OVERVIEW OF THE STUDY UNDERTAKEN BY THE NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE

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I. INTRODUCTION: PURPOSE AND BACKGROUND OF THIS SUMMARY

The main purpose of this document is to provide an overview of the main aspects of the research project undertaken by the National Law Center for Inter-American Free Trade following the initiative of the law firm of Shook, Hardy and Bacon (NLCIFT Report). The NLCIFT Report analyzed the evolution and current status of product liability law and procedures in seven Latin American countries: Argentina, Brazil, Chile, Uruguay, Mexico, Costa Rica and Colombia. Each of these countries was dedicated a separate chapter that analyzed the main issues affecting product liability in the relevant jurisdictions.

This summary is intended to present a brief comparative overview of the solutions adopted by each of the seven countries analyzed so as to provide a general outlook of the status of the problem within the region. Due to the fact that not all countries have been analyzed, this document is not intended to provide general conclusions for all of Latin America. The criterion followed when undertaking this study was to select various countries that could provide a clear and representative idea of the status of the topic in Latin America. As a matter of fact, the NLCIFT's study adds up to an analysis of legislation, case law, and doctrine on product liability, which applies to over 300 million people – that is to say, over eighty percent of the Latin American population. In addition, the study analyzes countries from South, Central, and North America in order to cover a sufficiently wide range of issues within the region. It is not possible to summarize in this overview each one of the country reports. Hence, we have opted to analyze the most salient points that we believe can be derived from all studies.

The purpose of this summary is to support the discussions that will take place in Miami. It does not entail a comprehensive analysis of the issues, but merely provides grounds for future in-depth discussion during the seminar. At that time, renowned experts will give their opinion on the issues analyzed herein, as well as on the treatment of product liability law and procedures in other countries that were not included in the initial NLCIFT Report.

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II. MAIN FEATURES OF PRODUCT LIABILITY LAW AND PROCEDURES IN LATIN AMERICA

A. Sources of Law

Unlike the law of common law countries, the law of civil law jurisdictions, such as those summarized herein, is codified in the sense that the rules, principles and concepts are encapsulated in systematic and exhaustive codes. The principal rules that govern private law, including the law of torts and product liability, are found in the civil codes (*códigos civiles*). The civil code is supposed to govern those legal relationships and transactions that are not commercial acts or among parties engaged in commerce. Typically, civil codes govern: family law; not-for-profit sales or other acquisition of ownership or possession; partnerships; wills and estates; and, last but not least, tortious or "extra-contractual" liability. Codes, in turn, are subordinated to constitutions and are supplemented by statutory and occasionally also by administrative law. Since codes in civil law countries are drafted in a highly general, abstract and logical fashion, there is a gap between the general and abstract rules in the code and the factually complex case before the courts or arbitral tribunals. This gap must often be bridged by court decisions or, more frequently in Latin America, by the writings of legal commentators also referred to as "doctrinal" writers or simply "doctrine."

B. Description and Relevance of Doctrine in the Creation of Product Liability Law

The NLCIFT Report originally focused on the study of Latin American doctrine on product liability. This focus was based on the understanding that, following continental Europe's legal trends, the influence of doctrine in the countries analyzed was far more relevant than case law when determining the living law applicable to the topic. As the report developed, it became more and more important to include references to relevant case law. However, the purpose of the study never shifted to a standalone analysis of case law. The study evidenced the relevance of doctrine in Latin America. However, the relevance of this source of law is not uniform in all countries. Simultaneously, it was observed that, although the role of case law as a trend developer for legal solutions that predominantly apply to product liability issues is still not as prevalent as that of doctrine, it is becoming increasingly important in Latin America.

All participants in the project agreed that in Latin America, doctrine plays a much more significant role in determining the living law applicable to product liability related claims than it does in other areas of the world–for instance, in the United States. During various discussions and interviews with Latin American and U.S. lawyers, judges, and professors, it was clear that in most of the countries analyzed, the opinion of legal writers is not restricted to being a

tool for training and educating future lawyers and judges. In Latin America, doctrine not only explains how laws are applied in practice; it also has a bearing in the interpretation of the law and, consequently, in its practical application.

Doctrinal opinions heavily influence the decisions of judges and lawyers, who do not limit the focus of their arguments exclusively to precedents and to the analysis of the differences and/or similarities that the case at hand may have when contrasted to previous case law. On the contrary, in several of the countries analyzed the opinions of renowned legal writers are often equally or more relevant than case law and even than codified law, which is a significant departure from the practices prevailing in the United States.

In some countries, doctrinal opinions have been decisive in the adoption of solutions to concrete issues related to product liability claims. Thus, these opinions have become the grounds for the solutions subsequently adopted by courts and tribunals, and have heavily influenced legislative developments.

1. Doctrine in Argentina

By way of example, the influence of doctrine in Argentina, particularly through the writings of Guillermo Borda, was instrumental in the 1968 amendments to the Civil Code, which established a system of strict liability (*responsabilidad objetiva*) under Article 1113. Prior to that, the work of other renowned authors had heavily influenced the decisions of Argentine courts when interpreting liability grounds in the Civil Code and in the traffic accidents law.

The original civil liability system structured under the Civil Code drafted by Vélez Sársfield established that in order to evidence liability the victim was forced to prove fault by the tortfeasor. This was the rule: there was no liability attributable to the owner of an object based on the mere ownership, unless there had been some negligent behavior. Doctrine subsequently evolved from this position to a system where the owner's fault was presumed, although he was allowed to allege as a defense that he acted diligently. Finally, Art. 1113 of the Civil Code was amended by Law No. 1968 which included the notion of damages arising from the inherent "risk or vice of the object." This new development significantly increased the liability of the object's owner or guardian, who could only be exempted from liability by alleging the fault of the victim or of an unrelated third party. In other words, he had to evidence a break in the link of causality between the event and the damages.

Subsequent work by authors such as Drs. Jorge Mosset Iturraspe, Aníbal Alterini, and Roberto López Cabana, among others, has been crucial to the application of Argentine law to practical cases involving product liability claims. Another feature of the Argentine legal system is that the most renowned authors are normally called upon to be part of the committees created in order to draft legislative amendments in the area of civil liability. The contribution of Argentine doctrine was essential in the interpretation of the 1993 Consumer Protection Law

and in the drafting of the proposed 1998 Civil Code. The 1993 Consumer Protection Law No. 24.240, which underwent several vetoes by the Argentine Executive Government, was highly criticized in doctrinal writings. Most of the criticisms were taken into consideration and incorporated into the 1998 amendments to the Consumer Protection Law, through Law No. 24.999.

2. Doctrine in Uruguay

A similar trend has been evidenced in Uruguay, where product liability legal provisions have remained unaffected for over 130 years. This, however, did not prevent the development of new and significantly different interpretations of such provisions, predominantly based on doctrinal works.

As in Argentina, Uruguayan doctrine incorporated new trends into the analysis of civil liability, which enabled the application of legal theories such as *guarda del comportamiento y de la estructura* (control of the behavior and of the structure)[1] and *obligaciones de medio y de resultado* (that is to say, those obligations where the agent's conduct is taken into consideration—*obligaciones de medio*—and those where the emphasis is on the attainment of a goal, regardless of the diligence evidenced by the defendant—*obligaciones de resultado*).[2] This evolution culminated with the acceptance of the notion of *responsabilidad objetiva* (strict liability). These doctrine-driven innovations completely modified the analysis of claims for damages resulting from manufactured products, even though no legislative amendments had taken place.

As pointed out by Dr. Peirano Facio, one of the most recognized Uruguayan civil law authors, the work of doctrine is a

> [W]ork of creation, since it is obvious that in this area the interpretation of the law becomes a true creation . . . . As a matter of fact, it suffices to put on one side of the scale the scarce materials included in the five articles on extra-contractual liability of the Napoleon Code (or the fourteen articles included in our Civil Code, which to all effects amount to the same result) and, on the other side, the work of doctrine and courts–which can fill libraries and court files–in order to realize that in this area of the law, more than in any other, a new legal world has been created, independent of any written law . . . .

Uruguayan courts have accepted doctrinal solutions relatively swiftly, and they have been favorably inclined towards the changes suggested by the relevant authors.

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1. *See infra* subsection G.6.
2. *See infra* subsection F.2.

3. Doctrine in Brazil

In Brazil, doctrine has been quite significant through commentators such as Professors Miguel Serpa López, María Helena Diniz, Sergio Cavalieri Filho, Antonio Benjamin, Caio Mário da Silva, Gustavo Tepedino, Ada Grinover and others whose influence has been quite significant in the evolution of product liability issues. However, the role of case law has also been quite relevant in introducing new solutions to the problems resulting from civil liability claims.

The interpretation by Brazilian courts of the 1912 Decree on Train Accidents has been crucial in determining grounds for liability.[3]

4. Doctrine in Chile

In Chile, the role of doctrine has been one of organizing and systematizing judicial decisions, rather than one of providing innovative solutions to the problems. Although Chilean authors are familiar with the theories applied abroad, they tend to be very cautious when promoting the application of these theories when there are no legislative texts to back them up.

A clear example is the differentiation between obligations to act diligently and obligations to attain a result (*obligaciones de medio y de resultado*)[4] Although this categorization is well known and has been analyzed by Chilean doctrine, most authors insist that it cannot be applied in the absence of a legal text to support it. This position differs substantially from the one adopted by Argentine and Uruguayan writers, who have strongly supported the acceptance of these theories and have interpreted existing legal provisions in a far-reaching manner, without relying on a legislative amendment to expressly support such solutions.

5. Doctrine in Mexico

At the other end of the spectrum, Mexico can be characterized as a country that does not have extensive doctrine on product liability. Existing doctrine is not often cited in court decisions or judicial briefs. Mexican authors consulted in the NLCIFT Report indicated that the practice in their country is not to cite doctrine profusely for fear that magistrates may interpret this as a lack of respect for their knowledge on the subject.

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3. *See infra* subsection E.2.
4. S*ee infra* subsection F.2.

6. Doctrinal Consultations or Formal Opinions (*Pareceres*)

The Mexican tradition clearly contrasts with the practice in countries like Brazil and Uruguay, where doctrine is broadly cited both in briefs submitted to judges and in judicial decisions. The practice of submitting consultations or formal opinions (*pareceres*) of the most renowned authors on the subject of civil liability in the specific case at hand is very common in Brazil and Uruguay. As for the influences on Latin American doctrinal writings, the seven-country study revealed that their doctrine has followed the teachings of European authors, particularly from France, Italy and–to a lesser extent–Germany.

The relevance of English and U.S. doctrine has been scant, although recently Latin American authors have started to cite more authors and case law of that origin (in particular, the work of Yale University Professor Guido Calabressi has been discussed in Argentina). Spanish doctrine has also become more relevant in the last few years, particularly when dealing with areas strictly related to consumer defense.

7. Transnational Influence of Argentine Doctrine

Argentine doctrine has had the most bearing on the other Latin American countries analyzed in the study. Argentine authors like Alterini, Mosset Iturraspe, and López Cabana are frequently cited in other countries. Brazilian doctrine, which may be as substantial in volume as Argentine doctrine, is not frequently cited abroad–possibly because of language differences.

