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Strict Liability in Mexico

> "When a person makes use of mechanisms, instruments, apparatus or substances which are dangerous in themselves, by the speed which they develop, by their explosive or flammable nature, by the energy of the electric current which they carry or for other analogous reasons, he is obliged to answer for the damage he may cause, even though he may not be acting illicitly, unless he proves that that damage was produced by inexcusable fault or negligence of the victim." [1]

It was a cool February day in 1935. José Santos, employed as a ranch hand by the Tirado Salido brothers, was riding as *machetero* on a truck driven by one of the brothers. The truck didn't quite make it across the grade crossing ahead of the train, and both men were killed. In criminal proceedings for homicide, the locomotive engineer was acquitted. José's widow then sued the Railroad for damages under the new article 1913 of the Civil Code, quoted above.[2]

The trial was a typical grade-crossing accident case. Plaintiff's witnesses testified that the crossing was not adequately marked or protected; the train was going too fast, and the engineer did not blow his whistle. The railroad's witnesses swore that the crossing was plainly

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[1] *Article 1913,* Civil Code for the Federal District and Territories, promulgated August 30, 1928, effective October 1, 1932. All translations herein from French and Spanish are my own. As to the Mexican Civil Code itself, there is a widely-used translation by Judge Otto Schoenrich published by Baker-Voorhis in 1950. This translation was reportedly revised and brought up to date by scholars at Southern Methodist University about 1958, but this work seems to have been lost.

[2] Mexico, like the United States, is a Federal republic, with twenty-nine States, two Territories and a Federal District like the District of Columbia. Each State has its own civil code. However (a) almost all the States have adopted civil codes closely modelled on the Federal District Code (we will note some important exceptions) and (b) the Federal District Code is officially the "back-up" Code for interpreting and filling gaps in all federal legislation and other matters delegated to the federal jurisdiction. The result is that the Federal District Code comes pretty close to being the "Mexican" Civil Code; Mexican students and writers concentrate on it and so shall we.

In the field of strict liability, some States have followed the Federal District Code exactly, including the imposition of liability under article 1913 and the limit on recovery under article 1915: Baja California, Colima, Durango, Jalisco, México, Nuevo León, Querétaro and Sinaloa. Other States have followed the Federal District Code with some modifications: Morelos, Sonora and Tamaulipas. Some States impose strict liability but have not put a limit on recovery: Aguascalientes, Campeche, Coahuila, Chiapas, Chihuahua, Hidalgo, Michoacán, Nayarit, Oaxaca, San Luis Potosi, Tabasco, Veracruz, and Yucatán. A few States still follow the 1884 Code rule of no liability without fault: Guanajuato, Puebla, Tlaxcala and Zacatecas. Bayitch and Siqueiros, *Conflict of Laws: Mexico and the United States,* (1968) p. 147.

marked; the train was proceeding at reasonable speed, and the whistle was duly blown in ample time; the truck was being driven at excessive speed and the driver was not paying attention. All this really proved was that neither side's lawyers had yet fully absorbed the scope and intent of the new Article 1913, because under article 1913, and between this plaintiff and this defendant, all this evidence was quite irrelevant.[3]

The trial court and the appellate court gave judgment for the plaintiff. The railroad's attorney brought *amparo* proceedings in the Supreme Court of Mexico.[4] There was nothing novel in all this except that the case was the first to come before the Supreme Court involving the new statutory rule, and all concerned, including the three Courts, were feeling their way into it.

The railroad's lawyers said that the lower courts had found that "a train is much more dangerous than a truck" and that therefore the railroad had the burden of showing the inexcusable negligence of the victim. The Supreme Court held that the lower courts needed only to find that a train is a dangerous mechanism. If in doing so they remarked that a train is "much more dangerous than a truck," this was an unnecessary comparison and was not one of the proper issues under article 1913, but it was not prejudicial error.

The railroad lawyers reminded the Court that the engineer had been acquitted on the criminal charges. This showed there was no negligence

[3] The plaintiff was only a passenger, not the driver.

