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## A Comparative Analysis of United States and Colombian Tort Law: Duty, Breach, and Damages

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# A COMPARATIVE ANALYSIS OF UNITED STATES AND COLOMBIAN TORT LAW: DUTY, BREACH, AND DAMAGES

Natalia M. Bartels<sup>†</sup>  
M. Stuart Madden<sup>††</sup>

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## I. INTRODUCTION

Throughout Europe, South America, and North America there exist systems for extra-contractual reparations for personal physical injury or property damage caused by the substandard conduct of others. The tort law of the United States, and that of other common law countries, derived in a labored but largely undistracted path from the common law of England. In contrast, in continental Europe, Central America and South America, the jurisprudence of such civil liability has developed within the procedural matrix and the cultural expectations of their respective civil codes.<sup>1</sup>

Many observers have quailed at the prospect of identifying similarities between and among the diverse civil code treatments of liability for "negligence," a concededly common law nomenclature. Such observers often note that the civil code maturation through the original Napoleonic Code and the greatly influential adaptation of that code in Chilean law is simply too incongruous a presentation of cultural commitment to justice for victims of unintentional injury to ever be reconciled meaningfully with common law negligence.

An examination of the contemporary Colombian civil code treatment of extra-contractual liability for harm (daño) to persons or property in fact reveals a system, similar in many respects to the civil code regimens of other Latin American nations, in which the similarities with the policies of common law negligence actually dwarf the distinctions, or at least reduce most of the distinctions to formalisms.

This article will describe essential nature of the Anglo-American development of the common law negligence components of duty, breach, and damages. There follows a detailed

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<sup>1</sup> Such civil codes find their rootstock in Roman law and the Napoleonic Code. See Richard Azarnia, *Tort Law in France: A Cultural and Comparative Overview*, 13 WIS. INT'L L.J. 471, 471 (1995).

discussion of the origins of Colombian liability (*responsabilidad*) for unintentional harms to persons or property (*daños*). In the course of the latter discussion, distinctions, variations and policy tangencies will be identified and discussed.

## II. ANGLO-AMERICAN DEVELOPMENT OF THE LAW OF NEGLIGENCE

### A. *Generally*

The Anglo-American development of the doctrine of liability for negligent acts causing harm to others or to their property followed a lengthy legal devotion to liability without fault, or strict liability.<sup>2</sup> Some scholars have associated the perfection of fault-based liability with the Industrial Revolution in England.<sup>3</sup> However, observers seem not to have established satisfactorily whether negligence liability was a mechanism of legal benevolence to persons and chattels or instead a legal prophylaxis that reduced the potential liability of businesses by requiring the putative plaintiff to prove not only injury and causation, but also that the actor had proceeded with an absence of due care under the circumstances.<sup>4</sup>

Modern negligence law is concerned primarily with the provision of reparations to persons suffering personal injury or property loss due to a failure of others to act with due care under the circumstances. It is established that (1) tort law is devoted to the protection of persons and property from unreasonable risk of harm; and (2) the actor's liability in tort is limited by concepts of reasonable foreseeability. Employing as an example the law of products liability, it is possible to state a rule for negligence liability for the sale of an unreasonably dangerous product: A product seller is liable in negligence if he acts

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<sup>2</sup> See generally DAN B. DOBBS, *THE LAW OF TORTS* 259-63 (2000).

<sup>3</sup> The development of negligence law "was probably stimulated a good deal by the enormous increase of industrial machinery and by the invention of railways in particular." P. WINFIELD, *LAW OF TORT* 404 (5th ed. 1950).

<sup>4</sup> Compare WINFIELD, *id.* ("At that time railway trains were notable for neither speed nor for safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted upon the law.") with Robert J. Kazorowski, *The Common-Law Basis of Nineteenth-Century Tort Law*, 51 OHIO S.L.J. 1 (1990) (referencing scholarly proponents of theory that negligence liability arose in a court-stimulated effort to moderate the liability of businesses and to permit devotion of industrial capital to production rather than to satisfaction of legal liability).

or fails to act in such a way as to create an unreasonable risk of harm or loss to the user of a product or to another who might foreseeably be injured thereby, and such act or omission is the legal cause of the claimant's harm.

More broadly, the contemporary United States cause of action for negligence requires the plaintiff to prove that (1) the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach was the cause in fact and the proximate cause of the plaintiff's injury or loss; and (4) that the plaintiff suffered harm compensable in tort. This segment of the article will be devoted only to a discussion of Anglo-American legal treatment of the first two dimensions of the plaintiff's cause of action in negligence: (1) duty; and (2) breach, and (4) compensable damages. Two theoretical models serve as a backdrop for consideration of modern Anglo-American treatment of duty and breach in negligence law. Considerations of corrective justice and economic efficiency each contribute distinctive but largely harmonious analytical threads.

## B. *Corrective Justice*

In general terms, corrective justice proponents advance the proposition that the judiciary should promote a rights-based jurisprudence grounded in moral precepts.<sup>5</sup> Even among those observers who would not subscribe wholeheartedly to this proposition, there is probably a consensus that if moral precepts are not to be the primary values supported, justice and morality-based goals still form a necessary if not sufficient foundational element of modern tort law.<sup>6</sup> The moral authority of any

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<sup>5</sup> See Vincent A. Wellman, *Conceptions of the Common Law: Reflections on a Theory of Contract*, 41 U. MIAMI L. REV. 925, 925 n.1 (1987) (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 1-130 (rev. ed. 1977), in which Dworkin "propound[s] a rights-based theory of law and a corresponding obligation of judges to consider moral precepts when deciding significant cases").

<sup>6</sup> It is agreed generally that only a wrong can transgress a moral imperative, in the sense that a harm befalling a plaintiff with no predicate negligence or violation of some other doctrinal imperative, such as liability for abnormally dangerous activities, creates no rectificatory duty of any actor. Ernest Weinrib might point to tort doctrine as common law in which wrongdoing is a necessary, but not individually adequate, component of liability. See Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1240 (1990) ("[W]rongdoing of a party is an essential factor in the decision to

law turns upon the perception that its tenets lead to just results.<sup>7</sup> There is widespread agreement that a core consideration in any modern contemplation of “justice” would be the goal of “corrective” justice, i.e., a result that to the extent possible deprives the wrongful party of his gain, and restores the injured party to the position he enjoyed before the harm.<sup>8</sup> Holmes explained: “Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors . . . .”<sup>9</sup>

### C. *Economic Efficiency*

Richard Posner and others call for a scientific ethic of wealth maximization, a so-called “efficiency norm.”<sup>10</sup> Many have responded to this call, with one influential commentator concluding that “much (though by no means all) of modern tort

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impose liability . . . .” (citing Ernest J. Weinrib, *The Morality of Tort Law*, Address to the Tort Law Section, Association of American Law Schools Annual Meeting (Jan. 9, 1988))).

<sup>7</sup> See READINGS IN JURISPRUDENCE 37 (Jerome Hall ed., 1938) (“As Augustine says (De Lib. Arb. i.5), that which is not just seems to be no law at all: wherefore the force of a law depends on the extent of its justice.”); cf. Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMM. 93, 105-13 (1995) (arguing that for constitutional procedures to be legitimate, they must be of such a nature as to bind in conscience).

<sup>8</sup> Jules L. Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David Owen ed., 1995) (“[C]orrective justice is the principle that those who are responsible for the wrongful losses of others have a duty to repair them, and that the core of tort law embodies this conception of corrective justice.”).

<sup>9</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 115 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881) (emphasis added). In addition, Henry Sumner Maine observed: “Now the penal Law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds. . . . [All such Torts] gave rise to an Obligation or vinculum juris, and were all requited by a payment of money.” HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS ITS RELATION TO MODERN IDEAS* 370 (1866).