Uruguayan and Chilean doctrines are rarely cited in other countries, with the exception of very renowned authors such as Couture and Peirano Facio (Uruguay) and Alessandri (Chile). Mexican, Costa Rican, and Colombian authors are not often cited in other countries, with certain exceptions, including Devis Echandia (Colombia) and Barrera Graf (Mexico). By way of summary, classical works by European authors (*e.g.*, Planiol, Ripert, Josserand, the Mazeauds, Starck, Capitant, Messineo, Betti, De Cupis, Ferrara, Trimarchi, Larenz, etc.) continue to be the most cited foreign doctrine across Latin America. Additionally, each country has local authors that are authorities on the law in their jurisdictions.

As for the methodology applied by doctrine in each country, Chilean doctrine has been the most traditional and conservative doctrine, favoring a literal interpretation of the law and judicial decisions. On the other hand, Argentine doctrine is the most innovative and inclined to accept new theories; it is less inclined towards a literal interpretation of the law.

C. Trend Towards an Autonomous Analysis of Product Liability Issues

An initial feature identified by the various country studies is a growing trend towards treating product liability as an autonomous area and incorporating special legislative and administrative solutions to the problem. Within the past decade, three of the seven countries analyzed have incorporated provisions that attempt to regulate product liability issues. As of 1997, Chile also incorporated provisions that partially address this matter

At the level of MERCOSUR (Customs Union of the "Southern Cone Countries"), since 1997 there has been a draft Protocol on Consumer Protection, which addresses some aspects of the problem.

The process of regulating product liability as an autonomous area has been characterized in Latin America by the inclusion of the relevant provisions within the scope of consumer protection legislation. This has been the solution adopted in Brazil, Argentina, Chile, and Uruguay through the laws referenced above, as well as by MERCOSUR technical committees. This process has diminished the importance of general civil liability provisions included in the civil codes of the relevant countries. However, the decline in the relevance of such provisions varies from country to country.

1. Brazil

Brazil is the country that first regulated product liability and consumer protection, and its regulation of the topic is the most complete. It established a comprehensive system for the compensation of civil liability claims arising from manufactured products in its 1990 Consumer Protection Code, Law No. 8078. The system expressly established the strict nature of the manufacturer's liability. It included specific provisions shifting the burden of proof off the victim, and detailed the damages that must be compensated, as well as the procedural and administrative mechanisms to be applied.

Due to the significance of these legal provisions, which comprise over 100 articles and a wide range of topics, much of the Brazilian doctrine views the Consumer Protection Code as a "micro-system" geared to regulating consumer relations independently from the 1916 Civil Code. This position is very significant in practice. Those who believe that the Consumer Protection Code is an autonomous micro-system that comprises all solutions to all problems affecting consumers do not accept any liability waivers other than those expressly provided for under the Consumer Protection Code. The practical significance of this position is that all liability exemptions accepted under the general civil liability framework established by the 1916 Civil Code, but not explicitly included in the Consumer Protection Code, are not accepted under the autonomous civil liability system prescribed by the Consumer Protection Code.

2. Uruguay

In contrast to Brazil, the new Uruguayan law on consumer relations, No. 17.250 enacted in August 2000, is simply limited to establishing that the provisions of the Civil Code will govern liability deriving from defective products. Although simultaneously it introduces significant changes as to the standing necessary to claim damages and the statute of limitations for such claims. Consequently, the new Uruguayan system does not amend the general civil liability provisions included in the Civil Code, which also apply to the claims filed by consumers affected by damages resulting from defectively manufactured products.

3. Argentina

The Argentine Consumer Protection Law introduces significant amendments to the civil liability regime, particularly with respect to the ability to file claims against those who participate in the chain of production and distribution of defective products.

The original draft of the referenced law underwent significant vetoes by the Executive branch of the government, which interpreted that it was not convenient to extend the liability arising from defective manufactured products to all participants in the distribution chain. Among other reasons, the Argentine Executive branch opposed such a liability regime because the strict, joint and several liability instituted under Article 40 of the vetoed law would increase prices for manufactured products and decrease competition in the markets, thus affecting the government's economic objectives as well as the interests of consumers.

Argentine doctrine almost unanimously defended the adoption of the legal text as originally drafted–that is to say, without the vetoes and providing for the strict, joint and several liability of the participants in the distribution chain. This position was highly critical of the arguments mentioned in the veto. While the veto was upheld, part of the remaining doctrine still defended strict, joint and several liability to all members of the distribution chain in a way that produced results similar to those established in the vetoed bill. Therefore, the impact of the provisions resulting from the Executive branch's veto was minimized. This doctrinal position was even supported by some courts.[5] Finally, the Consumer

5. *See* Rolando Dionisio v. Marconi SRL, Damages, Civil and Commercial Chamber of Azul, Room 1 (June 23, 1995) (Arg.).

This decision, issued while the Executive branch's veto to Art. 40 of Law 24.240 was still in force, established that "in spite of the veto to Art. 40 of Law 24.240, it can be asserted that there are concurrent obligations vis-à-vis the affected consumer. Therefore . . . he is entitled to sue any one of the participants in the consumer relationship, from the producer to the final salesman . . . ." JUAN M. FARINA, DEFENSA DEL CONSUMIDOR Y USUARIOS 347 (2d ed. 2000). It is noticeable that the decision points out the relevance of

Protection Law was amended in 1998; the text adopted was very similar to the original text vetoed by the Executive branch of the government. This process evidences the influence of Argentine doctrine on case law and even on the drafting of legal provisions.

4. MERCOSUR

The trend towards an autonomous solution to deal with product liability issues has also been the subject of an attempt at regional multinational regulation. In December 1997, MERCOSUR Technical Committee No. 7 drafted a MERCOSUR Consumer Protection Protocol which to date is still awaiting approval from the MERCOSUR Council. The Protocol, while dealing with consumer protection issues, also includes various solutions that may set the groundwork for regional regulation of civil liability issues related to manufactured products. As a matter of fact, during the drafting of the Protocol, specific mention was made of the problem of civil liability resulting from damages affecting consumers of manufactured products. However, no consensus was reached among member countries as to the regulation of this type of liability, although various proposals were discussed.

At the time, all MERCOSUR countries participating in the Technical Committee had different legislative approaches to the topic. In particular, Brazil and Argentina–the two main countries in the trade bloc–had significant differences. Brazil had a very detailed regulation that explicitly established a concept of non-fault liability for manufacturers and members of the distribution chain. In contrast, Argentina was dealing with the process that would ultimately conclude in the amendments to the 1993 Consumer Protection Law that were described above.

The situation has changed and presently there is a high level of uniformity at least among three of the four MERCOSUR members: Brazil, Argentina, and Uruguay. Together these countries have more than 200 million inhabitants and over ninety-five percent of the trading activities within the bloc. Following the 1998 amendments to the Argentine Consumer Protection Law and the enactment of the Uruguayan Consumer Protection Law of 2000, the three referenced countries have both legal and doctrinal solutions that endorse the strict liability of the manufacturer, as well as the joint and several liability of all participants in the distribution chain. However, there are still significant differences regarding the admissibility of exemptions to liability. In view of this new stance, the possibility of re-analyzing the drafting of uniform rules at the regional level should not be ruled out.

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doctrine, by citing and adopting the position of authors who clearly contradict existing provisions.

The latest development in the MERCOSUR harmonization process regarding this issue was the Declaration of Florianópolis, Brazil, issued December 15, 2000. Presidents of the four MERCOSUR countries issued a presidential declaration on the fundamental rights of consumers in MERCOSUR. The presidents of Argentina, Brazil, Paraguay, and Uruguay declared that the defense of consumers within MERCOSUR would contemplate certain basic rights, including "the effective prevention and compensation of economic and non-economic damages to the consumer, and the application of penalties to the parties liable."

5. Conclusion

The trend towards an autonomous regulation of product liability issues evidenced in the Southern Cone countries is not as clear in other countries analyzed by the NLCIFT Report. For example, while Mexico has enacted consumer protection provisions, it still follows the basic Civil Code regulations regarding damages arising from manufactured products. The same solution applies in Colombia and Costa Rica, where the provisions in the respective civil codes substantially govern product liability.

D. Key Legislative Features

As analyzed above, certain countries, particularly the MERCOSUR members, have shown a tendency to establish specific solutions to address product liability issues. In cases like Brazil, those solutions tend to be more comprehensive, while in others, for example Uruguay, the issue is addressed in only a partial manner. However, all member states tend to agree on two basic points: (a) the strict liability of the manufacturer of defective products; and (b) the joint and several liability of all participants in the distribution of such products.

1. Brazil

Brazil, which is the largest country in Latin America with 160 million inhabitants, and one of the twelve largest economies in the world, has the most comprehensive regulation of product liability in Latin America. The 1990 Consumer Protection Code has set itself apart from other regulations in the region due because it establishes a regime independent and distinct from the one established by the 1916 Civil Code. However, the Civil Code remains applicable to all cases not included under the scope of the Consumer Protection Code. In over 100 articles, the Code establishes a comprehensive regulation to address the problem. This system sets forth rules governing civil liability arising from

defective products and services, special procedures for certain types of claims, as well as criminal and administrative sanctions. It also defines the basic rights of Brazilian consumers.

The main disadvantage of this system is the lack of definition of certain essential civil liability concepts, such as shifting the burden of proof in favor of the so-called "weaker" consumer (*consumidor hiposuficiente*), or allowing exemptions from liability that have not been included in the Consumer Protection Code but are contemplated under the Civil Code. In addition, the system structured by the Code raised some doubts as to the interpretation of procedural provisions, which doctrine has recently tried to address.

As previously stated, the doctrinal position contends that the Consumer Protection Code is a closed and autonomous civil liability system that does not require general civil liability rules as interpretative guidelines. This has given rise to serious interpretation problems when dealing with issues such as liability exemptions. Furthermore, this system is not in harmony with existing legislation governing general principles of civil liability.

2. Argentina and Uruguay

In contrast to Brazil, Argentina and Uruguay have implemented "mixed" systems whereby consumer protection laws introduce certain changes to the general rules without constituting a separate system of civil liability. The most significant changes address the legal standing to act as a plaintiff or a defendant, as well as the applicable statute of limitations. In both Argentina and Uruguay, a doctrine of general civil liability rules has developed stating that product liability must be evaluated in light of a strict, non-fault liability concept. There has been a predominant tendency by the courts to adhere to the referenced doctrinal opinion. Thus, court decisions have established the strict nature of manufacturers' liability.[6]

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6. Argentine courts have established that "due to the fact that the manufacturer is strictly liable for vices in the manufacturing process, he can only be exempted by proving that the damages are the result of an extraneous cause that interrupted or altered the causal link." "Giovanetti," CNEspecial Civ. y Com. [1995].

