slippery, or if the swimming pool did not have a "no diving" sign. Not all normal U.S. warnings are given in Mexico, although some are. But the American tourists are ready to sue the U.S. parent company or travel agency to pursue any avenue that will lead to U.S. jurisdiction. The problem is the amount. What is the amount of pain and suffering in Mexico?

Calculation of Damages

In Mexico, there are two types of damages: material or economic, and pain and suffering. Economic damages can be calculated. If you destroy a car that was worth U.S. \$20,000, you have to pay U.S. \$20,000. That is very simple. But if you cause injuries or death to a human being, what is the price of a human life in Mexico? That is the question. Well, it is very cheap. For one American, you may get twenty Mexicans. But it is not a problem of citizenship. That is, if a Mexican is killed in the United States, the value will be that of an American, and if an American is killed in Mexico, he will be valued as a Mexican. If you come to an American court and apply American law, a death by tort is very expensive. But if you go to Mexico, a death is worth about U.S. \$70,000. This would be unthinkable in the United States. But if you then calculate the moral damages in Mexico, it is an open amount without any limits, and is not linked to material damages. The law says that the judge may take into consideration the economic status of the liable person and of the victim. The law does not say that a rich person deserves more money or a poor person deserves more money. But it is very clear that there is a punitive element, that a rich person or a rich company must be liable for a larger amount than a poor person.

I had a case of a not-for-profit foundation that caused damages when its truck struck a passerby, who suffered injuries to his legs and entered the hospital. The insurance company paid the bills at first, but there was one surgery after another, and the insurance company said they would not pay any more because the insurance benefits had reached their maximum amount. The plaintiff then sued that foundation, which is well known in the media because it has a lot of operations, but is not rich. It did have assets because it receives donations from many people, but as it was very famous, the trial judge thought it must be rich. No balance sheet or financial statements were provided to the court, but the court nonetheless gave a very large indemnification to the victim. The case went to the court of appeals, and the court of appeals said there was no evidence that the foundation had deep pockets, so the amount for pain and suffering would be reduced to a minimum.

However, even with damages for pain and suffering not being a fixed or limited amount, litigation of torts in Mexico is cheaper and simpler than in the United States. The main problem is that some people who suffer any kind of accident in an American car or with American tires, or on a trip that was first purchased in a travel agency in the United States, will come back to the United States to sue, even if they are Mexicans, and even if they never came to the United States before. This is because the price of a human life is quite low in Mexico,¹³ as is the price of a lost arm or leg. In the United States, litigation has become much more lucrative. Big jury verdicts may be a magnet to attract people to sue in the United States. The expression "ambulance chaser" is very well known in the United States, but it is unknown in Mexico. In Mexico there are no ambulance chasers, because there is not much money to be made suing for torts. But in the United States, it is a lucrative business.

13. See *supra* note 2, art. 1916.

Application of Foreign Law

If a person is traveling to Mexico, but the travel agency or airline is American or has any link to an American company, the person using the services of an American company in Mexico should sign an agreement accepting Mexican law and jurisdiction. In my experience, American courts will apply foreign law. That is why some of us have been in American courts as expert witnesses on Mexican law. But Mexican courts are reluctant to apply foreign law for many reasons. First, because they do not understand foreign law. Second, because it is very difficult to provide evidence about the contents of foreign law. And third, since most of the laws in the world have substantially similar principles, they apply foreign law as if they were applying Mexican law with Mexican principles and with a Mexican legal education. In fact, I have a good friend who is a fine litigator, and he once told me that he never invokes foreign law in Mexican courts because they do not apply it even if he invokes it. I file evidence of the contents of foreign law and so forth. They apply Mexican law. So I do not waste my time invoking foreign law.

My main recommendation is to obtain jurisdiction in Mexican courts and require the application of Mexican law. If you have a Mexican judge applying foreign law, you should know that he most likely will apply Mexican law. If you are in an American court and can convince the court that the applicable law is Mexican law, you will bring Mexican expert witnesses and Mexican statutes, and it is likely that American courts will try to understand and apply Mexican law.