<sup>10</sup> See generally Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

law is at least roughly consistent with a Posnerian economic analysis."<sup>11</sup>

Numerous analysts have identified a common law tropism towards efficiency.<sup>12</sup> Importantly, scholars have also concluded that efficient rules of law actually predict efficient litigation strategies, including settlement strategies. As stated by Ramona L. Paetzold and Steven L. Willborn, "[w]here both parties to a dispute have a continuing interest in precedent, the parties will settle if the existing precedent is efficient, but litigate if the precedent is inefficient."<sup>13</sup> Wes Parsons, even while disputing these premises, collected scholarship revealing in fact the broad range of cost internalization achievements of evolving common law doctrine.<sup>14</sup> Included in Parsons's review was scholarly attribution to the common law of accidents as "promot(ing) efficient resource allocation;"<sup>15</sup> the efficiencies of the common law of rescue, salvage and Good Samaritan assistance;<sup>16</sup> the efficiency of the common law damages rule for anticipatory repudiation of contract;<sup>17</sup> and the efficiency of the economic loss rule in tort.<sup>18</sup>

A leading exponent of the efficiency role of the common law of tort has been Dean, and now Judge, Guido Calabresi, who argues persuasively that in matters of compensation for accidents, civil liability should ordinarily be laid at the door of the

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<sup>11</sup> Gary T. Schwartz, *Reality in Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 U.C.L.A. L. REV. 377, 381 (1994) [hereinafter G. Schwartz, Deterrence].

<sup>12</sup> E.g., George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEG. STUD. 65 (1977); Ramona L. Paetzold and Steven L. Willborn, *The Efficiency of the Common Law Reconsidered*, 14 GEO. MASON. L. REV. 157 (1991) [Hereinafter Paetzold and Willborn].

<sup>13</sup> Paetzold and Willborn, *supra* note 13.

<sup>14</sup> Wes Parsons, Note, *The Inefficient Common Law*, 92 YALE L.J. 862 (1983).

<sup>15</sup> William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 852 (1981).

<sup>16</sup> William A. Landes & Richard A. Posner, *Saviors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEG. STUD. 83, 128 (1977).

<sup>17</sup> Thomas H. Jackson, 'Anticipatory Repudiation' and the Temporal Element of Contract Law: *An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance*, 31 STAN. L. REV. 69 (1978) ("compensating the aggrieved party for its entire expectation loss, without overcompensating it, is an economically sound principle in that it facilitates the movement of goods and services to their higher value user." *Id.* at 69).

<sup>18</sup> W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEG. STUD. 1, 2-3 (1982).

“cheapest cost avoider,” the actor who could most easily discover and inexpensively remediate the hazard. Together with A. Douglas Melamed, Calabresi states that, particularly in the setting of environmental harm, considerations of economic efficiency dictate placing the cost of accidents “on the party or activity which can most cheaply avoid them[.]”<sup>19</sup> A lucid adoption of this approach is found in the Ninth Circuit decision of *Union Oil Co. v. Oppen*,<sup>20</sup> a California coastal oil spill case in which the court allowed commercial fishermen to recover from defendant their business losses caused by lost fishing opportunity during a period of pollution. Noting some difficulties in applying the “best or cheapest cost avoider” approach in concrete circumstances, the court followed Calabresi’s requirement that it “exclude as potential cost avoiders those groups\activities which could avoid accident costs only at extremely high expense.”<sup>21</sup> This approach, to the mind of the appeals court, militated against the conclusion that the cost of preventing or repositioning the loss should be borne directly by consumers (fishermen or seafood purchasers) in the form of precautionary measures (whatever they might hypothetically be), or by first party insurance. Rather, the court found, justice and efficiency were served by placing responsibility for the loss on the “best cost avoider,” in this setting the defendant oil company. The court explained its reasoning:

[T]he loss should be borne by the party who can best correct any error in allocation, if such there be, by acquiring the activity to which the party has been made liable. The capacity to “buy out” the plaintiffs if the burden is too great is, in essence, the real focus of Calabresi’s approach. On this basis, there is no contest — the defendant’s capacity is superior.<sup>22</sup>

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<sup>19</sup> Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability*, 85 HARV. L. REV. 1089, 1096-97 (1972). See also MARK C. RUDERT, COVERING ACCIDENT COSTS: INSURANCE, LIABILITY AND TORT 29, 32-33 (Temple 1995).

<sup>20</sup> *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

<sup>21</sup> *Id.* at 569.

<sup>22</sup> *Id.* at 569-570.



## III. DUTY

When it is claimed that an actor owed a duty to a plaintiff, the duty described is that of ordinary care, or care commensurate with that which would be expected of a reasonable man under the same or similar circumstances. The duty is not owed to a public generally, but rather to those whom the actor, looking prospectively with the eye of reasonable vigilance, would perceive to be put at an unreasonable risk of harm or loss should the actor proceed incautiously, or with an absence of due care.<sup>23</sup> The decision of the Massachusetts Supreme Judicial Court in *Brown v. Kendall*<sup>24</sup> put the proposition in these influential words: "[W]hat constitutes ordinary care will vary with the circumstances. . . . In general it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case."<sup>25</sup>

Duty is relational, which is to say that for a duty to exist, it must be associated with a particular person or a particular class of person within which the plaintiff finds himself.<sup>26</sup> Thus as it

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<sup>23</sup> The proposition . . . is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense . . . would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger.

Heaven v. Pender, 11 Q.B.D. 503 (C.A. 1883) (Brett, M.R.).

<sup>24</sup> *Brown v. Kendall*, 60 Mass. 292 (1850).

<sup>25</sup> *Id.* at 296.

<sup>26</sup> The element of duty establishes that there is a legally recognized relationship between the plaintiff and the defendant and the plaintiff that obligates the defendant to act (or refrain from acting) in a certain manner toward the plaintiff. . . . Whether a duty exists is largely a policy-based determination. [Where the presence or absence of duty constitutes an issue to be decided by the court, "a judge often balances such factors as the foreseeability of the harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connections between the defendant's conduct and the injury suffered; the policy of preventing future harm; the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and the availability, cost and prevalence of insurance for the risk involved."

JOHN L. DIAMOND, LAWRENCE R. LEVINE, M. STUART MADDEN, UNDERSTANDING TORTS 112 (1996).

has been said that negligence “air” does not exist,<sup>27</sup> and neither does its predicate, duty. Returning to the model of products liability law, *MacPherson v. Buick Motor Co.*<sup>28</sup> secured its position as a lynchpin in the development of products liability by providing persuasive arguments as to three propositions governing the duty of manufacturers. The opinion of Judge Cardozo is greatly informative in its evaluation of duty as affected by the variability of risk, the foreseeability of that risk should the actor proceed without due care, and the identification of the class of persons to whom duty is owed. The three propositions were these: (1) a manufacturer owes a duty of due care to not only its immediate vendee, but also to remote vendees who in the ordinary course may be expected to purchase the product; (2) the duty is not confined to the manufacture and sale of so called imminently dangerous products, but instead to all products that could be expected to do substantial harm to others if not made with care appropriate to the pertinent risks; and (3) this duty of due care is nondelegable, and thus even if it is a component part of the product that causes its injurious failure, the manufacturer of the overall product may remain liable.

*MacPherson* stood for the principle that although manufacturers of all products would be held to a standard of ordinary care under the circumstances, the ordinary care expected of a manufacturer of locomotives would logically involve a higher level of scrutiny than would the “ordinary care” that one might expect of a the weaver of fruit baskets, as the risk of harm from a negligently manufactured locomotive is incalculably greater than that created by a defectively fashioned basket. Each of the rules advanced in *MacPherson*: (1) the injured plaintiff’s negligence remedy against the remote manufacturer without regard to privity; (2) the finished product seller’s responsibility (or duty) for the prudent design and the manufacturing integrity of component parts; and (3) the manufacturer’s duty to conduct reasonable and necessary tests on the product before its introduction into commerce, represents the established majority rule in tort today.

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<sup>27</sup> See *Brown v. Racquet Club of Bricktown*, 95 N.J. 280, 471 A.2d 25, (1984), quoting WILLIAM PROSSER, *THE LAW OF TORTS* (5th ed. 1971)(while facts may indicate negligence in the air, “it is still necessary to bring it home to the defendant.”).