In Uruguay, a clear example is set forth in the decision of the Court of Appeals of the 1st Term in the proceedings *Fuselli v. Montevideo Refrescos S.A*. The basis for the claim was the explosion of a bottle of Coca Cola when it was picked up from a supermarket shelf. The Court established that there was strict liability and that "the provisions of Articles 1719 and 1721 of the Civil Code are applicable both to contractual and extracontractual liability cases, taking into consideration the unity of the civil liability system." Such provisions regulate a hypothesis of strict liability whereby the manufacturer has the obligation to guarantee and repair the damages that the defective product that he placed in the market may have caused to the buyer. Case No. 13.143, La Justicia Uru.; *see* Jorge Gamarra,

2. Chile

Chilean legislation remains the most conservative legislation within the Southern Cone countries. The basic provisions on this subject continue to be those of the Civil Code. The amendments introduced by the Chilean consumer protection law basically address restitution and compensation for damages arising from defective products, and doctrine has criticized the lack of precision of such rules.

3. Mexico, Costa Rica, and Colombia

Mexico, Costa Rica, and Colombia also continue to regulate this topic under their respective Civil Code provisions. However, there are special rules that contemplate specific liability cases, including those arising from in-flight or space accidents or fuel spills. They also have special consumer protection rules.

E. The Decline of Traditional Tort Law and of the Concept of *Hecho Ilícito*

A feature common to all of the legislations analyzed herein is the fact that they were originally based on the assumption that civil liability emerged as a consequence of the performance of an illicit civil, as opposed to criminal, act (*hecho ilícito*). The underlying principle in this area was that if the law did not qualify the violator's behavior as an illicit act, then no civil liability resulted. To this effect, all civil codes in the referenced countries included rules that established that civil liability occurred when damages were produced by an act that was in conflict with regulations in force at the time the damages took place.

Responsabilidad del Fabricante, 17 ANUARIO DE DERECHO CIVIL URUGUAYO [AN. DER. CIV.] 229 (1987); Jorge Peirano, 4 ANUARIO DE DERECHO COMERCIAL 72 (1974).

The Court of Appeals of the 7th Term also issued a similar decision in 1992, asserting that "it is decided that this claim must be settled by resorting to Arts. 1719 and 1721 of the Civil Code, both in the area of contractual liability (where these provisions normally apply) and extracontractual liability, taking into consideration what Gamarra has designated as the "unity" of civil liability. Therefore, in this case the manufacturer has a strict liability and has the obligation to guarantee (that is to say, to repair) the damages that the defective product could cause to the consumer." Case No. 12.705, La Justicia Uruguaya 949; Gamarra, *supra*; Peirano, *supra*. The definitive acceptance of this doctrinal position came about in 1993 when the Supreme Court of Justice expressly supported it when it ratified the decision of the Court of Appeals of the 7th Term, mentioned above. The Supreme Court established that "we are facing a case of strict liability of the manufacturer, which applies both to instances of contractual and extracontractual liability, by virtue of the principle of unity of civil liability. This solution has been supported by prestigious national doctrine." Case No. 12.705, La Justicia Uruguaya.

1. Elements of a Traditional Tort Action

All legislation analyzed herein require the following elements in order for civil liability to exist: (1) an act or omission of the person responsible for the damage which conflicts with existing legal provisions (illegality); (2) a direct connection between the action and the damages (causality); and (3) an economic detriment to the plaintiff (damages); that is (4) derived from non-diligent behavior by the defendant (negligence). Almost all of the analyzed legislations construed that liability only arose where all four elements were present.

However, almost all statutes also included certain exceptional cases of liability arising out of licit acts, that is to say, situations in which the person causing the damage had to respond even though his acts were acceptable under existing legal provisions. The most common example mentioned by legal writers as a legitimate act giving rise to damages is when a person legitimately crosses a third party's land in order to have access to a road or highway. Even though that person is legally entitled to create an easement through the third party's land, the owner of the land is also entitled to receive compensation for the use of that land.

2. The Onset of the Notion of Liability Without Fault

The classic civil liability scheme inspired by the early 19th Century French Civil Code began to deteriorate during the first decades of the 20th Century. Latin American doctrine stresses the fact that fault-based liability and the notion of an illicit act did not adapt easily to the needs of the new economy based on the mass production of consumer goods.[7] Under the new economic order, which reflected the beginning of industrial activities in Latin America, potentially dangerous but economically desirable and consumer demanded

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7. Argentine Professor Graciela Messina de Estrella Gutiérrez states that:

> [T]he proliferation of damages to individuals and their properties due to modern lifestyles imposes on the law of damages the obligation to repair certain damages, not based on their unfairness but rather on their harmfulness. At present, the law of damages deals with the settlement of risks . . . . The notion of fault-based liability dominated the 18th Century and most of the 19th Century and is still prevalent in those societies that have not abandoned the idea of individual liability for social conducts. With time, the transformation of the notion of negligence and the almost complete elimination of moral assessments in favor of objective rules of conduct have contributed to change the nature of fault-based liability in the law of damages. Technical evolution, particularly industrialization and urbanization, have promoted such transformation.

Graciela Messina de Estrella Gutiérrez, *Los presupuestos de la responsabilidad civil: situación actual*, *in* RESPONSABILIDAD POR DAÑOS, HOMENAJE A JORGE BUSTAMANTE ALSINA 66 (Alberto J. Bueres & Jorge Bustamante Alsina eds., 1990).

activities and products were introduced. Often the damages that resulted were not connected to an illicit act or to negligence by the manufacturer of the goods. Furthermore, in many instances it was impossible to identify the origin of such damages in an adequate manner.

The initial reaction to this new reality was provided by doctrinal opinions in the various countries that began promoting a solution that consisted of broadening the grounds for liability included in the relevant civil codes. In Argentina, for example, doctrine pointed out the significance of no-fault civil liability grounds that developed from case law on auto collision related personal injury claims, and its extension to other areas of law. Arturo Alessandri, possibly the best-known Chilean civil law scholar of the 19th Century, supported an expanded interpretation of the three grounds for liability established under Article 2329 of the Chilean Civil Code. He claimed that such grounds were, indeed, a general principle applicable to all cases of liability resulting from the acts of third parties or from the operation of an object.

In Uruguay, both doctrine and courts expanded the interpretation of the liability grounds established under Article 1324 of the Civil Code. This was the first step towards the acceptance of no-fault liability in claims arising from defective manufactured products. A similar solution was adopted in Brazil, although in this case courts played a more active role in expanding to other areas the grounds established by the 1912 decree for liability arising from train accidents.[8]

The purpose of all of these expanded interpretations was to overcome the significant obstacles created by the traditional theory of civil liability. Mass damages resulting from new transportation and production means rendered obsolete the traditional civil liability structure whereby the plaintiff had to prove the occurrence of the act, its illicit nature, a negligent behavior by the person causing the damage, and the damages caused. The traditional structure was based on pre-19th Century notions and was tailored to individual claims where both the origin of the event and the behavior of the person liable could be easily determined. Under such a structure, it was reasonable to expect the claimant to prove that the person causing the damage had acted negligently and had also failed to comply with a law. The evolution of industrial techniques brought about the creation of damages that were very hard to avoid even when the person causing such damages was acting legally. This theory became more common as a result of an increase in those activities that are dangerous *per se*, such as

8. Article 17 of Decree No. 2681 of December 7, 1912 established the existence of a presumed fault of rail companies for damages caused to their passengers. Brazilian courts extended such presumption to all types of transport means and made it increasingly strict. In Pronouncement (*Súmula*) No. 187, the Federal Supreme Court summed up this position by establishing that "the carrier's contractual liability for an accident is not excluded by an act of a third party, against whom such carrier shall have a right of recourse." Pronouncement No. 187 of the Federal Supreme Court of Brazil [hereinafter Pronouncement No. 187].

transportation, energy, therapeutic drugs, mass distribution of products, etc., but that consumers and the eventual victims themselves demanded as elements needed to enhance the quality of life.

When faced with this new reality, the weakening of the traditional axiom, whereby the act that generates the damage needs to be illicit, is to be expected. Another way to weaken the referenced axiom was through the doctrinal position that expanded the notion of illegality (*ilicitud*) to cover not only acts that were contrary to legal provisions, but also contrary to any type of rule, regulation, administrative ruling, and even ethical and moral principles and behavior patterns normally accepted by society in general. This expanded notion of illegality was initially introduced during the early 20th Century, and presently it has been accepted by almost all of the legislations analyzed herein. Even though the notion of illegality had been expanded, the concept remained difficult to apply in the case of damages arising from activities carried out within the framework set by the relevant authorities and not contrary to any moral or ethical principles, but which nevertheless, were susceptible to causing damages due to their inherently dangerous nature.

As a response to this reality, doctrine began to develop the notion of non-illicit, non-fault liability. In this new approach, the focus of the compensation process is the victim–*i.e.*, the party suffering the damages, who needs to be compensated in all instances, regardless of the licit or illicit nature of the act. This approach entails a radical change to the traditional civil liability theory that did not admit any compensation for damages caused as a result of a legal activity, except in exceptional cases especially contemplated by the law.

This trend has been made very clear by Argentine doctrine, which has promoted the substitution of the notion of illicit act for that of damages as the basis to establish civil liability. Most such doctrine maintains that all damages, regardless of the existence of an illicit act, need to be remedied. Several Argentine authors point out that the essential element of the new notion of civil liability is the damage, not the illegality. Those authors claim that all damages need to be repaired, regardless of whether or not they contravened a legal provision. Various renowned Argentine writers predict the elimination of the notion of illicit act as a prerequisite to determine civil liability. Doctrine has even gone as far as promoting the change of the designation "civil liability law" to "damage compensation law," as a way to diminish the relevance of the illicit act element. As evidence of this trend, the 1993 proposed amendments to the Argentine Civil Code established the principle that "every act or omission that causes a damage is anti-juridical when it is not justified." Although this proposed amendment is not currently in force, it is based on the notion that the focus of the civil liability should be damages, regardless of whether there was an illicit activity. Part of the Argentine doctrine predicts that the element of illegality will disappear as a prerequisite for the compensation of damages.

Even though other countries, like Brazil and Uruguay, continue to affirm the relevance of the notion of illegality as part of the civil liability system,

doctrine in these countries has devised formulas to assess illegality that are specifically tailored to product liability and that are flexible enough so that the problem of evidencing the illegality becomes almost non-existent. In Mexico, the notion of illegality has also become irrelevant in cases dealing with dangerous goods. The Mexican Civil Code specifically provides for the compensation of damages caused by dangerous goods, even when the activity carried out by the person causing the damage is essentially legal.

Mexican doctrine manifestly establishes that in those instances of strict liability arising from the use of dangerous products there should not be any mention of the illicit nature of the act. In those cases, the duty to compensate is caused by a legal act of the person causing the damage.

Even though in Costa Rica and Colombia the illicit act continues to be the central focus of civil liability law, compensation for damages arising from legal acts is also required in those activities that are deemed to be dangerous. Chile, on the other hand, remains loyal to the principle of defining liability as a consequence of an illicit act. There are exceptions to this principle where the notion of strict liability arising from legal activities has been specifically established by law. As a general trend, this author believes that the notion of illicit act is currently in crisis in the area of product liability regulation. Arguments regarding the applicability of this element vary. Some authors consider that this element should not be considered at all when analyzing product liability. There are yet other authors who advocate maintaining this element, but they essentially assimilate this notion into the concept of damages.