[4] The development of the Mexican *amparo* proceeding is a fascinating bit of history which we do not have space to narrate in detail. It began about 1840 as a constitutional mandate to the Federal courts to protect (*amparar,* v.t.—"to shelter") the rights of all persons in Mexico against invasion of their constitutional guarantees. The potential villains were originally thought of as the executive and legislative branches, particularly the former; so that it is frequently said that *amparo* is the Mexican equivalent of *habeas corpus.*

It is that and much more. The Supreme Court declares laws unconstitutional in *amparo* proceedings brought against Congress for having passed them and the Executive for trying to enforce them. Executive excesses are curbed, and executive inaction is prodded, by *amparo* proceedings against individual officials in the nature of injunction and *quo warranto* and *mandamus.*

Most important of all, among the enumerated constitutional guarantees of every person in Mexico, in article 19 of the Constitution is the right to have "controversies of a civil nature" (i.e. ordinary lawsuits) decided "according to the letter of the law or its juridical interpretation." I.e., the individual has a *constitutional* right to have lawsuits decided *right.* This means (this has been settled law for a hundred years) that if the loser in the State courts (from which there was intended to be no right of appeal) can assert that the law was wrongly applied in his case, he can ask the Supreme Court to grant him *amparo* against this invasion by the State courts of a right granted him by the Federal Constitution.

The result is that *amparo* proceedings in the Supreme Court are a catch-all for *habeas corpus, mandamus, quo warranto,* test of constitutionality of legislation, and what have you, and also fulfill the function that in other countries is usually entrusted to a Court of Cassation. The expansion, by making the Supreme Court available to review every decision of every other court, has taken some of the lustre from the original "sheltering" concept, and has overburdened the Supreme Court frightfully; but Mexicans are justly proud of their *amparo.*

on the part of the railroad, and the accident must have been caused by the inexcusable negligence of the victim. But the Supreme Court held that (a) acquittal of the engineer on criminal charges is no bar to a civil action against the railroad under article 1913; and (b) any fault of the truck driver, even if inexcusable, was not imputable to the "victim" whose death gave rise to this action, since he was only a passenger.

The railroad's lawyer, pulling out all the stops, then planted his defence squarely on the Constitution. The new Civil Code has adopted the doctrine of "objective damage" or "theory of risk." This approach to extracontractual liability discards the Roman system—i.e., the system of fault as a source of obligation—and looks only to the damage caused and makes a legal presumption of liability on the part of one who uses a dangerous mechanism. This, says defendant's lawyer, is a violation of article 19 of the Constitution, which provides that "judicial controversies of a civil nature are to be decided according to the letter of the law or its juridical interpretation."

"It suffices to say," said the Supreme Court, "in overruling this objection, that the decision under attack, by its own terms, does not rest on the theory set out, but on the clear and specific provisions of article 1913 and 1915 of the Civil Code." Amparo denied.[5]

The Supreme Court, in this first decision, did a good job of laying down the broad outline for the development of Article 1913 in future decisions. But before we begin to look at these decisions, it would be well to examine some of the background that led to article 1913 itself.

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[5] Ferrocarriles de México, S.A., 57 *SJF5a* 1127 (1938). Decisions of the Mexican Supreme Court are reported in the *Semanario Judicial de la Federación,* created in 1870 and the only authorized official publication of these reports. Decisions of the Federal Supreme Court are the only court decisions in Mexico that are published in any regularly organized way. Like our own reports, it has gone through several series (*epocas*) and its format has changed from time to time. All of the cases in this paper are from the Fifth Epoch or the Sixth Epoch.

The Sixth Epoch publishes a separate volume, about the size of a fattish volume of U.S. Federal Reporter advance sheets, containing all the decisions handed down by the Court in each month. There is considerable delay; volume 121, the latest volume we have on our shelves as this is written, contains the decisions of the Court for July 1967. Each volume is then divided into "Parts." The First Part contains decisions of the *Pleno,* the Court sitting *en banc.* The Second Part contains decisions of the First Chamber (criminal), the Third Part decisions of the Second Chamber (administrative), the Fourth Part decisions of the Third Chamber (civil), and the Fifth Part decisions of the Fourth Chamber (labor). The pages of each Part of each volume are numbered separately.

This does not make for an easy system of citing cases, and the Court itself has developed no uniform or consistent short form of citation. For teaching purposes, I have invented my own: Volume number, followed by Epoch number, followed by Part number, followed by page number. For example: 57 *SJF6a* 2:30 means that the case is in Volume 57 of the Sixth Epoch of the Semanario Judicial, on page 30 of the Second Part of the volume.