<sup>28</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

Further illustrative of modern interpretation of duty in tort law is the New York decision in *DiPonzio v. Riordan*.<sup>29</sup> That suit involved injuries sustained by a filling station patron when another customer's car, left running as the latter paid his bill inside, slipped either into gear or into neutral and backed into plaintiff, injuring his leg. Plaintiff and his wife sued the car owner and the filling station. As to the filling station, plaintiffs' theory was that it "had been negligent in failing to properly train its attendants and that its attendants had been negligent in failing to comply with [station's] rules requiring that customers be warned to turn off their engines while fueling their vehicles."<sup>30</sup>

The Supreme Court denied defendant's motion for summary judgment, in which defendant argued "the lack of any cognizable duty, the lack of a proximate causal relationship between its alleged negligence, if any, and the accident, and the unforeseeability of the accident."<sup>31</sup> The Appellate Division reversed.

The New York Court of Appeals identified the "threshold" inquiry as being "whether [the station] had a legally cognizable duty" to take measures to prevent this accident. Acknowledging that a business proprietor's duty extends to "maintain[ing] their property in a reasonably safe condition[,]" and that the duty "may extend to controlling the conduct of third persons who frequent or use the property, at least under some circumstances[,]" the court observed that these duties are "not limitless."<sup>32</sup> Drawing upon the *Palsgraf v. Long Island R.R.*, the Court reiterated that "[t]he risk reasonably to be perceived defines the duty to be obeyed."<sup>33</sup> Applying this standard, the Court of Appeals concluded there could be no service station liability, as "DiPonzio's injuries did not arise from the occurrence of any of the hazards that the duty would exist to prevent." The Court's reasoning continued: "When a vehicle's engine is left running in an area where gasoline is being pumped, there is a

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<sup>29</sup> *DiPonzio v. Riordan*, 89 N.Y.2d 578, 679 N.E.2d 616, 657 N.Y.S.2d 377 (1997).

<sup>30</sup> *Id.* at 581-82.

<sup>31</sup> *Id.* at 582.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 583 (citing *Palsgraf v. Long Is. R.R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99).

natural and foreseeable risk of fire or explosion because of the highly flammable properties of the fuel. . . . It is this class of foreseeable hazards that defines the scope of [the] station's purported duty. The occurrence that led to plaintiff's injury was clearly outside of this limited class of hazards."

Further illustrative of the boundaries that will be imposed upon an actor's duty is one decision requiring the court's consideration of whether a manufacturer's duty, and potential liability, in a DES case should be extended to the generation born not of the mother who ingested the DES, but rather to the second generation, which is to say, the offspring of the DES daughter. The Ohio Supreme Court offered a telling treatment of the logical limits of an actor's duty in *Grover v. Eli Lilly & Co.*,<sup>34</sup> following a federal trial court certified this issue to the Ohio Supreme Court in the setting of a grandchild's claim, through his representatives, that his severe birth defects were caused by defects in the mother's reproductive system, which defects were earlier caused by the grandmother's ingestion of the drug DES. The court noted that courts in some other jurisdictions, on similar but distinguishable facts, had not permitted actions to proceed for such "preconception" torts.<sup>35</sup> The Ohio high court noted *Palsgraf v. Long Island RR. Co.*<sup>36</sup> for the proposition that "[a]n actor does not have a duty to a particular plaintiff unless the risk to that plaintiff is within the actor's 'range of apprehension.'"<sup>37</sup> Finding no cause of action inuring to the grandchild, the *Grover* court explained:

When a pharmaceutical company prescribes drugs to a woman, the company, under ordinary circumstances, does not have a duty to her daughter's infant who will be conceived twenty-eight years later. Because of remoteness in time and causation, we hold that; the grandchild] does not have an independent cause of action, and answer the district court's question in the negative. A pharma-

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<sup>34</sup> 591 N.E.2d 696 (Ohio 1992).

<sup>35</sup> The court noted *Monusko v. Postle*, 437 N.W.2d 367 (Mich. Ct. App. 1989)(cause of action against mother's physicians for failure to inoculate mother with rubella vaccine prior to child's conception) and *Renslow v. Mennonite Hospital*, 367 N.E.2d 1250 (Ill. 1977) (negligence action by child against hospital that negligently gave mother Rh-positive blood eight years before, stimulating Rh-positive antibodies that injured the fetus).

<sup>36</sup> 162 N.E. 99, 100 (N.Y. 1928).

<sup>37</sup> 591 N.E.2d 696, quoting *Palsgraf*, 162 N.E. at 100.

ceutical company's liability for the distribution or manufacturer of a defective prescription drug does not extend to persons who were never exposed to the drug, either directly or in utero.<sup>38</sup>

#### IV. BREACH OF DUTY

To locate the line between an actor's fulfillment of its duty to others and its breach of that duty, courts in numerous jurisdictions employ the formulation of Judge Learned Hand, or a harmonious risk-benefit model.<sup>39</sup> This primitive but enormously influential calculus was offered in a negligence context by Judge Learned Hand in the opinions in *United States v. Carroll Towing Co.*,<sup>40</sup> and *Conway v. O'Brien*.<sup>41</sup> In those two cases, the court stated that "the degree of care appropriate to a situation is the result of the calculus using three factors: the likelihood that the conduct will injure others, multiplied by the seriousness of the risk if it happens, balanced against the burden of taking precautions against the risk."<sup>42</sup> The formula is known to many as B (Burden) < P (Probability of Harm) \* L (Magnitude of Loss Should It Occur).<sup>43</sup> The Learned Hand approach can be conformed to more modern utilitarian analysis by visualizing B as encompassing not only the particular burden of precautionary measures upon the actor, but also the burden upon society if the conduct must either be eliminated due to liability rules, or made more expensive by requiring precautionary measure and therefore beyond the economic reach of many.<sup>44</sup>

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<sup>38</sup> *Id.* at 700-01.

<sup>39</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir.1947).

<sup>40</sup> 159 F.2d 173 (2d Cir. 1947).

<sup>41</sup> 111 F.2d 611, 612 (2d Cir. 1940).

<sup>42</sup> M. STUART MADDEN, *PRODUCTS LIABILITY* (2d) § 4.2 at 108 (1988).

<sup>43</sup> Of Hand's formula, Posner writes:

This is an economic test. The burden of precautions is the cost of avoiding the accident. The loss multiplied by the probability of the accident is the expected accident cost, i.e., the cost that the precautions would have averted. If a larger cost could have been avoided by incurring a smaller cost, efficiency requires that the smaller cost be incurred.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 122 (2d ed. 1977) (citations omitted).

<sup>44</sup> Likewise in keeping with a utilitarian view that transcends the concerns of the individual plaintiff and defendant, consideration of the factors P (Probability of Harm) and the L (Magnitude of the Loss should it occur) would be enlarged to contemplate the likelihood of harm to others identically or similarly situated, and

Applying this negligence evaluation to a hypothetical personal injury claim arising from a vehicular collision in which the plaintiff's injuries were caused by this design defect in the automobile: a rear positioned gas tank particularly susceptible to rupture, creating the risk of conflagration in a collision. These facts would support a finding of manufacturer negligence if one agrees that on the right side of the equation there is a measurable risk that any motor vehicle will be struck from the rear at some time during its useful life, and if one agrees further that the type of injury that might follow from the rupture of a gas tank in a collision is very great indeed. Turning to the left side of the equation, suppose the financial burden to the manufacturer of either using a more sturdy material for the tank, or placing the tank in a more forward position beneath the vehicle, was only a matter of \$200 per car. The claimant would argue that such a cost is certainly moderate, and is, in any event, less than the risk of some harm multiplied by the seriousness of that harm (death or serious bodily harm) should the design change not be undertaken. If the assumptions in this hypothetical are accepted, a plaintiff injured in this way should be able to make out a *prima facie* case that the manufacturer has breached its duty of care.

## V. COMPENSATORY DAMAGES

### A. *Generally*

Compensatory damages are those damages awardable to a person as compensation, indemnity, or restitution for harm or loss caused by the tortious act of another.<sup>45</sup> One principal goal of compensatory damages is to place the person in the position they were in before the injury or loss, at least insofar as money damages can do so, which is to say compensatory damages "are designed to place [the injured party] in a position substantially equivalent in a pecuniary way to that which he would have been in had no tort been committed."<sup>46</sup> A second goal is that of deterring similar tortious conduct in the future, be it undertaken by

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the magnitude of the potential harm, not only in terms of the individual plaintiff but also to the population exposed to the risk.