F. The Trend Towards the Unification of the Notions of Contractual and Extra-Contractual Liability

A common trend evidenced by the legislations referenced herein is the attempt to overcome the traditional dichotomy between the notions of contractual and extra-contractual (tortious) liability included in their civil codes. Most Latin American legislations, following European models, particularly the French Civil Code, promoted the differentiation between contractual and extra-contractual civil liability. This dichotomy stems from the type of relationship existing between the parties to an action in damages. Consequently, if the parties had a previous contractual relationship, all liability resulting from the non-compliance with such agreement shall be governed by contractual liability rules. Such rules differ substantially from those that govern situations where there is no previous relationship between the parties.

1. Consequences of the Contractual–Extra-contractual Dichotomy

In practice, the distinction between the consequences of contractual and extra-contractual rules is significant since the regulation of both types of liability is substantially different. For example, statutes of limitation are different for contractual and extra-contractual liability; typically, they are much longer in the case of contractual liability. Rules of evidence also differ and tend to be more favorable in claims resulting from contractual liability. Generally speaking, the position of the person filing a claim based on contractual liability is more favorable than that of a person who invokes extra-contractual liability rules.

2. The Merger of Contract and Tort: Contractual Obligations to Act Diligently or to Attain a Result

In the area of contractual liability, Argentina, Colombia, and Uruguay have applied the theory of obligations to act diligently (*obligaciones de medio*) and obligations to attain a result (*obligaciones de resultado*). This division is based on the assumption that there are certain contractual duties, identified as obligations to attain a result, in which the parties are held responsible even if they have acted diligently. For example, the obligation to attain a result in a transportation contract consists in ensuring that the passenger will reach his destination safely. If, after having entered into a transportation contract by purchasing the common carrier's ticket, the passenger does not arrive safely at his destination, all the plaintiff-passenger needs to prove for breach of contract is that he entered into a contract with the carrier and did not arrive safely at his destination. In contrast, there are other obligations where the non-compliance by the debtor must be analyzed based on the diligence applied in fulfilling such obligation. A typical example of an obligation to act diligently is that undertaken by career professionals (lawyers, doctors, etc.).

It is not unlikely for the two types of obligations to co-exist in a single situation. For example, when a person enters into an agreement with a medical institution in order to undergo surgery, the institution owes a duty of safety that his physical integrity not be put at risk by the normal operation of the contracted services. Simultaneously, if during the surgery there is a failure in a piece of equipment and this failure causes damages, such damages will be assessed based on rules pertaining to contractual liability to attain a result. Hence, it will not matter whether the hospital was diligent in maintaining the defective equipment, since the purpose of this type of obligation is to avoid damages to the affected party, regardless of fault. The outcome of the surgery, on the other hand, constitutes an obligation to act diligently. The professional performing the surgery does not guarantee the attainment of a result, but is bound to use diligence according to standard rules and professional usage in place at the time such

service was agreed upon. Any claim against such a professional will be evaluated according to the rules of due diligence.

3. Defective Products and Liability for Improper Results and Means

In Uruguay and Argentina the majority doctrine maintains that sellers are obligated to sell products that do not cause any damages. This is an obligation to attain a result, and thus, it is irrelevant to determine whether the seller was diligent when manufacturing the product. This position favors the affected consumer, since an obligation to attain a result demands strict compliance. Once it has been evidenced that damages have derived from a defective product, the manufacturer is liable unless she proves that an extraneous cause severed the connection between the damage and the product.

4. The Importance of Privity of Contract

From the plaintiff's point of view, the problem with these types of theories is that they do not apply in those cases that constitute hypotheses of extra-contractual liability. According to traditional doctrine, they do not apply in cases where there is no direct previous relationship between the manufacturer and the affected consumer. This is the normal situation when dealing with damages arising from manufactured products because it is not common for consumers to purchase products directly from the manufacturer.

A considerable portion of Latin American doctrine has pointed out that the dichotomy between contractual and extra-contractual liability established by civil codes is not appropriate to regulate damages resulting from manufactured products that can affect people who never had a direct relationship with the providers of the defective goods. Doctrine points out that by applying the dichotomy between contractual and extra-contractual liability, incongruous situations may arise whereby two parties who have been affected by the same defective product may face very different outcomes if one of them purchased the product directly from the producer and the other one did not. If the person affected had acquired the goods directly from the manufacturer, then the latter's liability would be evaluated according to contractual liability rules.

In addition, if the victim resides in one of the countries that accept the application of the notion of obligations to attain a result, then the victim's position would be favored and the manufacturer's position would be seriously compromised. As explained above, the application of the theory of obligations to attain a result makes it very difficult for the defendant to avoid having to make reparations for the damages produced by the defective product. On the other hand, if there is no contractual privity between the parties, because the affected party purchased the product from an intermediary, the situation would be more

complex. In this case, in order for the manufacturer to be held liable, the victim would have to file a claim based on the rules of extra-contractual liability and prove that there was lack of diligence in the manufacturing process. Additionally, the statute of limitations for such course of action is shorter than the one applicable to contractual liability.

Due to this disparity, doctrine in Argentina, Brazil, and Uruguay attempted to expand the interpretation of rules pertaining to the manufacturer's obligations to attain a result and to act safely, both of which apply in the realm of contractual liability, to make them applicable to cases of extra-contractual liability. This mechanism of expansion was intended to facilitate the processing of claims by consumers who had not contracted directly with the manufacturers, by putting them in equal standing with those who had.

5. Developments in Brazil, Argentina, and Chile

Thanks in great measure to changes incorporated into their legislations during the past decade, Brazil, Argentina, and Uruguay now specifically regulate the affected consumer's ability to initiate an action against all members of the distribution chain. However, such an amendment was not easy to bring about. Brazil was the first country to introduce it into its 1990 Consumer Protection Code. Argentina had included it under Article 40 of the Consumer Protection Law; however, such provision was eventually vetoed. Over five years later and as a result of the efforts of an almost unanimously endorsed doctrine, an amendment to the law was introduced in 1998, which established the joint and several liability of all participants in the distribution of defective products.

The Chilean consumer protection law, which establishes a similar criterion, has encountered practical difficulties in its application due to certain technical deficiencies in its drafting. In conclusion, even though the process is not uniform, there has been a decrease in the significance of the notions of contractual and extra-contractual liability in several countries within the region. This can be attributed to two factors: (1) the establishment of the joint and several liability of all participants in the distribution chain as a result of the damages caused by the products manufactured or distributed thereby; and (2) the increasing acceptance of the notion of strict liability.

G. The Trend Towards Strict Liability

The acceptance of the notion of strict liability as the basic criterion to be applied when analyzing product liability claims was the result of the evolution of doctrinal and court opinions over several decades.

1. The Notion of Fault in 19th Century Civil Codes

Originally, the civil codes of all countries analyzed herein–most of which were drafted during the second half of the 19th Century–adopted the notion of "fault" (*culpa*) as the focal point when dealing with civil liability. In the view of early 20th Century Latin American doctrine, the notion of fault in the illicit act materialized in damages caused to another party due to negligent or careless behavior. Hence, there was an assessment of the reproachable nature of the liable party's behavior.

The notion of fault in the civil codes of the countries referenced herein is equated with the standard of a "good head of the household" (*buen padre de familia* or good *pater familias*). According to this notion, in order to establish whether or not there had been fault, the behavior of the non-complying party had to be contrasted with that which would have been evidenced by a "good head of the household" when faced with a similar situation. Doctrine agreed in defining such conduct as the attitude that is to be expected of a man of average good sense when facing the same situation.

2. Categories of Fault

Most Latin American authors differentiate between two categories of fault. The first category is negligence, where the liable party omits to carry out a certain activity that would have avoided causing the damage. Under the second category, carelessness, the individual acts impulsively or without fully calculating the consequences that his actions may bring about. All of the civil codes of the countries analyzed herein also accepted different levels of fault, simple and complex. Such distinction was highly relevant in practice when the early cases of product liability arose, and it promoted the evolution towards the notion of strict liability.[9]

Under the framework of subjective liability doctrine, as opposed to strict liability, identifies the notion of *dolo* as a separate category from fault. *Dolo* can be equated with gross negligence or intentional misconduct. Unlike fault, *dolo* requires a voluntary representation or visualization of the damage or a deliberate abstention from the action. When there is *dolo*, the author is liable because of his harmful behavior or at the very least for the harmful behavior that he deliberately failed to avoid.

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9. Even in those countries that are governed by the relative presumption of fault, whereby the defendant is exempted by evidencing the diligence of a good head of the household (that is to say, by evidencing the lack of fault), strict liability has prevailed as a result of the strictness applied in the evaluation of that negative evidence. This is the case in Uruguay, where one judge ironically commented that "not even the Wizard of Oz" would be able to submit such evidence to the satisfaction of the court." 19 JORGE GAMARRA, TRATADO DE DERECHO CIVIL URUGUAYO, 87 (5th ed. 2001).

3. Simple and Complex Liability

The standard form of civil liability takes place when a person must respond for the damages caused by his or her own behavior. This is a case of simple liability or liability for a person's own act. However, almost all Latin American civil codes contemplate other situations where damages cannot always be attributed to their author. In many situations, damages are attributed to persons who have a special relationship with the author, namely guardians, tutors, etc., even though these persons may not have participated directly in the production of the damages. This is called "complex liability."

Most codes set forth the notion of "liability for the act of a third party" (respondeat superior). This principle of attribution of liability is applied in those cases where a law authorizes the victim to file a claim against a person who, because of his relationship with the author of the damage, is under the obligation to compensate the victim, even though he did not directly cause the damage. An example of this principle is the liability employers have vis-à-vis acts carried out by their employees, or that of tutors, etc. In such cases, Latin American legislations used to set forth basic presumptions of fault whereby even when the indirect author (*i.e.*, the father or tutor) proves that he had no direct participation in the event that lead to the damage, he will still need to make reparation for the damages. This liability exists by virtue of the law that holds him responsible for the acts of the people who are under his control.

4. Liability for Damages Caused by Objects

A special kind of complex or derivative liability is that resulting from the operation of objects. For most Latin American legislations, this situation occurs when an object, under normal conditions and without any human intervention, caused the damage. A typical example would be the explosion of a heater. It is the object that assumes a key role in the causation of the damages. Thus, the damages are produced by the objects and not by the negligence of an individual. Latin American civil codes establish that, in those instances, the liability falls on the person who had "custody" of the object that produced the damage. The custodian of the thing is deemed to have defaulted in her duty of safe custody.

The evolution of this notion of liability resulting from the operation of an object has been crucial in many of the countries analyzed herein. Custody based liability constituted the first legal scheme used to decide initial product liability cases. It was also the notion that promoted future doctrinal and court opinions on this topic.

5. Article 1113 of the Argentine Civil Code: The Doctrine of Inherent Vice

In Argentina, the amendments to Article 1113 of the 1968 Civil Code introduced a new concept, which was highly significant in the analysis of cases of liability based on the operation of an object. This concept was that of the "vice or risk of the object." The referenced article sets forth a substantial distinction as to liability defenses between those damages caused by "objects" and those damages caused as a result of a "vice or hazard of the object." This differentiation translates into the fact that the object's owner or guardian may be exempted from liability by proving that there was no fault on his or her part. In contrast, if the damages resulted from the inherent vice or risk of the object, the owner or guardian may only be exempted by proving the victim's fault or the intervention of a third party for whom he is not responsible. In other words, by virtue of the application of this new principle, the liability of the person in charge of the object that caused the damage became a more strict liability.