In the Fifth Epoch, the bound volumes are not divided into Parts and the page numbering is consecutive, so that a sample citation would be: 118 *SJF5a* 4275.

I. Where Did Article 1913 Come from?

The *Exposición de Motivos*[6] of the 1928 Mexican Civil Code is a faithful reflection of the revolutionary fervor which then still preoccupied many Mexican minds and most Mexican official statements. Some of the picture it gives of the objectives of the framers of the Code would give a man of conservative bent the cold shivers:

> "The social revolutions of the present century have brought about a complete revision of the basic principles of social organization, and have overthrown traditional dogmas hallowed by secular respect . . .
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> "To transform a Civil Code, in which the concept of individualism predominates, into a Private Social Code requires substantial reformation, repealing everything that favors only the private interest at the expense of the community, and enacting new provisions which are in harmony with the concept of solidarity . . .
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> "The famous formula of the liberal school, *laissez faire, laissez passer,* is completely inadequate to resolve the highly important and complex problems which arise every day in the life of today . . .
>
> "We must socialize the law . . .
>
> "The central thought that motivates the Draft can be briefly expressed in the following terms:
>
> "To harmonize individual interest and the interests of society, correcting the excess of individualism which dominates the Civil Code of 1884."

The draftsmen then go on to enumerate at some length the "principal" reforms made in the new draft Code. Reading them, one immediately sees that the extent and nature of the reforms is nowhere near up to the advance notices; most of them, indeed, are old hat in the United States (although some were not in 1928). And the curious thing is that although the draftsmen refer to the creation of liability without fault by employers for accidents suffered by their employees, they do not even mention the much more "revolutionary" article 1913, creating a general rule of strict liability against any user of a dangerous mechanism or substance.

The two Mexican Codes that preceded the 1928 Civil Code—the

[6] The *Exposición de Motivos* is a sort of explanatory report of the drafting committee when it submits a draft of a new law of any importance. It is quite common in civil law countries. Though it may sometimes be longer than the law itself, it is usually published with it, at least in official editions. It is admissible, and often used, as part of the legislative history to aid in interpreting the law. It goes without saying that it is also a partisan political document intended for public consumption by those who will not read or understand the law itself.

Codes of 1871 and 1884—based civil responsibility squarely on fault.[7] They came close to strict liability for damage caused by conditions or acts which we would call generally actionable nuisances.[8] The same articles came even closer to liability without fault for injuries caused by "the weight or movement of machinery." Artice 731 of the 1884 Code (which became article 839 of the 1928 Code) made a landowner who deprives the land of his neighbors of lateral support by excavating on his own land in effect an insurer against any damage they might suffer. These provisions were said to reflect the special fact that Mexico City stands not very securely on the fill of a lake, and digging a hole of any size is a pretty dangerous thing to do.[9] But all these provisions, at least in the 1884 Code, would seem to be at most exceptions to the general statement of article 1578 of the 1884 Code that "No one is liable to answer for a pure accident (*caso fortuito*) except when he has expressly accepted such responsibility." Thus, neither the 1871 nor the 1884 Code contain anything that one can point to as the source of the 1928 Code's article 1913, and we must look elsewhere.

Some authors[10] have suggested that article 1913 is drawn from article 404 of the Russian Civil Code of 1922, which was in force when the Mexican Code of 1928 was being drafted.[11] It is true that the two

[7] The pertinent articles of the 1871 Civil Code, reproduced without change in the 1884 Code, state:

"*Article 1574* (1884 C.C. art. 1458). Causes of civil responsibility are:

(1) Failure to perform a contract;

(2) Acts or omissions which are expressly made subject to it by law.

Article 1578 (1884 C.C. art. 1462). No one is put under obligation by pure accident except when he has caused or contributed to it and when he has expressly accepted such responsibility."

On this subject, the 1871 drafting committee said:

"*Of Civil Responsibility.* The commission had at first decided to make this a separate Chapter from one on 'Reparation of Damages' but realizing on further thought that these are always included in civil responsibility, it was proposed to bring together both subjects. The commission adopted as its bases the only two sources from which civil responsibility can arise, which has the additional advantage of reducing to this compass all the old provisions on responsibility arising from quasi-delict."