<sup>45</sup> RESTATEMENT (SECOND) OF TORTS § 903.

<sup>46</sup> RESTATEMENT (SECOND) OF TORTS § 903 cmt.

the defendant or by others.<sup>47</sup> Restatement Second, Torts § 901 summarizes the purposes of tort damages as: “to give compensation, indemnity, and restitution for harms \*\*\* to determine rights \*\*\* to punish wrongdoers and deter wrongful conduct \*\*\* and to vindicate parties and deter retaliation of violent and unlawful self-help.”<sup>48</sup>

A claimant's non-economic harm is ordinarily distinguished from his economic harm. Often also termed pecuniary loss, economic loss includes such loss as to which a monetary value can be assigned with some level of experience-based reliability. Examples of economic harm would be past and future lost wages, or the cost of past and anticipated medical care, physical rehabilitation and the like. Non-economic damages are less susceptible of reliable monetary valuation. Such non-economic damages can include, without limitation, indemnity for a claimant's pain and suffering, emotional distress, a spouse's loss of consortium, and lost quality of life—the latter often referred to as hedonic damages. An endorsement of this evaluation is found in the Analysis to the Model Uniform Product Liability Act which suggests that awards for pain and suffering “have no market value and, thus, are to be contrasted with pecuniary damages which compensate victims for lost wages, medical and rehabilitation costs, and other actual expenditures has or will incur due to injuries caused by a defective product.”<sup>49</sup>

### B. *Personal Physical Injury*

All jurisdictions permit the personal injury plaintiff recovery for pain and suffering.<sup>50</sup> Restatement Second, Torts § 924 confirms that the prevailing plaintiff may recover damages for past or prospective “bodily harm and emotional distress[;] \*\*\* loss or impairment of earning capacity[;] \*\*\* reasonable medical

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<sup>47</sup> See generally RICHARD A. EPSTEIN, CASE AND MATERIALS ON TORTS §§ 4.4-.7 (6th ed. 1995).

<sup>48</sup> *Id.* at § 17.2 (“[T]he bywords in establishing the law of damages are compensation, deterrence, and consistency.”).

<sup>49</sup> Model Uniform Product Liability Act § 118(D) (Analysis), 44 Fed.Reg. 62746 (Oct. 31, 1979).

<sup>50</sup> EPSTEIN *supra* note 47, at § 17.2 (“All jurisdictions recognize a right to recover damages for bodily injuries, generally defined to cover ‘any impairment of the physical condition, including illness and physical pain.’”), quoting RESTATEMENT (SECOND) OF TORTS § 905 cmt. b. E.g., *Lakin v. Senco Products*, 329 Or. 62 (Or. 1999).

and other expenses; and \*\*\* harm to property and business caused by the invasion.”<sup>51</sup> Thus, it is agreed generally that the successful plaintiff in a tort personal injury claim can recover provable damage to property, for personal injury, illness, or death, or for mental or emotional harm accompanying plaintiff’s placement in direct physical peril by such a the defendant’s actions.<sup>52</sup> Plaintiff’s personal injury damages are recognized generally to include “medical expenses, loss of future earnings, permanent disability or disfigurement, and damages for past and future mental pain and suffering.”<sup>53</sup> The general rule is that the injured plaintiff may be awarded compensatory damages without proof of pecuniary loss.<sup>54</sup>

For personal physical injuries involving a reduction or elimination of the plaintiff’s ability to earn a livelihood, the claimant may recover damages for loss of future earnings. Such injuries are recoverable in tort, because, as they are associated with personal injury, they are not precluded by application of the rule ordinarily applied to “pure economic loss.”<sup>55</sup> Accordingly, in determining the size of such an award, it is agreed generally that the finder of fact may consider plaintiff’s loss of earning ability, loss of future earning capacity, work life expectancy, age, life expectancy, investment income, inflation, predictable productivity increase, prospects for rehabilitation, and probable future earning capacity.<sup>56</sup>

### C. *Increased Risk of Future Illness*

In some jurisdictions a plaintiff whose exposure to a process, often a process that contaminates the environment, elevates his risk of contracting an injury or disease in the future

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<sup>51</sup> See generally Thomas W. Long, *Economic Impairment in Personal Injury Actions*, 30 So.TEX.L.REV. 97 (1989); Steven G. Schumaier, *Proof of Hearing Loss*, 22 TRIAL 32 (1986).

<sup>52</sup> See N.J.Rev.Stat. § 1(1), Ch. 197.

<sup>53</sup> E.g., *Adkins v. Asbestos Corp., Ltd.*, 18 F.3d 1349 (6th Cir.1994) (asbestos-related personal injury action).

<sup>54</sup> See, e.g., *Croteau v. Olin Corp.*, 644 F.Supp. 208 (D.N.H.1986).

<sup>55</sup> The “economic loss” rule provides generally that economic loss that is not associated with personal physical injury or damage to property cannot be recoverable in tort. Rather, such “pure” economic loss claims may only be pursued in warranty or other contract claims.

<sup>56</sup> E.g., *Lanclos v. Rockwell International Corp.*, 470 So.2d 924, 934 (La. Ct. App.1985); *Robertson v. Superior PMI, Inc.*, 791 F.2d 402 (5th Cir.1986).



may seek a monetary award for incurring the increased risk. Where a claimant can show existing illness or disease that is understood by sound medical science to be a precursor of the future injury or disease feared, many jurisdictions will permit recovery in damages for the increased risk of that future disease.<sup>57</sup>

#### D. *Emotional Distress*

Subject to application of state by state standards, courts in all jurisdictions permit the award of damages for emotional distress associated with plaintiff's personal injury.<sup>58</sup> Such recovery may be secured under any of the conventional doctrines under which the finder of fact determines an award to be allowable, be it negligence, warranty, or strict tort liability.

#### E. *Fear of Future Illness*

Distinct questions of recoverability and proof are posed by the emotional distress claims of the plaintiff who is "at risk" of illness due to antecedent exposure to a long latency disease-inducing substance due to another's claimed negligence. The issue posed is how, if at all, may the person exposed to, for example, respirable asbestos, or a contaminated water source, or whose mother was prescribed a synthetic estrogen during pregnancy, articulate a claim for damages for the reasonable apprehension of future illness. A claim for increased risk of future disease differs from a claim for fear of such future illness. The former is based solely upon the probability upon the medical probability of the future illness, and in this sense permits recovery to the plaintiff who has involuntarily been denied a future without an unreasonable risk of harm from defendant's product or process. The latter claim, for reasonable fear or apprehension of the manifestation of a future illness, represents a claim for emotional distress damages.

#### F. *Property Damage*

In tort suits, including negligence actions, compensatory damages will be considered appropriate for plaintiff's injury or

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<sup>57</sup> E.g., *Martin v. Johns-Manville Corp.*, 469 A.2d 655, 659 (Pa. Super. 1993).

<sup>58</sup> See comment to RESTATEMENT (SECOND) OF TORTS § 46.

loss due to harm to his property, or to the loss or diminution of individual or business earning capacity, but only upon proof of the actual pecuniary loss.<sup>59</sup> In a products liability claim, to use one model, physical damage the defective product causes to the user's other property should be compensable in a cause of action brought either in negligence or in strict liability, or as consequential damages in warranty.<sup>60</sup>

The ordinary measurement for tortious damage to property is the calculation of the value of the property immediately preceding the loss, less the value following the loss, plus appropriate compensation for plaintiff's deprivation of the property or loss of use.<sup>61</sup> When the loss to plaintiff's property amounts to total destruction, plaintiff will be entitled to damages measured by the difference between the value of the property before the loss and after the harm, or the reasonable cost of repair or restoration, and the loss of use.<sup>62</sup>

## VI. COLOMBIAN DEVELOPMENT OF THE LAW OF NEGLIGENCE

### A. *Generally*

As is the case for most Latin American countries, Colombia's jurisprudence is based largely upon its civil code; thus, its approach to tort law liability differs from common law countries, such as the United States.<sup>63</sup> Unlike Anglo-American jurisprudence, which uses case law as primary authority in the development of its legal principles, such as the doctrine negligence, Colombian jurisprudence does not follow precedent as a primary authority of its laws. Cases are decided based on the particular facts of the case at hand, and the court's ruling is not binding on future decisions even if the facts of the later case mirror that of the prior case.