6. The Doctrine of Inherent Vice in Uruguay

In Uruguay, doctrine took significant steps in the analysis of the notion of control over objects that may cause damages, and ultimately adopted the French theory of control of the behavior and of the structure (*guarda del comportamiento y de la estructura*). According to this position, manufacturers are always liable for the damages that are a result of the internal structure of the product, since consumers do not have access to that structure. The manufacturer will maintain a certain degree of liability even when he has delivered the products to a third party. If the damages are a result of a mistaken behavior or of mistaken use given to the object, then the manufacturer will not be liable. However, "if the damages are a result of a defect in the internal structure of the object, the inner part that a person using the object has no access to, then liability falls onto the manufacturer."[10] Hence, all damage derived from the internal structure of the product is deemed to be a result of the manufacturer's behavior and must be compensated thereby – except where there have been liability exemptions.

7. The Doctrine of Inherent Vice in Brazil

In Brazil, the notion of liability resulting from the operation of objects was also highly significant for the development of the civil liability system, particularly through doctrinal and court opinions that followed the practical

10. Gamarra, *supra* note 6, at 234.

application of the 1912 decree on railroads that was based on the same principle.[11] Once the notion of presumed fault established by such decree was expanded to other types of activities, Brazilian doctrine and jurisprudence evolved towards a position that was ready to accept no-fault liability in certain areas. Finally, the 1990 Consumer Protection Code established the strict liability of providers of defective products.

8. Effect of European and U.S. Doctrines of Inherently Dangerous Objects in Latin America

Modern European and U.S. positions on strict liability were also well received by Latin American doctrine. Particularly relevant was the theory of "assumption of the risk," whereby a person who benefits from a dangerous activity must assume the eventual damages that result from such activity. This concept applies even when the victim has all necessary legal and regulatory authorizations to undertake that activity, and strictly speaking such activity cannot be considered to be illicit or non-diligent.

In Mexico, for instance, the Civil Code establishes the no-fault liability of a person who uses and receives a benefit from the use of dangerous goods, even if the underlying activity is legal according to Mexican doctrine.[12] In Colombia, subjective liability continues to be the rule, although doctrine is leaning towards accepting strict liability in the case of dangerous activities.[13] In each specific

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11. *See* Pronouncement No. 187, *supra* note 8.

12. Traditionally, liability for damages was addressed from a strictly subjective point of view, taking into consideration a behavior which had to be characterized by the presence of fault–negligence or serious misconduct–as a determining factor. In the absence of such fault, there was no compensation. The evolution of laws under the pressure of social and economic needs imposed by the industrial revolution lead to an objective notion of liability for damages. The person is liable without regard to negligence or misconduct, by virtue of his mere activity and taking into consideration the fact that the victim is totally unrelated to such activity and receives no benefits from the use of an inherently dangerous object . . . .

Ernesto Gutiérrez y González commends the vision of Mexican legislators who–even before the writings of Ferri–included in the Civil Code principles of strict liability (Art. 1595). This vision was carried on by 1884 legislators, in Art. 1479, which establishes in general terms that civil liability for damages will also arise in the case of industrial establishments that through the operation of their machinery, emissions or for any other reasons cause damages to their neighbors. JAVIER ANTONIO MARTÍNEZ ALARCÓN, TEORÍA GENERAL DE LAS OBLIGACIONES 129-30 (1997).

13. Colombian doctrine has established that:

Article 2356 of the Civil Code, which establishes the basis for liability deriving from objects used in dangerous activities, sets forth a presumption of liability that does not depend on evidencing diligence and care. Such liability changes

legislation, the notion of dangerous activities may be found by resorting to specific laws that regulate no-fault liability for damages derived from certain activities such as air transportation or nuclear activities.[14] In Brazil, strict liability has been regulated to different degrees in the area of labor accidents, state activities, consumer relations, air transportation and nuclear accidents. This constitutes a significant increase in the scope of legal situations governed by the notion of strict liability.

When a particular activity that causes the damages has not been defined specifically as a dangerous activity, it will be construed as dangerous when its application or use intensifies or multiplies the potential for damages. This happens when the objects are not compliant or amenable, or are complex objects that require a special knowledge in order to be used without creating risks. Objects that involve a danger regardless of the circumstances under which they were manufactured, due to their intrinsic normal features such as complexity, components, fragility, or easily showing vices or defects, also fit into this theory of liability. Chile, on the other hand, remains close to the notion of subjective liability, with the exception of clearly determined hypotheses based on no-fault liability. The MERCOSUR Protocol on Consumer Rights drafted by Technical Committee No. 7 has not achieved a consensus regarding the notion of strict liability for manufacturers of finished products.

Finally, all of the countries analyzed herein have certain rules that explicitly accept the concept of strict liability when dealing with certain activities, including air transportation, nuclear facilities, fuel spills, etc. Such provisions are usually a result of the application of international conventions on those topics. They have also contributed in various countries to the widespread acceptance of the notion of strict liability as the central criterion governing civil liability.

> only when the causal link has been broken, that is to say when the alleged originator or party liable for the event can establish that the result was caused by *force majeure*, by an act of God or because of the victim's exclusive fault. Liability does not disappear by the mere evidence of a diligent and careful behavior.

CÓDIGO CIVIL [CÓD. CIV.] art. 2356 (Col.); GILBERTO MARTÍNEZ RAVE, RESPONSABILIDAD CIVIL EXTRACONTRACTUAL 239-40 (1998).

14. In Argentina, the Mining Code explicitly establishes the strict liability of the owner of the mine. COD. MIN. art. 16 (Arg.). The same type of liability is established by the Aeronautic Code and by decree-law No. 17.048 which ratified the Vienna Convention on Civil Liability for Nuclear Damages. COD. AERO. art. 91 (Arg.); Ley No. 17.048 ratifying the Vienna Convention on Civil Liability for Nuclear Damages, *opened for signature* May 21, 1963, 2 I.L.M. 727. Argentine law also sets forth the strict liability of the generator of hazardous wastes. Ley 24.051 Contaminación Ambiental 17-I-1992 (Arg. 1992). Finally, no-fault liability had traditionally been accepted in the area of labor accidents. Law No. 24.028 COD. TRAB. art. 5 (Arg.).

H. Strict Liability and Defects

In those jurisdictions that have adopted the notion of strict liability in order to compensate damages caused by manufactured products, such as Argentina, Brazil, and Uruguay, it is required that the products be "defective." Generally speaking, the concept of defect implies any deficiency in the product, in its manufacturing process or in the information provided in relation to that product, which may potentially render it harmful, even when such product is used in an appropriate manner.

1. The Notion of Defective Product in Brazilian, Argentine, and Uruguayan Law

Article 12 of the Brazilian Consumer Protection Code defines a defective product as a product that: (1) does not provide the safety that legitimately could be expected thereof; (2) taking into consideration all relevant circumstances; including (3) presentation; (4) reasonable use; (5) risks to be expected; and (6) the time it was released for distribution. This definition is very important because it stresses that the assessment of the existence of the defect must consider the degree of safety that the product must evidence, according to the consumer's expectations regarding such product and the use thereof. Brazil's legal notion of defect, which focuses on the safety such product may have, as legitimately assessed by a consumer, is very close in essence to the doctrinal notions of defect applied by Uruguayan and Argentine doctrine.

2. Types of Defects

The three countries referenced in the previous subsection accept that not all damages derived from manufactured products are caused by a defect. In particular, it has been accepted that a product is not defective if the damage resulting thereof is the consequence of the inappropriate use of the product by the consumer, and it could not have reasonably been expected for the product to be safe under such circumstances. Based on this notion of defect, authors in Argentina, Brazil, and Uruguay have stressed the importance of providing accurate information to the consumer regarding the product's features and handling instructions.[15]

Argentina, Brazil, and Uruguay categorize three different types of defects. First, there are manufacturing defects, caused by mistakes in the manufacturing process and that affect individual products rather than an entire line, for instance, a bent or defective part. Second, there are construction defects

15. *See* discussion *infra* subsection I.

like defective materials, design, or workmanship, which affect an entire line of production. The third type of defect typically mentioned by doctrine is the defective disclosure of information. In this case, the damage is caused as a result of insufficient, misleading or otherwise inadequate information provided to the consumer to make adequate use of the product.

I. Exemptions from Liability

Defenses against actions for defective products vary according to the nature of the manufacturer's liability in each country. Under traditional civil liability provisions, liability exemptions were typically circumscribed to establish that the person responsible for the damages would be exempted if he had acted diligently. The defendant was placed in a very favorable position. In other words, he would not be held liable unless the plaintiff evidenced his fault, except when such fault was presumed, as in the case of liability for minors, dependents, or objects under his custody. Alternatively, if the defendant assumed an active role and submitted evidence of her diligent behavior, she would also be exempted.

The shift in Latin American doctrine, case law, and legislation, which brought about the acceptance of the notion of strict liability as the basis for assessing product liability, also brought about a change in the determination of possible exemptions to liability. Generally speaking, in those countries that have accepted the notion of strict liability, such as Brazil, Argentina, and Uruguay, a manufacturer can no longer be exempted from liability by alleging that there was no fault on his part. He may, however, be exempted if he proves that: (1) there is no link (causality) between his act or omission and the damage; (2) the product is not defective; (3) there was an act of God or *force majeure*; (4) there was contributory negligence of the victim; or (5) the damages were caused by a third party. There are other possible exemptions, including development risks and compliance with governmental standards, where consensus has yet to be reached.

The following subsections provide a brief overview of some of the exemptions mentioned above, as regulated in the various countries analyzed herein.

1. Act of God

Although the act of God exemption has been questioned by certain legal systems like Argentina and Brazil, most doctrinal and court opinions have accepted it. The solution to this particular issue is very closely related to the discussion of whether consumer protection laws within the different jurisdictions constitute a closed, autonomous civil liability system that cannot be interpreted by resorting to general principles included in the relevant civil codes, or, if on the other hand, basic principles of civil liability remain applicable.

In Argentina, for example, Article 1613 of the 1998 proposed Civil Code specifically includes acts of God as an exemption from liability when objects cause damages. In contrast, Uruguayan doctrine accepts this exemption only provided the act of God is unpredictable and uncontrollable.[16] Brazil, on the other hand, accepts this exemption in the area of product liability only if the act of God is "extraneous" to the object that caused the damage.[17] Unlike other exemptions like contributory negligence or act of a third party where the damages are related to an individual other than the defendant, acts of God are circumstances that are not created by a person, but rather unforeseeable and inevitable acts of nature. Unforeseeability and inevitability are the key elements of this exemption. Typically, the act is inevitable because it is unforeseeable. Such unforeseeability is a result of the extraordinary and extraneous nature of the event.

Generally speaking, most of the jurisdictions analyzed herein accept acts of God as an exemption from liability that the defendant can claim whenever the damage is caused by an unforeseeable and inevitable event. However, all of the legislations analyzed herein have been very strict when determining the degree of unforeseeability and inevitability that is required to constitute an act of God that can be claimed as an exemption. In other words, there is a de facto presumption that many of these events are foreseeable.

