

FOREWORD

Boris Kozolchyk*

The fall of the legal “citadel” that protected those responsible for personal injuries from breach of contract actions in United States law (bringing with it lesser requirements on causation and burden of proof, as well as large tort awards) has had hemispheric implications. Approximately two decades after the first product liability decisions were handed down by United States courts and the Restatement of the Law of Torts (Second) was published by the American Law Institute, Latin American commentators, especially in Argentina, Brazil, Chile, and Uruguay, began to develop a Latin American law of product liability. Soon thereafter, Latin American courts started to hand down their first product liability decisions. These writings and decisions were not carbon copies of their United States counterparts. Given the affiliation of Latin American law with European civil law, Latin American doctrinal comments and court decisions bore the visible influence of French, German, and Italian writers. Ironically, many of the Latin American writings and court decisions were still influenced by United States sources, albeit indirectly. This was true for two reasons. First, contemporary European writers were themselves influenced by United States legal developments. Second, product liability litigation had migrated throughout the hemisphere.

Enterprising Latin American lawyers started suing remote vendors and manufacturers, sometimes basing their causes of action on civil code provisions, while other times on the incipient consumer protection legislation. Soon thereafter, industrialized countries, like Brazil, enacted consumer protection statutes, which in the case of needy plaintiffs reversed the burden of proof of the dangerousness of the product. This trend was encouraged by rather liberal rules on the availability of class actions. Concomitantly, enterprising United States personal injury lawyers started flying south, often coming back armed with individual or class actions of their own to be litigated in the United States, and in front of sympathetic juries. Suddenly, the growth of a Latin American law of product liability, as well as the growth of inter-American product liability litigation, ceased to be merely a topic of curiosity for comparative inter-American lawyers and became a serious issue of survival for many foreign, and especially deep-pocket corporations in Latin America.

As the interest in Latin American product liability and litigation grew among United States corporations, Michael Socarras, Esq., a very able lawyer then with the Kansas City law firm of Shook, Hardy and Bacon, approached the National Law Center for Inter-American Free Trade (NLCIFT) with the proposal

* Evo DeConcini Professor of Law, University of Arizona James E. Rogers College of Law, Director of National Law Center for Inter-American Free Trade.

that NLCIFT examine the writings of key Latin American commentators on product liability law and render them understandable to his corporate clients, especially Philip Morris. Mr. Socarras had insightfully perceived the extremely important role played by doctrinal comments in the development of Latin American law. Shook, Hardy and Bacon, as well as Philip Morris, assured the NLCIFT that it would retain total control over the objectivity and quality of the study. They were true to their word.

The NLCIFT produced this study under the main authorship of Professor Alejandro Hernández Maestroni, a professor at the School of Law of the University of the Republic and an associate at the Ferrère Lamaison law firm in Montevideo, Uruguay, with the help of Professor Lidia Sosa of the University of Buenos Aires, Argentina, who conducted preliminary research. Upon request of Shook, Hardy and Bacon, NLCIFT circulated the study to law firms in Latin America. The response to the study was positive, and the Miami Conference was planned to discuss its findings, as well as the opinions of plaintiffs' and defendants' lawyers, scholars, judges, and government officials on the emerging law of product liability law in Latin America. The readers of this Symposium will soon discover not only the importance of the NLCIFT study, but also of the rich exchange of ideas and points of view that took place during this conference, the first of its kind in the Western Hemisphere. As a student of comparative law, I was particularly interested in the role that contract was beginning to play in the product liability law of some South American countries. If the product in question bore a clear enough warning of its dangers to the user-plaintiff, such user was deemed to have contractually assumed the risk of the injury suffered. The contractual assumption of the risk was a bar to the product liability action. This reasoning immediately brought to mind the assertion of some United States commentators that tort law, and especially product liability law, was in the process of displacing contract as a basis for remedial law. The circularity and fallacy of the assertion became apparent. Contract liability, with all its paradoxes, was alive and well in the emerging Latin American law of product liability.

We are most appreciative and honored by the participation of Latin American dignitaries and scholars, including: Dr. José Ramón Ximénez Carbo, Attorney General of Ecuador; Mr. Alfredo Bullard of INDECOPI, Peru; Prof. Alejandro Hernández Maestroni (Uruguay); Prof. Jorge Mosset Iturraspe (Estudio Jurídico Mosset Iturraspe, Santa Fe, Argentina); Dr. Luiz Migliora (Veirano and Associates, Rio de Janeiro, Brazil); and Dr. Alberto Molinario (Marval, O'Farrell & Mairal, Buenos Aires, Argentina). The NLCIFT is very grateful to Mr. Socarras, as well as to Shook, Hardy and Bacon and Philip Morris, for having entrusted us with the product liability study and with the ability to bring to the Conference some of Latin America's best product liability lawyers and scholars. We are also grateful to the following law firms: Astigarraga Davis, Robbins & Green, P.A.; Cleary Gottlieb Steen & Hamilton; Snell & Wilmer, L.L.P.; and Fulbright & Jaworski, L.L.P. Many thanks as well as to The U.S.-Mexico Law Institute, Spectrum Printing, *Latin Finance*, *Latin Lawyer*, and *Latin American*

Monitor for their participation and contribution to the meeting. The NLCIFT also owes a special debt of gratitude to Phil Robbins, Esq., NLCIFT Vice-President and Coordinator of Continuing Legal Education, and José Astigarraga, Esq., a NLCIFT board of directors member, for their enormous investment of time and effort in helping to organize the meeting and chairing some of the sessions. We are also most grateful to the Honorable Judge John Molloy, Secretary of the NLCIFT Board of Directors, for his excellent summary of the Conference transcript of presentations and discussions. We owe gratitude to Mr. Francisco A. Laguna, of Translegal, L.L.C., for most of the translations in this Symposium, and to Dr. Mariana Silveira, the NLCIFT Director of Research, for her assistance in the translation and editing of the materials. Last but not least, we are most grateful to the members of the editorial board of the *Arizona Journal of International and Comparative Law* for their interest in the topic and their painstaking editorial assistance.

The reader interested in obtaining additional sources of documentation, or periodic updating of these symposium materials is encouraged to visit the NLCIFT website at www.natlaw.com.