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<sup>59</sup> RESTATEMENT (SECOND) OF TORTS § 906: "Damages for causing a loss of earning capacity are not necessarily based upon what the plaintiff has done or would have done, but are based upon the amount by which the earning capacity of the plaintiff has been reduced through the conduct of the tortfeasor."

<sup>60</sup> See, e.g., *Z-J Corp. v Tice*, 126 F.3d 539 (3rd Cir. 1997) (allowing recovery in negligence and strict liability for "other" property).

<sup>61</sup> RESTATEMENT (SECOND) OF TORTS § 927(a), (b), (c).

<sup>62</sup> RESTATEMENT (SECOND) OF TORTS § 928.

<sup>63</sup> M.C. Mirow, *The Power of Codification in Latin America: Simon Bolivar and the Code Napoleon*, TUL. J. INT'L & COMP. L., 83, 83 (2000).

This analysis of the Colombian notion of negligence is based on four primary texts written by Colombian legal scholars. They all agree that in its basic form, the term liability suggests a link between individuals.<sup>64</sup> It is a term that suggests a nexus between two people— he who causes the harm and he who suffers it. The term liability is used to describe the duty to assume the consequences of an act, an occurrence or a form of conduct.<sup>65</sup>

Non-contractual duty arises when a person wrongs or harms another or its belongings. This form of liability arises where there is no contractual nexus between the two. Non-contractual civil liability is divided into direct or personal liability and indirect or complex liability. Indirect liability refers to vicarious liability or acts made with the aid of machines that are used in dangerous activities. These forms of liability are codified in the Colombian Civil Code. Personal liability is stated in Article 2341, third party liability is stated in Article 2347, liability due to the acts of an animal is stated in Article 2353, liability arising out of the use of machines is stated in Articles 2350 and 2355, and liability arising out of dangerous activities is stated in Article 2356.<sup>66</sup>

The Colombian legislature maintains a division in the treatment of contractual versus non-contractual liability. This differential treatment is shown in the separate codification of these two forms of liability in the Colombian Civil Code.

### B. *The Unicistas v. The Dualistas*

There are two theories of liability among Colombian scholars. The first theory is the Unicista (unity) theory.<sup>67</sup> This theory reinforces that both types of liability come from a breach of duty or obligation (*responsabilidad*). The fact that one arises out of a contractual obligation and the other does not should not be a factor in determining liability.<sup>68</sup> The second theory is the

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<sup>64</sup> See HUMBERTO CUELLAR GUTIERREZ, *RESPONSABILIDAD CIVIL EXTRA-CONTRACTUAL* (1983); JUAN CARLOS HENAO, *EL DAÑO*; GILBERTO MARTINEZ RAVE, *RESPONSABILIDAD CIVIL EXTRA-CONTRACTUAL* (10th ed. 1998); JAVIER TAMAYO JARAMILLO, *2 DE LA RESPONSABILIDAD CIVIL* (1989).

<sup>65</sup> See MARTINEZ RAVE, *supra* note 64, at 3.

<sup>66</sup> See MARTINEZ RAVE, *supra* note 64, at 1-50.

<sup>67</sup> See *id.* at 17.

<sup>68</sup> See *id.*

Dualista (dual) theory. This is the conventional Colombian theory. It seeks to treat liability in terms of the obligations assumed either by contract or by law in two separate categories.<sup>69</sup>

Irrespective of the theory adopted, in either situation the act that causes the harm or injury does not have to be an illicit act. The trigger to liability lies in the modification or alteration of the previous state of a thing or person. In contractual liability there are different levels of breach. There is only one level for breach non-contractual liability. "Culpa" which translates into fault, is also used when referring to civil liability. Culpa must be proved under Civil code Article 2341 but it is presumed under Articles 2347, 2350, 2353, 2355, and 2356.<sup>70</sup>

The study and development of non-contractual liability in Colombia in the modern times has also looked at risks (riesgos) when identifying the elements of liability. In the past, Colombian law had a subjective approach towards the elements necessary to establish liability. In the study of non-contractual liability there are two interests at stake: the progress of technology and the welfare of the public in general from the use or misuse of this technology. In this quest, Martinez questions the Colombian legal system's ability to handle these interests and still uphold the rights of the injured.<sup>71</sup>

### C. *Impact of Science and Technology in Colombian Jurisprudence: Jaramillos' Approach*

Jaramillo states that the scientific and technological advances of the past few decades have obligated and permitted that the laws regarding liability for negligent acts undergo a radical change. The scholar posits that most of the principles guiding negligence liability of fifty years ago are not applicable today. In effect, transportation in general and objects used in everyday life have made it almost impossible for the victim to be able to demonstrate the fault (culpa) by the responsible party.<sup>72</sup>

Based on this proposition, Colombian jurisprudence has attempted to mitigate this problem, for example, in cases of dangerous activities, the victim only has to show that the

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<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See TAMAYO JARAMILLO, *supra* note 64, at 1.

occurrence caused by the defendant was the triggering factor of his injuries and harm. Legislators have tried to free the victim from the procedural burdens of proof that bring the element of fault into the equation for sustaining a negligence liability claim.<sup>73</sup> Social Utility theory is also present in Colombian law as it accepts the harms posed by technology (*tecnología* meaning man-made structures, products, or mechanical fixtures) upon the individual in order to improve society as a whole.

#### D. *Duty*

Chile's Civil Code, written by Andres Bellos, served as guide to Colombia's Civil Code.<sup>74</sup> Both codes followed the French model regarding non-contractual liability, the Napoleonic Code.<sup>75</sup> Both codes, however, left out the following words, which were present in the Napoleonic Code, Article 1384 "we are responsible (liable) of the things that we have under our care (custody)." These few words have had a great impact in the development of Colombian law. Without these words the victim was left with the burden of proving fault or breach when dealing with other than direct or personal negligence cases.<sup>76</sup>

Through the use of technology and scientific development, the role and importance of direct liability as stated in Article 2341 of the Colombian Civil Code has decreased. As potential liability arising out of dangerous activities increases, the interpretation and application of Article 2356 is also elevated. A victim of a civil non-contractual wrongdoing fares best if he can establish that his harm and injuries arose out of defendant's engagement in a dangerous activity defined by Article 2356. If the claimant is successful in establishing the claim, the liability, or breach of due care is presumed by law. This is an important advantage for the victim who now does not have to prove defendant's fault or guilt.<sup>77</sup>

According to Tamayo Jaramillo, the words left out from the Napoleonic Code, Article 1383 "one is responsible (liable) for the things that we have under our care (custody)," while not stated

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<sup>73</sup> See generally *id.* at ch. 2.

<sup>74</sup> See Mirow, *supra* note 63, at 83.

<sup>75</sup> See *id.* at 83-4.

<sup>76</sup> See TAMAYO JARAMILLO, *supra* note 64, at 2.