> 16. The act of God is characterized by the fact that it is inevitable; in other words, in addition to being an event that is extraneous to the defendant, it is also unpredictable, uncontrollable and final. We consider that includes the case where the steering bar broke while the vehicle was circulating under normal conditions and within city-authorized speed limits, and produced a sudden and unpredictable turn that caused the vehicle to hit the pedestrian.

Decision of the Civil Court of 1st Instance of the 10th Term, September 15, 1986 (Uru.).

17. Brazilian doctrine has understood that even though the act of God is not included as a defense in Article 12 of the Consumer Protection Code, it can be admitted as such provided it is not related to the manufacturing process of the defective product.

Doctrine has considered that the act of God is admissible only if it is totally unrelated to the manufacturing process, that is to say, independent from the manufacturer's activities. An internal act of God does not break the causal link, since the damages are ultimately caused by the introduction of the already defective product into the market. In contrast, in *force majeure* and external acts of God there is no causal link between the manufacturer's activities and the damages. *See* GUSTAVO TEPEDINO, TEMAS DE DIREITO CIVIL 242 (1999) (citing MARIN JAMES, RESPONSABILIDADE DA EMPRESA PELO FATO DO PRODUTO).

Consequently, in order to establish whether an act of God constitutes a defense, it is essential to determine whether such act is internal or external. Internal acts of God refer to unforeseeable–and thus, inevitable–events pertaining to the company's organization and related to the business risks undertaken by the manufacturer. External acts of God are also unforeseeable and inevitable, but they are unrelated to the business organization. It is an extraneous event that has no relationship whatsoever with any business risks and it includes, for instance, natural phenomena (storms, etc.). *See* Sérgio Cavalieri Filho, *La responsabilidad en el Transporte terrestre de pasajeros a la luz del Código del Consumidor*, 1 ENSAYOS JURÍDICOS, EL DERECHO, REVISTA DE IBAJ 208 (1996).

2. Act of a Third Party

In most of the countries analyzed, the act of an unrelated third party, who has no legal relationship with and is not subordinated to the defendant, also constitutes an exemption that can be claimed by the defendant. The reasoning behind this exemption is that the act of a third party destroys the link (causality) between the defendant's act or omission and the damages caused. Doctrine points out that the first element to be considered in order for the act of a third party to constitute an exemption is that such party cannot be related to the defendant, either directly or indirectly. Consequently, children under legal custody, employees carrying out an assigned task and corporate bodies or authorities of a legal entity cannot be included under this exemption. It is also necessary for this act to be unforeseeable and inevitable by the presumed offender (defendant). Additionally, there can be no concurrent fault, provocation or any act by the defendant that aggravates the consequences of the event. Another requirement of this exemption is that the act of the third party must be the only cause of the damage. This is a relevant issue since damages may have more than one origin, so that both the defendant and a third party may have contributed to the detriment. Most doctrine and court decisions have established that the concurrence of two acts, one by a third party and one by the defendant, does not constitute an exemption.

3. Act of the Victim and Assumption of the Risk

The defense of the act of the victim is accepted in most of the countries analyzed. However, it lends itself to significant discussion. For instance, although most doctrine and courts in these countries admit this defense, questions have been raised as to whether any act of the victim constitutes a defense, or if on the other hand, such act must be the result of a lack of diligence or a negligent behavior. Although there is no unanimity, most legal writers in Argentina, Brazil, and Uruguay point out that from a strictly causal point of view, the mere act of the victim should be sufficient even if no negligence is present to exempt the defendant from liability. Among others, this has been the position of Alterini in Argentina and Szafir in Uruguay.

The reasoning behind this position is the relationship between this defense and the element of causality. Hence, if the damages have been caused by the plaintiff or by a person or object that the plaintiff is accountable for, then it follows that it would not be reasonable to require negligence on the part of the victim. In Argentina, various renowned authors affirm that when the victim's behavior, whether negligent or not, has caused the damages, then such damages cannot be ascribed to any other person. This is the position that has been adopted under Article 1611 of the 1998 proposed Civil Code, which explicitly establishes the act of the victim as a defense. This is a significant defense in all countries

analyzed. It is one of the main arguments made by product manufacturers when defending their position, particularly in the case of products that are distributed legally and in mass, for example, tobacco or alcohol.

The act of the victim is closely related to another defense that doctrine in the countries analyzed has been less ready to accept and which consists in the victim's assumption of risks. This is a very significant issue, since it entails the problem of whether a person may voluntarily commit to something that may jeopardize her health or integrity. Even though there are conflicting positions in all of the legal systems analyzed herein, it is possible to assert in general terms that doctrine and courts accept the assumption of risks by the victim as an admissible defense, provided such assumption of risks is the result of an informed and deliberate decision. Consequently, information becomes key when determining whether the damages were self-inflicted by the victim, knowing that such damages were a possible outcome of his own actions.[18]

In view of the above, almost all legal systems analyzed include provisions regarding the information that must be provided to consumers. All countries require that the advertised information be truthful and sufficient. They also require manufacturers to disclosure all new developments that may potentially be dangerous to consumers as they become aware of them. This obligation continues even after the products have been distributed to the market.[19] There are various court decisions in Argentina, Brazil, and Uruguay that exempt manufacturers from liability in cases where damages were caused by the inappropriate use of the relevant products, and where consumers had adequate information regarding the manner in which such products had to be used. An example of such a situation is when damages result from electrical equipment that was incorrectly plugged by the user and where the instructions from the manufacturer gave adequate warning.[20]

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18. In Uruguay, for example, when analyzing the harmful effects of Viagra, doctrine has affirmed

> [I]nformation on such side effects enables the provider to be exempted from liability when the consumer affected by an ailment and who desires to benefit from the favorable effects of VIAGRA decides to take it regardless. The consumer should do so at his own risk and any damages will be the result of his own fault.

Dora Szafir, *Trascendencia del deber de informar en el derecho del consumidor* 28 AN. DER. CIV. URU. 660 (1998).

19. For example, Art. 10 of the Brazilian Consumer Protection Code establishes that "[s]uppliers may not place any product or service that they know or ought to know is extremely harmful or hazardous to health or safety on the consumer market." Law No. 8078, Sept. 11, 1990, art. 10 (Braz.), *translated in* DAVID B. JAFFE & ROBERT G. VAUGHN, SOUTH AMERICAN CONSUMER PROTECTION LAWS 27 (1996).

20. In Argentina, for example, a recent court decision established that the publicity carried out by tobacco companies on the harmful effects of smoking prevented the victim from legally claiming lack of knowledge of such effects.

Another related topic is that of comparative causation where there are concurrent acts by the victim and by the defendant. Consensus has yet to be reached in this area, and some of the doctrine still contends that the concurrent act of the victim is irrelevant due to the fact that the manufacturer's actions take precedence. However, a majority of the doctrine is in favor of accepting a solution whereby the negative consequences to the defendant would be tempered, attenuated, or divided up. By virtue of this solution, both victim and defendant would bear the harmful effects according to their participation in the event that caused the damages.

4. Development Risks

Development risks are probably one of the most debated defenses addressed by Latin American doctrine.[21] In the Latin American context, development risks have been construed as the scenario that takes place when scientific and technical developments subsequent to the distribution of the product reveal that such product was defective and that the use thereof has resulted in damages to consumers. Those who are opposed to this defense claim that the acceptance of such an exemption would create unfair results. For example, it would exempt laboratories that produced and distributed seemingly innocuous medicines that, subsequent technical and scientific advances, prove to be dangerous. Argentine doctrine has analyzed this issue at various scientific seminars, where the trend has been against accepting the admissibility of development risks. It has been stated, "[t]he manufacturer is not exempted when subsequent scientific developments evidence the harmful nature of the product."[22]

In Brazil, the initial prevailing position following the adoption of the Consumer Protection Code was in opposition to the admissibility of development

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> Even though it is true that it is hard to ponder the harmful effects that this industry may have in the health of those who have the habit of smoking, it is also true that those effects are so well known that damages cannot be claimed after having consumed the product for 40 years. It is necessary to insist on the fact that it is not reasonable to interpret that the claimant has become aware of the harm only shortly before filing the claim.

"Minisini Verdi," CNCiv. (2000-K).

21. According to Mosset Iturraspe, development risks are the main element of dissension in the area of exemptions from liability resulting from defective products. The issue has generated conflicting trends, and consensus has been hard to reach among legislators. Some tend to favor the victim, while others support technological advances and new developments. Jorge Mosset Iturraspe, *Exemptions, in* 4 RESPONSABILIDAD POR DAÑOS 231 (1998).

22. Eighth National Seminar on Civil Law at La Plata, Argentina, *Committee No. 5 on Product Liability* (1981).

risks as a defense.[23] However, a minority position in favor of accepting this defense has developed within Brazilian doctrine.[24] In Uruguay, even though there has not been much doctrinal development following the enactment of the 2000 consumer protection law, there seems to be a tendency in favor of admitting the applicability of this defense. The remaining countries analyzed by the NLCIFT Report do not have significant studies in this area.

5. Inherent Vice of the Product and Government Authorizations

Government authorizations are another controversial issue. It is the view of a majority of the doctrine in Latin America that government authorizations cannot be claimed as a defense. This position is due to the fact that the purpose of governmental controls is, indeed, to protect consumers. Therefore, it would be unreasonable to view such authorizations as a defense whenever the product meets governmental standards and yet it still causes damages to consumers, either because of insufficient government controls or due to a defective manufacturing process.

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23. In favor of this theory is Flavio de Queiroz Cavalcanti, who rejects development risks as a possible exemption from liability:

> Medicines are a good example in order to illustrate the difference and thus, the inadmissibility of development risks as an exemption within our system. If there is no cure for an ailment when a drug is introduced in the market, and the purpose of the drug is merely to delay or minimize the harmful effects, then it is not legitimate for the consumer to expect such drug to be a cure. In other words, the product is not defective at the time it is introduced in the market. In contrast, the drug may not cause damages to the consumer because of its side effects that were not known at the time it was distributed, but if these were to occur, then the consumer would be entitled to compensation. The solution would be different if development risks were accepted as an exemption in our legal system. It is worth noticing that it is not possible to conclude from article 12, 1º, III of the Code, that such exemption is acceptable.

FLAVIO DE QUEIROZ B. CAVALCANTI, RESPONSABILIDAD CIVIL POR EL HECHO DEL PRODUCTO EN EL CÓDIGO DE DEFENSA DEL CONSUMIDOR 131.

24. For instance, in a recent publication, Gustavo Tepedino seems to be in favor of accepting this exemption. This author points out that even though the Consumer Protection Code did not explicitly regulate development risks as an exemption from liability, such Code tends not to consider as defects those vices that science is not aware of at the time the product is distributed or the service is rendered. Development risks involve no defect, because there is no expectation based on current knowledge. You cannot expect something that you are unaware of. In this author's opinion, Brazilian legislators have not adopted the theory of absolute risks, which is the theory whereby the manufacturer is liable for all damages caused to the consumer, regardless of the existence of a defect in the product or service. GUSTAVO TEPEDINO, A RESPONSABILIDADE MÉDICA NA EXPERIENCIA BRASILEIRA CONTEMPORÁNEA.