<sup>77</sup> See *id.* at 8-9.

expressly in the Article, are given implicit effect in another article of the Colombian Civil Code Article 669. Thus, arguably, it operates as a means of avoiding the issue of, the predicate showing of which predominated, in the early stages of Colombian jurisprudence. Article 669 of the Civil Code defines the word dominion as follows: "dominion [that is also called property] is the right to a corporal [material] thing, to enjoy and dispose of arbitrarily, as long as it is not against the law or against the rights of others." These words allow for the interpretation that intruding upon the rights of others does not require the element of fault, thereby negating the proposition that it is needed in non-contractual liability.<sup>78</sup>

## VII. DANGEROUS ACTIVITIES

It 1938 Colombia was introduced to the theory of civil liability for dangerous activities, which today is codified by Article 2356 and translated below. By dangerous activities (*actividades peligrosas*) is meant human pursuits that create a high and unavoidable risk of great harm. Up to 1938, Colombian courts hewed to the principle of fault, which is present in the French legal system. The historical development of this theory arises out of the work of a lawyer by the name of Eduardo Zuleta, who through his arguments in front of the Supreme Court was able to introduce this theory to the Colombian jurisprudence. Later, Carlos Ducci Claro, in his doctorate thesis published in 1936, invoked the teachings of Zuleta, and further developed this theory.<sup>79</sup>

Article 2356 presumes the liability of the defendant. He can only be exonerated by a break in the causation link, such as an act of *force majeure*. There were many debates among Colombian scholars as to whether the use of the risk theory should play a role in this type of liability, or whether the principle should be that of objectivism. Whether the risk theory or the objective theory is applied, one thing remains consistent: the person engaging in the dangerous activity bears the burden of exonerating himself from liability.<sup>80</sup>

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<sup>78</sup> See *id.* at 40-41.

<sup>79</sup> See *id.* at 52-53.

<sup>80</sup> See *id.* at 53-54.

The test of Article 2356 demands that there be malice or negligence on the part of the responsible party. This requirement is founded on the notion of fault. The fact that fault is presumed or proved is a matter of legal interpretation. One thing is certain, according to Tamayo Jaramillo, to wit, the risk theory is adoptive in nature and does not have its roots in the Colombian jurisprudence. The Supreme Court has debated over the elements needed to point down the responsible party to a dangerous activity. The modern trend is to hold he who has the "intellectual direction and control over the dangerous activity."<sup>81</sup>

#### A. *Civil Code Article 2356*

The translation to this Article is as follows:

Article 2356 Obligations arising out of dangerous activities. As a general rule all harm resulting from the malice or negligence of another person must be compensated by the obligator.

Particularly obligated to reparation are:

- 1) He who imprudently fires a firearm;
- 2) He that removes things from a pipe or sewer line, or leaves them open in a street or highway, without the precautions needed to prevent the injury (falling) of its transients either day or night;
- 3) He who does construction or reparations to aqueducts or fountains that cross roads, has it in a state that could cause harm to those traveling the roads.<sup>82</sup>

The Article further states that there is a presumption of guilt on those who engage in dangerous activities. This is due to the

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<sup>81</sup> *Id.* at 60.

<sup>82</sup> Art. 2356: Responsabilidad por actividades peligrosas. Por regla general todo daño que se pueda imputarse a malicia o negligencia de otra personon, debe ser reprado por esta.

Son especialmente obligados a esta reparacion:

- 1) El que dispara imprudentemente un arma de fuego;
- 2) El que remueve las cosas de una acequia o caneria, o las descubre en calle o en camino, sin las precauciones necesarias para que no caigan los que por alli transiten de dia o de noche;

El que obligado a la construccion or reparacio de un acueducto o fuente, que atraviesa un camino, lo tiene en estado de causar daño a los que transitan por el camino.

COLOMBIAN CIVIL CODE, Art. 2356.

consideration that it is not the victim but the defendant who creates the danger to third parties by engaging in an activity, which although licit, in its nature implicates risks of such a nature that the imminent occurrence of harm explains and validates this presumption.<sup>83</sup>

### B. *Automobile Accidents*

Automobile accidents have constituted one of the most abundant sources of Colombian personal injury litigation. Humberto Cuellar Gutierrez summarizes different forms of accidents, which contain a negligent act. Some of these examples include, running a red light and speeding. Both of these situations contain both a criminal act and a civil wrongdoing. The modern doctrine, Gutierrez states, finds that there is only one difference between the criminal and civil wrongdoing, that of degree and not of the nature of the wrongdoing itself. As above-mentioned, Article 2356 of the Civil Code defines what Colombian law refers to as dangerous activities. To drive an automobile is considered a form of dangerous activity.<sup>84</sup>

The elements for negligence for this type of activity are as follows: First, there must be an accident. Second, the accident must be occasioned by the dangerous activity. Third, the victim is not obligated to demonstrate the culpability of the author of the injurious act. Fourth, the person liable must be responsible for the dangerous activity. Lastly, the accident cannot be the result of force majeure, fault of a third party, or the fault of the victim.<sup>85</sup>

Savatier defines an accident as the "abnormal fact and unforeseeable that has been produced thus bringing with it the injury." Cuellar Gutierrez states that he would complete the concept by adding the words "as a result of a dangerous activity." This addition to the definition allows people to make the first distinction: the responsibility or liability defined in Article 2356, refers to injuries caused by automobiles, and is not applicable when the injury does not come from the accident itself. Injuries must be caused by the exercise of the dangerous activity and thus liability and duty of care arise from the same activ-

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<sup>83</sup> See *id.*

<sup>84</sup> See HUMBERTO CUELLAR GUTIERREZ, *supra* note 64, at ch. 15.

<sup>85</sup> See *id.*



ity, not of fault, thus it is not necessary to prove non-contractual liability.<sup>86</sup>

In many instances, where there is an accident in land transportation, the obligation or liability will be contractual in kind. If a passenger is injured, the legal claim is made pursuant to the Code of Commerce, in particular, Articles 982, 992 and 1003. If the passenger dies before exercising his rights, his family will be allowed to commence a contractual hereditary claim (*hereditaria contractual*). The death of the passenger also allows his family to maintain a personal non-contractual negligence claim. This action is based upon the injury they suffered in relationship to the death of their family member, i.e., lost earnings (*lucro cesante*). If a transporter causes injuries to a pedestrian, however, his liability will be non-contractual and will be applied under Article 2356.<sup>87</sup>

### VIII. BREACH

For an occurrence or act to give rise to civil liability, the act or occurrence (*hecho*) does not have to be illicit in nature or unlawful (*delictivo*) or intentional. Traditionally, the act that gave rise to fault needed to be unlawful. Today the law divides these acts into *delictivo* and *cuasidelictivo*. Acts, which are considered *cuasidelictivo*, are those that occur due to a mistake in conduct, which in turn, result in injury, or results that were not sought after. Martinez disagrees with the traditional use of the word *delito* (crime) when referring to civil liability. In his view, the word *delito* should only be used in the context for which it was created, criminal law.<sup>88</sup>

There is considerable debate among Colombian scholars as to whether fault should be part of the equation for civil liability. The word fault or guilt translated into Spanish is *culpa*. The same word is used in describing tortious conduct and criminal conduct. The word *culpa* was used because there is no uniform definition to describe breach of duty.<sup>89</sup> To some Colombian Scholars the term *culpa* imports not only fault or guilt, but also breach. Pursuant to such an interpretation, the breach must

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<sup>86</sup> See generally MARTINEZ RAVE, *supra* note 64.

<sup>87</sup> See generally TAMAYO JARAMILLO, *supra* note 64.

<sup>88</sup> See MARTINEZ RAVE, *supra* note 64, at ch. 7.

<sup>89</sup> See *id.* at ch. 10.

have an objective factor that refers to awareness or free will of the actor. To this date, however, culpa is based on a subjective standard. It looks at the internal conditions surrounding the breach of each individual. Martinez's text refers to some of these objectivists scholars' definition of the word breach. Serratier defined breach as the breach of a duty that the actor was aware existed and could not observe. The Mazeud brothers defined breach as a mistake of conduct that a prudent person under similar circumstances would not make. The aforementioned theorists believe that we should look at breach in the abstract light, which they call objective fault. Objective fault looks at the prudent man as its model, the careful man, a "good family man." Martinez cautions that this term should not be confused with "objective liability" or strict liability, which does not require the element of fault or breach.<sup>90</sup>

The objective fault approach is the modern view of liability embraced by Colombian scholars. Notwithstanding this newest view, the Colombian legal system is still based on subjective fault. The subjective fault has criminal liability as its roots. Despite the Colombian attempt to modify its notion to civil liability, Martinez believes that the principle and the required showing of subjective fault will die out. To him, objective fault is the next step in the progress and development of civil liability.

Within the objective fault movement, there are many debates regarding the management of fault. To some, the element of culpa should be eliminated altogether. To others, liability will be proven if the hecho or negligent occurrence is proven together with the injury. Martinez believes that an adequate interpretation for Colombia would be to treat breach as presumed in all cases where the other elements are proven by the injured. In this case, the defendant can escape liability if he can demonstrate that he acted with diligence and due care. In other cases, which are expressly stated in the Civil Code Article 2356, for example, liability should be presumed. The defendant in this situation can escape liability by establishing a break in the causation link. Unlike the American origin of negligence, Colombian negligence principles emerged with the question of "fault"

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<sup>90</sup> See *id.*

as the first element of the negligence claim. This is of course, an imitation of the Napoleonic Code's treatment of "fault."<sup>91</sup>

#### IX. INJURY: AS THE FIRST ELEMENT OF LIABILITY

Non-contractual liability in Colombian law has as its goal to deal with the issue of injuries or harm suffered by an individual in a legal and ordered fashion. The incorporation of this notion into the law allows for society to develop rules regarding human risk and the consequences of acts that arise out of the risks.<sup>92</sup> There is no consensus among Colombian scholars as to which element of liability to highlight in the study of non-contractual liability. The Colombian author Juan Carlos Henao states that in dealing with this form of liability, the first element that must be studied is the injury or harm suffered by the victim.<sup>93</sup>

According to Henao, in dealing with negligence liability, there are many ways to look at liability. The key is in determining which element of liability one chooses to study first. Colombian jurisprudence, particularly prior to the 1991 Constitution, insisted that in order for civil liability to arise, one must show that there was a breach. Concurrently, the injury had to be both present and tied or linked to causation. Today, Henao states, the focus has shifted to the element of injury, because in some cases, fault is not always an element or requirement for liability to exist. As Dean Hinestrosa states in the prologue to Henao's text:

[T]he injury is the reason liability exists, and that is why, it is imperative that it is explored in its distinct aspects and degree; for it should occupy the first place in a logical and chronological sense, in the minds of judges. If there is no injury, or it can't be determined or evaluated, that should be the end; any further effort, relative to the act or actor or moral qualification of the conduct will be futile.<sup>94</sup>

Henao echoes this proposition by stating that the harm suffered should be the first element to be discussed in the equation

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<sup>91</sup> *See id.*

<sup>92</sup> *See* HENAO, *supra* note 64, at ch. 2.

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

of civil liability. If a person has not been injured or harmed, he should not be favored by a judgment that would unjustly enrich him without cause. The injury is the cause for reparation, and reparation or compensation is the finality of civil liability. Henao criticizes judgments by the Colombian "Consejo de Estado" which imposes its primary judgments based on a lack of service or fault. For example, in a judgment dated October 2, 1996, the Consejo de Estado affirmed, "in an event of *sub iudice* [lack of service], the injury does not have to be proven by the person claiming the harm." According to Henao, this case represents the inadequacy of treating injury as a subsequent element of civil liability. Notwithstanding the importance of first determining the injury or harm suffered by the victim, it should be noted that a showing of injury alone does not give rise to civil liability.<sup>95</sup>

The person claiming the injury or harm must prove the injury exists. As a starting point, Article 177 of the Code of Civil Procedure affirms that "the legislator has established that it is the duty of the parties to prove the claimed tortious act or conduct (*hecho*) of the norms that allow the judicial effect that they seek." Therefore, it is not enough for the claimant to state that she has suffered an injury; it must be proven in court. One exception to this rule applies when dealing with lost earnings (*lucro cesante*) pertaining to an individual who has been injured or has died. The judge will presume an injury when computing lost earnings sought by those who are economically dependent on that individual and have suffered an injury as a result of the victim's injuries. The standard of proof to determine the value of the *lucro cesante* is not the same standard required to prove an injury was sustained. Nevertheless, this treatment of the element of injury shows a departure from the American treatment of negligence.

## X. DAMAGES

In a personal injury complaint, it is customary for a plaintiff's attorney not to include a money amount for the total damages sought. Instead, the attorney will include generic language in the complaint. This procedure regarding the ques-

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<sup>95</sup> *Id.*

tions of damages leaves the judge ample discretion in the determination of damage awards. An example is illustrated in a case where a minor suffered brain damage due to a gunshot, for which he underwent several surgeries. The minor did not fully recover from the injuries suffered. The Consejo de Estado ordered the defendant to pay the minor's health care bills for the life of the minor together with any psychological treatment he may need in the future. It is seen that the court may acknowledge not only the damages that can be proved at the time of the trial, but also the long term damaged that many not be assessable at the time of the trial.<sup>96</sup>

Another case pointed out by Henao is the case of a victim of a negligent occurrence (hecho). He became 86% incapacitated and remained in a paraplegic state. The normal equation for damages in lost future earnings would have been based on the aforementioned percentage. Notwithstanding, the Consejo de Estado held that due to the high percentage of incapacity, the percentage to be used in this case should be 100%. This, the Estado noted, was justified by the necessity to cover the continuous damage suffered by the injured and the assistance he will need in living with the injuries sustained.<sup>97</sup>

As stated above, Colombian law deals with the notion of damages or indemnification, based on the proposition that the injured should be put back in the position he was in prior to the negligent act, or as closely to it as possible. Unlike the law of most United States jurisdictions, under Colombian law, injured parties in cases of personal injury arising out of non-contractual liability do not include the recognition of punitive damages. Henao states the unavailability of exemplary damages allows for the injured to be made whole again without unjustly enriching the injured. While the two systems diverge on the question of punitive damages, the civil code and common law approaches alike are in agreement that the objective of such causes of action is to permit the meritorious plaintiff to be returned, in however imperfect manner money damages can do so, to his or her original condition. Indeed, it is fair to state that corrective justice is part of both Colombia and the United States equation for negligence.

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<sup>96</sup> *Id.* at 84.

<sup>97</sup> *See id.*

Henao writes that the United States' treatment of punitive damages has as its object to calm or comfort the injured for its mental anguish, feelings, degradation, etc. He states that compensatory damages are based upon the policy objective of publicly punishing the tortfeasor. Should a losing defendant be called upon to pay a substantial sum to the prevailing plaintiff, Henao suggests, the defendant is made an example to others who may be engaging in similar activities. In other words, compensatory damages are used as a public deterrent.<sup>98</sup> Although punitive damages are not often used in the contemporary Colombian approach to liability, the influential authors concur that as technology continues to develop, the concept of exemplary damage awards will be incorporated into Colombian jurisprudence, even if not expressly inserted into their Civil Code.

Furthermore, Henao argues that the application of the aforementioned types of punitive damages do not exist "in theory" in the continental system, which system's gravitational pull can be recognized in much Colombian law. The Colombian objective is to indemnify or compensate the injured for the harm sustained. In contrast, by entertaining the potential of an award of both compensatory damages and punitive damages, the law of most United States jurisdictions is to provide compensation for the wrongfully injured, and further, in instances of extreme misconduct by the defendant, permit a quasi-criminal penalty that serves both to punish the defendant and to make a public statement as to the unacceptability of such behavior.

Under Colombian law, compensation for injuries sustained must be made fully. Nevertheless, according to Henao, compensation should be limited to the injury actually suffered and proved. In the words of the Colombian Supreme Court "payment for damages must directly correspond with the magnitude of the injury suffered, thus can not be any higher." The explanation to this notion lies in the public belief that there should not be unjust enrichment to the party injured. Again, Henao, in the context of punitive damages, contrasts the United States' public punishment of tortfeasors by the awarding of enormous often bearing no discernible relationship to the harm actually

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<sup>98</sup> See HENAO, *supra* note 64, at 84.

suffered. In his discussion of damages, and in relationship to the concept of unjust enrichment, Henao also considers the issue of subrogation under Colombian law. He analyzes the situation in which an injured individual receives compensation from other sources. The compensation by other sources (other than the tortfeasor) lowers the threshold of damages actually suffered. In Colombia, the term used to describe this type of situation is called *compensatio lucri cum damno*. This issue arises when other parties contribute to the indemnification of the damages. Examples of these forms of compensation are social security and private insurance policies. In the aforementioned situations, the injured can conceivably end up in a better situation, in other words, unjust enrichment may occur as a result of the payment of damages by other and collateral sources. According to Henao, the Consejo de Estado has stated that even though unjust enrichment does not form part of the equation for computing damages, there may be situations where this enrichment may be legally justified.<sup>99</sup>

Payments of employment insurance policies or social security benefits legally belonging to the injured party or his family does not prevent the injured from recovering damages from the negligent party. Henao contrasts this view with that of France. In France, these sources indeed limit the amount of recovery an injured party may receive from the tortfeasor. One exception to this rule occurs with respect to negligence insurance, where it expressly calls for subrogation in accordance with Article 1096 of the Colombian Commerce Code. According to Henao, discrepancies between supplemental indemnification and negligence contracts arise as a result of the Colombian legislature's decision to differentiate the two. This leaves the courts powerless to allow for supplemental compensation where there is an insurance contract, which contains subrogation clauses.