As analyzed before, the legality of the defendant's actions is becoming less and less accepted as a possible defense due to the decline of the notion of illegality as a component of civil liability. This is the prevailing position in Brazilian and Argentine doctrine.[25] However, recent opinions by some Argentine authors regarding liability arising from the consumption of tobacco have evidenced a trend towards the inclusion of government authorizations and controls as one possible argument to release tobacco companies from liability.[26]

J. Reimbursable Damages

1. Definition of Damages: *Restitutio Ad Integrum*, Future Losses, Pain and Suffering

There seems to be significant consensus among Latin American legal systems with regard to compensation of damages and the scope thereof. In all of the countries analyzed, doctrine agrees that in product liability cases the nature of the compensation is that of a reimbursement. The purpose of this reimbursement is to eliminate the negative consequences caused by the defect, but not to punish the defendant. The principle underlying this position is the integral reimbursement of damages caused (*restitutio ad integrum*). Following this principle, all damages must be reimbursed to the extent they were generated, and

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25. This is the position of Stiglitz, an author who considers that the manufacturer cannot be exempted by the mere fact that the distribution of the product has been authorized by the government. He also does not consider that development risks are an act of God that exempts the manufacturer from liability under Argentine law. He does admit, however, that the manufacturer can be exempted by proving the consumer's fault, evidenced by an abnormal use of the product. Gabriel Stiglitz, *Reglas para la defensa de los consumidores y usuarios*, 2 JURIS 42 (1997).

26. In a recent paper that specifically addressed the liability for damages arising from cigarette smoking, Mosset Iturraspe points to the fact that the sale of tobacco has been authorized and regulated by the government as an element in favor of exempting tobacco companies from liability for the damages caused to smokers. According to Mosset,

> [T]he State's intervention in the production and distribution of cigarettes in Argentina should be particularly stressed. Such "intervention" or "direction" is reflected in this area through two national laws. Little or nothing has been left to chance. Therefore, we believe this constitutes the case that has been contemplated in the area of manufacturer products by Directive 85-374 CEE, which establishes that the manufacturer "is not liable for the damages caused by a defective product when the product's defect was compliant with the mandatory rules enacted by the public sector." The State even "co-participates" in the distribution of the product, by collecting significant taxes.

Mosset Iturraspe, *El daño originado en el consumo de cigarrillos: Su prueba*, 2 REVISTA DE DERECHO DE DAÑOS [REV. DER. DAÑOS] 24 (citing Loustanou v. Club Nacional de Football).

they may not become an unfair source of wealth to the injured party, who only has the right to recapture the same position as before the harmful event took place– neither better nor worse. Generally speaking, damages are defined as the economic or moral loss, detriment, harm, pain, or inconvenience experienced by a person as a result of a certain incident or event. It is relevant to point out from this definition that all of the countries analyzed accept the distinction between economic damages and moral damages (pain and suffering) and allow for compensation of the latter.

2. Elements to be Taken Into Consideration

Damages have a harmful effect on tangible or intangible goods or properties over which the affected party has or had an interest. All legal systems analyzed herein require that the plaintiff have a legitimate interest over the tangible or intangible goods that have been affected by the loss or detriment. Another requirement that has been emphasized by most of the legal systems of the countries analyzed herein is that the loss or harm must be certain. The certainty of the damages implies the determination of an actual fact that also projects inevitable consequences into the future. When the consequences are not inevitable but contingent or undefined, then damages are uncertain. In this sense, courts have allowed the compensation of damages that have not concretely materialized at the time the decision is issued, but that are certain to take place in the future irrespective of any reparation. An example of certain future damages is the progressive loss of abilities as a result of an affected organ.

There is certainty when the consequences of the harmful event emerge as an inevitable and foreseeable outcome of the current damages, whereby if there had been no damages the circumstances of the victim would be better than they are as a result thereof. Damages must be certain as to their existence, even if such existence is in the future rather than the present. All legal systems analyzed provide that ascertained damages can be either present or future. Present damages are the ones that have already taken place and are undoubtedly subject to compensation. In contrast, future damages will only be compensated when they are, at the very least, a probable consequence of the event.

Consequently, the important element is for damages to be certain, regardless of whether they are present or future. Certain damages are those that are not eventual, hypothetical, or conjectural. The mere risk or threat of damage is not subject to compensation, since it would generate an unfair source of wealth for the claimant. Hypothetical damages are merely conjectural; they may or may not take place. If the victim were reimbursed for these damages, he would be obtaining an unfair benefit at the expense of the liable party. A final feature that is common to all legal systems analyzed is that the damage must still exist at the time of reimbursement. In other words, damages that have already been reimbursed cannot be taken into account.

3. Types of Damages

All legal systems analyzed point out the existence of two different categories of damages: moral damages (pain and suffering) and economic damages.

a. Economic Damages

It has been unanimously accepted that economic damages are related to a loss, detriment, injury, or harm to a person's assets, which can be defined as the aggregate of that person's possessions or properties of an economic nature. In turn, economic damages may be divided into two subcategories: (a) the actual loss, which most legislations designate as consequential damages (*daño emergente*); and (b) lost profits (*lucro cesante*). Consequential damages are the economic damages suffered, which consist of the value of the loss experienced that is reflected in a decline in the victim's assets as a result of the harmful event.

In order to obtain the effective reimbursement of the different types of damages, the plaintiff must evidence the losses suffered as well as the decline in his assets as a result of having incurred expenses to duly confront the illegal act. Lost profits are defined as the profits or income that the victim has been deprived of as a result of the losses he has suffered to his assets. The purpose of lost profits is to reimburse the victim for the deprivation of profits or gains that he would have obtained if the obligation had been duly complied with.[27] In order to assess the amount of lost profits, damages are deemed to be certain when it is sufficiently probable that such profits would have been attained. A mere possibility to attain such profits does not suffice; neither does the certainty that they would have existed, since such certainty cannot logically refer to profits that are eventual in nature. The criterion that has been more widely accepted by various legislations analyzed herein is a middle-ground solution: an objective possibility according to the circumstances of the relevant case.

In order for lost profits to be reimbursable, such profits must be certain. The burden of proof lies with the party who claims the losses. Thorough evidence must be submitted at trial so that the court can assess the circumstances. To this effect, it will not suffice to evidence the possibility of the existence of a loss or harm. There is consensus among the countries analyzed that compensation cannot be granted when only based on conjectures. Most legal systems analyzed permit

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27. For example, a Uruguayan court decided that a traffic accident suffered by a painter, which prevented him from working for eight months, caused lost profits amounting to $103,500 USD. Such amount was calculated based on the average value of the 46 paintings that it was assumed the victim could have painted during that time, according to witness testimony. 24 GAMARRA, *supra* note 9, at 201. This decision was affirmed on appeal.

the reimbursement of future lost profits, provided such loss emerges as inevitable–that is to say, an event that has not taken place yet, but that is certain to happen in the ordinary course of matters.

A more debatable issue has to do with so-called "chance." The majority doctrinal position promotes the reimbursement of this item, but full consensus has yet to be reached. "Chance" is defined as an element that alters a process and that could have led to a profit. The likelihood of obtaining such profit cannot be regarded as a general and vague possibility, but rather as a serious and founded prospect.[28] For the majority of Argentine, Uruguayan, and Brazilian doctrine, the loss of the chance is an actual, not hypothetical, damage, which should be reimbursed when it implies a sufficiently high likelihood of frustrating an economic benefit as a result of the acts of the liable party.

When the damage consists of the frustration of an expectation, in the loss of a chance or a probability, there are simultaneous elements of certainty and uncertainty. The certainty is that had the harmful event not taken place, the victim would have maintained a future expectation which would have enabled him to obtain a profit or avoid a loss. The uncertainty resides in whether if the *status quo* had been maintained, *i.e.*, the circumstances of fact or law that presupposed the chance, the profit in effect would have been obtained or the loss would have been avoided. The chance can be assessed in and of itself, regardless of the uncertain final result, taking into consideration its intrinsic economic value as a likelihood. It is the possibility of a future damage that can be designated as certain, and not eventual. Reimbursements for chances have been one of the latest developments adopted by court decisions, and there is yet no consensus. Consequently, there are still court decisions that deny their admissibility.

b. Moral Damages (Pain and Suffering)

Reimbursement for moral damages was a subject of prolonged dialogue that came to fruition during the second half of the 20th Century. At present, moral damages are compensated in all of the legal systems analyzed herein. Generally

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28. For example, a Uruguayan court decided the case of a 21 year-old soccer player who was intentionally injured by a rival and as a consequence of the injury was forced to stop playing soccer. The injured player requested compensation for additional profits that could have resulted from championship prizes or transfers to other teams during his career. The court of first instance awarded the player $150,000 USD based on the concept of lost profits, calculated on average earnings for players of his same age and team, without taking into consideration the issue of chance. However, the court of appeals reduced the award for lost profits to $40,000 USD, alleging that transfers and prizes fell within the notion of chance and even though they have to be compensated, the rate of compensation is not the same as in the case of a damage that will necessarily take place. The court also took into consideration the fact that although the player showed good conditions, he was not "exceptional." *Id.* at 124.

speaking, moral damages are defined as the detriment or harm to non-economic interests as a result of the harmful event. The pain or the suffering per se does not define moral damages. They are reimbursable provided they are the result of an injury or harm that limits or prevents the exercise or use of non-economic interests that the victim of the harmful event is entitled to by virtue of applicable legal provisions. Such interests may relate both to economic and non-economic rights.

Although the notion of moral damages as defined above is recognized by most of the legal systems referenced in this study, some countries tend to stress the significance of the fact that the suffering that is taken into consideration should be greater than normal–of an extraordinary nature–in order to give rise to the compensation. Moral damages presuppose the violation or decline of non-economic goods that have a particular value for the individual, such as peace, freedom, spiritual tranquility, honor, physical integrity, and other special feelings and affections.[29]

In this case, the duty of the person who caused the damages is not to reconstruct the assets, as in the case of damages to economic assets, but merely to make reparation for the pain and suffering that cannot be quantified. The monetary reimbursement does not eliminate moral damages; it is merely an attempt to alleviate or ease the pain caused to the victim.

Part of the doctrine stresses that moral damages are characterized by the fact that they pertain to sufferings or inconveniences affecting legitimate feelings of those who experience them. The mere occurrence of illicit acts, by itself, enables us to presume their existence. It is an *in res ipsa* proof, immediately derived from the acts themselves and which particularly takes into account their seriousness and incidence on the affected party. However, most doctrine and

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29. When analyzing the parameters to assess moral damages, Uruguayan doctrine notes that

> [W]hen the court evaluates moral damages, it takes into consideration a series of elements that enable it to infer the relevance of the damages that are to be compensated. These elements include the circumstances of the case as guidelines for the court's decision; these are circumstances that have a bearing on the damages. Such guidelines direct the court, and at the same time they avoid the risk of arbitrary compensation. It is not possible to make an exhaustive list of all circumstances, because all circumstances that have a bearing on the damages will need to be taken into consideration. These circumstances are normally equated with the legal notion of "circumstances of the specific case," but there is not a complete coincidence of both concepts. Certain circumstances of the specific case (including fault and the economic situation of the parties) are not valid assessment criteria… Doctrine and court decisions often enumerate the elements that become more significant or that happen on a more regular basis. For example, they mention the seriousness of the injuries (or of the offense), the duration thereof, treatment, side effects, age and sex of the injured person, and in the case of relatives, the nature of the relationship with the victim and their life in common.