There are different types of damages which entitle the injured to compensation. The first type of damage is material. It presupposes an economic loss. The second harm is moral in nature, and does not contain an economic value. Colombian jurisprudence has sustained that this distinction must be used to guide the analysis of the types of damages in relationship to

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<sup>99</sup> See *id.* at ch. 3.

their compensation. Notwithstanding, the types of damages as outlined above can present confusion. It allows one to think that all damage that does not have an economic or pecuniary nature must be moral. Under Colombian law, the compensation of "physical harm or in relation to life" was added only in 1993. Henao argues that the better classification would be to say that moral damages are a kind of non-pecuniary damage. In light of the foregoing, the classification of damages should be done in terms of economic versus non-economic.<sup>100</sup>

In Colombian law, another distinction is made between damages that are patrimonial versus non-patrimonial. Under the economic damages are two sub-categories: the *lucro cesante* and *daño emergente*, both, which are patrimonial. Under the non-patrimonial damages are included the moral injury and physical injury. The judge decides both types. He has the discretion to decide the injury's classification and the amount of compensation the injured will receive for each type of injury. As to personal but non-physical injuries (*daños morales*), Colombian legal scholars refer to as moral injuries can be classified as the equivalent of American damages for pain and suffering.

Economic damages are those that deal with personal property or economic interests, which is to say, they are measurable in terms of money. Colombian law, perhaps due to Articles 1613 and 1614 of the Civil Code, differentiate between *lucro cesante* and *daño emergente*. Article 1614 states that *daño emergente* arises out of "the damage or loss that arises of an obligation that was not fulfilled, of erroneous fulfillment, or tardy fulfillment." The *daño emergente* encompasses the loss of patrimonial property, the gains that this property would have brought to the individual. *Lucro cesante* refers to the earnings that stop from accruing due to the damage aforementioned. These types of damages are applicable in both contractual and non-contractual obligations. Henao distinguishes between the two by stating that the *daño emergente* produces a "desembolso" an out of pocket damage, while the *lucro cesante* produces a "no embolso" damage, meaning there is nothing being pocketed which would have been but for the injury or harm sustained. The Mazeud brothers refer to *lucro cesante* as the

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<sup>100</sup> HENAO, *supra* note 64, at 191.



“perdida sufrida” or loss suffered and “ganancia frustrada” or frustrated earnings.<sup>101</sup>

#### A. *El Daño Emergente*

As previously stated this type of damage presents itself when it is a physical injury suffered by the individual. Examples given by Henao representing daño emergente are as follows: (1) The victim dies as a result of the injury. His family must incur all expenses related to the victim's burial. Those costs are an example of the daños emergentes. (2) If the victim survives, all the expenses incurred in the rehabilitation of the victim are considered daños emergentes. Daños emergentes can also arise out of harm to one's belongings. When the injurious act affects belongings, the judge applies the same logic for reparation of the damage as used in the damage to the physical damage suffered by the individual.<sup>102</sup>

#### B. *El Lucro Cesante*

As stated by Henao, when the integrity of a person is attacked there are effects that must be compensated. When an individual dies as a result of the negligence of another, his family is entitled to compensation for their out-of-pocket losses or expenses (el daño emergente) but also for the losses that will be sustained by the family due to the injury or death of the family's economic provider. Their loss in terms of monetary reparation refers to the economic dependence family members may have had on the decedent. When the daño emergente is a damage done to an object or thing, the Courts look to see the amount of earnings lost as a result of the harm or damage.<sup>103</sup>

For a long time, the Supreme Court and the Consejo de Estado sustained that non-patrimonial damages constituted only moral damages. It was not until the 1990's that non-patrimonial damages were broadened to include more than moral damages. In the case decided on February 14, 1992, the court awarded a judgment of 1.800 grams of gold for moral damages. This amount was higher than the traditional 1.000 gram courts

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<sup>101</sup> See *id.* at 197.

<sup>102</sup> See *id.* at 210-14.

<sup>103</sup> *Id.* at 223-224.

had previously awarded. Despite the fact that the decision only referred to the compensation of moral damages, it was inferred that the judge was awarding damages that were outside the scope of moral damages.<sup>104</sup>

The definitive recognition of non-material damages took place in the case decided on May 6, 1993. A year after the Consejo de Estado amplified "physical damages" as a synonym of "injury to the relationship of life," this case affirmed that "it is necessary to recognize the award for physical damage or to the damage to the relationship to life. This form of damage must be distinguished from material damage, which encompasses both *daño emergente* and *lucro cesante*, and also must be distinguished from subjective moral damages."<sup>105</sup> Recognition of this type of compensable harm remains an uphill fight. When, for example, a boy suffers an injury that will leave him blind for the rest of his life, or limited to a wheel chair, the amount and logic of the award of damages for pain and suffering may become enmeshed in the amount and rationale of the award of material damages. Further employing the above hypothetical, perhaps the blinded boy will require the aide of a guide dog. Should a part of any monetary award be considered an award to compensate for his physical injury, or is it more appropriately considered an award for *daño emergente*? Is it an award for pain and suffering? Since 1998, there have been 35 cases where the right to an "objective" award for pain and suffering has been given.

## XI. CONCLUSION

Non-contractual civil liability under Colombian law is currently struggling, as Colombian jurisprudence maintains archaic notions of guilt and fault in determining civil liability. As seen above, Colombian legal scholars are unable to identify and clearly define the elements needed to achieve a unified notion of non-contractual liability. This struggle has as one of its components the influence of French law, which Colombia modified in an attempt suit the Colombian needs regarding the structure of civil liability. Another component is exemplified by

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<sup>104</sup> See TAMAYO JARAMILLO, *supra* note 64.

<sup>105</sup> *Id.* at 265 (trans. from Spanish).

the need to modernize the terms and the usage of liability to fully compensate victims. Due to the fear of unjust enrichment, often-Colombian victims are left without the due compensation for the injuries they suffer.

A struggle for legality and compensation are reflected in the texts used in my effort to better understand the legal concept of non-contractual liability in Colombia. They are extremely unclear, filled with thesis's containing no concrete answers. The authors' conceptualization of this current vagueness is tempered by the understanding that the concept of non-contractual liability in Colombia is at best at its early stages of development. As stated by Henao, it was not until the 1990's that the courts fully accepted the concept of pain and suffering awards, and today, many cases contain awards that are not easily differentiated.

Colombian negligence law emerged from the Napoleonic Code, which it modified to comport with the Chilean Civil Code written by Andres Bello.<sup>106</sup> By leaving out the words "under its care" the Colombian Civil Code created negligence laws that used criminal law principles to attain a desired result — a non-contractual liability tort system. This gave rise to the past and continued disagreement and confusion among its scholars who try to define Colombian negligence laws. Notwithstanding, along the way both American and Colombian laws are seeking to create a balance between the interest of the injured party and society's interest in what might be termed robust personal and commercial autonomy. On one hand, Colombian lawyers struggle to capture the flag of punitive damages for their clients. On the other hand, American trial lawyers lobby against business efforts to moderate or eliminate such awards. When and where will they meet?

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<sup>106</sup> See *id.* at 2.