25 GAMARRA, *supra* note 9, at 396.

courts are very careful when analyzing the existence of moral damages, and they require that the plaintiff submit sufficient evidence as to the extent of the harm suffered and its capacity to cause damages of a strictly non-economic nature. One common feature of all legal systems analyzed is the low value of the reimbursements that are typically paid in Latin America to compensate moral damages.

4. Calculation of Damages

All legal systems analyzed are based on the underlying idea that the purpose of compensation procedures is not to punish but to repair the damages. The object is not to penalize the offender but rather to repair the damages caused to the victim. Calculating and quantifying damages is one of the most controversial and difficult tasks in all of the legal systems analyzed.

Generally speaking, all countries analyzed leave the final determination of the amount of the compensation to the courts. Most countries do not have pre-established parameters to calculate compensation, with some exceptions in sector-specific activities which use tables or charts (*e.g.*, in the case of labor accidents, such as is the case with Mexico).[30]

A controversial point upon which no consensus has yet been reached is whether at the time of assessing the damages consideration should be given to the circumstances of the victim and, particularly, to his social status. This is a very significant point since when calculating the amount of the future damages and of the chance–in those countries that admit this item–discussions are centered on what type of parameters must be used in order to calculate lost possibilities. For example, a typical question is whether the compensation to be granted for the permanent disability affecting two minors of the same age and caused by the same product should be the same if the parents of one of the boys have professional careers whereas the other parents are country laborers. As of this time, doctrine has no uniform criterion on this issue.

Another shared feature is the fact that, generally speaking and with the exception of some specific activities (*e.g.*, air transportation, the fall of space objects, etc.), there are no limits to the compensation to be granted to the victims. The issue of limiting compensation is significant due to the fact that the development of strict liability criteria–which in general favors the claimant's position–is usually linked to the establishment of monetary limits. There have been considerable doctrinal controversies in various countries regarding the feasibility of establishing limits to compensation. In general, the majority position in doctrine has favored the non-establishment of compensatory limits, given the

30. *See* Boris Kozolchyk, *Mexican Law of Damages for Automobile Accidents: Damages or Restitution?*, 1 ARIZ. J. INT'L & COMP. L. 189 (1982).

understanding that such limits would conflict with the principle of integral compensation of damages that is basic in this area.

Another common feature to all legal systems analyzed herein is that the value of compensation is considerably low, particularly when compared to the awards granted under similar circumstances in the United States. By way of example, a study undertaken by three Argentine judges in the early 1990s drew significant conclusions regarding award amounts granted by Argentine courts. The referenced study established, for example, that in 448 cases where claims related to the death of relatives, spouses, etc., the average compensation (including pain and suffering) amounted to 87.337 Argentine pesos (or dollars, since the peso is tagged to the U.S. dollar).

The same study pointed out that there was higher compensation when the victims were between 30 and 39 years of age (an average of 120.300 pesos) and between 40 and 49 years of age (an average of 116.700 pesos). In contrast, the 70–79 age group received an average of 28.700 pesos, and those victims between 80 and 89 years of age received an average of 25.200 pesos. The study's authors indicated that the reasoning behind the court awards is that higher amounts are given to groups that are in the height of their careers, receiving top-level income and with good expectations as to remaining work years.

Uruguay publishes, on a regular basis, comparative charts detailing the awards granted by various tribunals. Average compensations are similar in amount to those granted by Argentine courts. Even though the compilation and publication of such charts are tasks undertaken by doctrinal writers, and as such are not binding, courts in their decisions often cite these charts. Generally speaking, Brazil's average compensations are not higher than those awarded in Argentina and Uruguay.

5. Punitive Damages

In all of the countries analyzed, doctrine recognizes the notion of punitive damages. This is defined as money that courts award in favor of the victims of certain illicit acts, in addition to the awards for damages actually suffered by the victims. The purpose of these awards is to penalize serious misconduct by the defendant and to prevent the occurrence of similar events in the future. However, the underlying principle in Latin American legal systems is that of integral reparation of damages, whereby compensation cannot become a mechanism for victims to become wealthier at the expense of the defendant. Compensation is merely a means of making the victims whole by placing them in the position they were in before the damages happened.

The logical consequence of this reasoning is the rejection of the imposition of punitive damages where the purpose is not to compensate the victim, but rather to punish the defendant. Although some writers in Argentina and Brazil seem to be favorably inclined towards the imposition of punitive

damages as a mechanism to avoid the repetition of harmful behaviors by certain companies, courts have not embraced this position. The dominant position in the legal systems analyzed is that punitive damages should not be applied, even by analogy, due to the fact that there are no legal provisions to support such application.

K. Class Actions

The majority of countries analyzed permit the filing of class actions relating to damages caused by defective products. However, the prevailing principle continues to be that specific damages affecting each claimant must be determined on a case-by-case basis. Generally speaking, the underlying principle in this area, when analyzing all legal systems involved, is that no global compensation may be imposed upon manufacturers liable for defective products. On the contrary, the assessment of damages must take into consideration the particular situation of each affected consumer. Most legal systems analyzed permit class actions to evidence the fact that a product has certain defects. However, determining whether, and to what extent, such defects have effectively caused damages to each claimant requires a case-by-case analysis. This is required even if the claim is submitted within one class action procedure.[31]

Through its Consumer Protection Code, Brazil has regulated the procedure to bring forth a claim along the lines of U.S.-style class action suits in greater detail than any other country in Latin America. However, Brazilian procedural doctrine has recently undertaken the task of interpreting such provisions and has established that there are significant differences between the Brazilian and U.S. systems.

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31. All countries analyzed regulate the concept of "consortium of plaintiffs." In other words, they enable all parties injured by the same event to file a joint claim. However, even if it is evidenced that the harmful event took place, *e.g.*, the heater exploded because of an inherent defect, this will not suffice for all plaintiffs to obtain compensation. Latin American legislations assume that damages are strictly personal, and each plaintiff within the class action will have to prove the extent to which he was damaged by the defective product, provided also that he was injured (it is possible that one or more of the plaintiffs may not be successful in evidencing the damages caused).

Brazil is a special case due to the fact that its regulations enable a shift in the burden of proof in the case of weaker consumers (*consumidores hiposuficientes*). This creates doubts as to the possibility of shifting such burden when the claim is a class action, since in that case the plaintiffs may include both weaker consumers and consumers who are in a more advantageous situation.

L. Final Considerations

The legal system applicable to product manufacturers in Latin America has evolved in recent years. The analysis undertaken by the NLCIFT evidences two different trends with respect to this subject matter. On the one hand, countries like Brazil, Argentina, and Uruguay, which have opted to regulate the topic within consumer protection provisions, favor the strict liability of manufacturers and the elimination of the barriers derived from the dichotomy between contractual and extra-contractual liability. Among the other countries analyzed, Mexico has also evolved toward the notion of strict liability in the area of dangerous activities.

In contrast, countries like Chile, Costa Rica, and Colombia still support the notion of fault-based liability, which may be attenuated to differing extents based on cases of presumed liability. Under this approach, the typical problems associated with the dichotomy between contractual and extra-contractual liability persist. However, both Costa Rica and Colombia have addressed the concept of strict liability for those activities that relate to the use of dangerous goods. Within the countries where the notion of strict liability prevails, there are still significant problems related to the determination of specific elements required in order to hold the manufacturer liable. Similar problems exist in determining what the manufacturer must prove in order to be exempted.

In Brazil, doctrine has not clearly addressed the extent to which the burden of proof is to be shifted in those cases of weaker consumers (*hiposuficientes*) as established by the Consumer Protection Code. It is not apparent whether such shift pertains merely to determining the existence of the defect or if it also covers the link (causality) between the defect and the damages claimed. There are also problems related to the interpretation of procedural provisions regarding class actions. In addition, there have been significant discussions regarding the exemptions or defenses that manufacturers can claim, particularly regarding development risks and compliance with administrative and quality standards. These problems have been reflected in the discussions regarding a uniform regulation in MERCOSUR, where consensus has yet to be reached on basic points such as the strict or fault-based liability of the manufacturer.

Finally, even though Brazil, Argentina, and Uruguay have evidenced a clear trend towards the adoption of the strict liability notion, there is no uniformity with respect to defining the issue of limiting liability. As a matter of fact, strict liability is generally associated with the limitation of liability. Such limitation is a logical way to avoid the proliferation of claims, which would have a negative financial impact on manufacturers. The same conclusion can be drawn in the cases of Mexico and Colombia when applying strict liability solutions to damages derived from "dangerous goods."

Most of the doctrine analyzed herein is opposed to the notion of limiting liability. This opposition is due to the fact that limiting liability contradicts the principle of integral compensation of damages, which most of the legal systems

analyzed adopted. Some of the essential issues that need to be contemplated under uniform rules are: limitation of liability, the clear determination of the manufacturer's liability, shifting the burden of proof, and liability defenses.

Uncertainty in these matters can negatively impact trade. Those countries that have not established clear solutions make it difficult for an investor to evaluate and quantify possible risks when entering into a new market. From a practical standpoint, for example, the position of a manufacturer of therapeutic drugs who has taken diligent precautions but discovers that the product is unsafe after distribution, will vary considerably from one Latin American country to another, depending on the applicable standards.

In Brazil, the manufacturer will face serious problems due to the fact that the Consumer Protection Code is very stringent in limiting defenses and establishing the strict liability of the manufacturer. Most Brazilian doctrine rejects the possibility of alleging development risks as an exemption. Therefore any possible defense should be based on circumstances that eliminate the link (causality) between the defective product and the damages. A similar solution would be applied in Argentina. In contrast, even though Uruguayan doctrine and courts defend the notion of strict liability, doctrine has also favored the defense of development risks.

In Mexico and Colombia, the solution to the problem will depend largely on whether the defective drug is considered to be a dangerous product. If it is indeed considered to be a dangerous product, then strict liability rules will apply and the manufacturer may not assert the defense that he acted diligently. Mexican and Colombian doctrines have not analyzed in detail the area of development risks. In Chile, it is highly likely that the case will be analyzed based on fault-based liability rules. Thus, the victims will be responsible for evidencing the fact that the manufacturer was liable. Additionally, it is to be expected that in most instances the victims will not have a direct relationship with the manufacturer. In view of this circumstance, they will need to base their claims on extra-contractual liability rules, which are less favorable to their interests.

An added element of uncertainty to be taken into consideration by manufacturers is the amount of eventual compensation. None of the countries analyzed establishes liability limits. Consequently, it is highly difficult to assess venture costs and risks and to contract for adequate insurance to counterbalance the negative impact of eventual claims. A possible avenue to address the different approaches would be to move in the direction of a regional solution that would harmonize the legal systems in all countries, along the lines of the solution adopted by the European Community over fifteen years ago, but taking into consideration the particular circumstances of the Latin American system.