There is a good translation into English of the 1884 Civil Code by J. P. Taylor, American Book and Publishing Co., 1904.

[8] 1871 Code, article 1595 (1884 Code, art. 1479): ". . . deleterious discharges; accumulation of materials or animals prejudicial to health, or for any other cause genuinely injurious to persons in the vicinity . . ."

[9] Antonio Aguilar Gutiérrez, *Panorama del Derecho Mexicano* (1965), vol. II, pp. 84-5. Cf. German Civil Code art. 909. Manuel Borja Soriano, *Teoría General de las Obligaciones* (3d ed. 1959), vol. I, p. 407. Rafael Rojina Villegas, *Compendio de Derecho Civil* (1962), vol. III, p. 289.

[10] See the reference by the Supreme Court in *Fulgencio Antonio Diaz,* 16 *SJF6a* 4:68, at p. 75 (1958). See also Rafael Rojina Villegas, supra note 9, vol. III p. 275. On the other hand, Lic. Manuel Andrade, in his article-by-article concordance of the 1928 Civil Code (10th ed., 1952) cites article 403 of the Russian Civil Code under article 1910 of the Mexican Code (fault liability). Of article 1913, he states only, "This article is new."

[11] "*Article 404.* Individuals and enterprises whose activities involve increased hazard for persons coming into contact with them, such as railways, tramways, industrial

articles *look* so much alike that it seems certain that the Mexican draftsmen had at least seen the Russian Code. But there are significant differences. The Russian Code speaks of "extra-hazardous *activities*" while the Mexican speaks of the "use" of dangerous *things*; and the Russian Code includes in "extra-hazardous activities" conduct (such as the erection of buildings and other structures) which would be outside the Mexican concept of use of "dangerous" things, at least under article 1913. The Russian article 404 exonerates the actor if he proves that the injury was the result of *force majeure*; the Mexican article 1913 does not. Finally, if the Mexican draftsmen were getting their inspiration from the Russian Code, one wonders why they did not go all the way and draw on article 403 of that Code, which imposed a general rule of liability without fault, subject to limited defences which the defendant has the burden of proving.[12]

Others have suggested that the Mexican draftsmen were enacting into statute the French law as then judicially interpreted;[13] but the

establishments, dealers in flammable materials, keepers of wild animals, persons erecting buildings and other structures, and the like, shall be liable for the injury caused by the source of the increased hazard, if they do not prove that the injury was the result of *force majeure* or occurred through the intent or gross negligence of the person injured." Russian Soviet Federated Socialist Republic (RSFSR) Civil Code, enacted November 11, 1922, effective January 1, 1923. Gsovski *Soviet Civil Law* (1948) vol. I, p. 489.

This enumeration is not exclusive. The Russian courts have extended it to proprietors and lessees of automobiles under car rental systems; *Sotsialisticheskaia Zakonnost,* 1960, p. 59, cited in Hazard and Shapiro, *The Soviet Legal System* (1962) II, p. 86; see also Gsovski, supra, I, 505, gas plants in case of gas poisoning, loading equipment, mines, and other hazardous enterprises. However, the injury must be caused directly by the source of the increased danger to establish liability under article 404. Gsovski, supra, I, pp. 505-6.

Article 404 of the 1922 Code is closely followed by article 454 of the 1964 Code. See translation in Gray and Stults, *Civil Code of the RSFSR* (University of Michigan Law School, 1965). As to the present state of Soviet tort law, see Hazard, Shapiro and Maggs, *The Soviet Legal System* (1969) pp. 449 ff.

[12] "*Article 403.* Any one causing injury to the person or property of another must repair the injury caused. He is absolved from liability, if he proves that he could not prevent the injury, or that he was privileged to cause the injury, or that the injury arose as the result of the intent or gross negligence of the person injured." Gsovski, supra note 11, I, p. 207.

But observe a significant evolution (regression?) in the 1964 Russian Code:

"*Article 444. General grounds of liability for the causing of injury.* Injury caused to the person or property of a citizen, as well as injury caused to an organization, is subject to compensation in full by the person who has caused the injury.

"A person who has caused injury is relieved of the duty to make compensation if he proves that the injury was not caused through his fault.

"Injury caused through lawful acts is subject to compensation only in cases specified by law." [Translation, Gray and Stultz, supra note 11].

Although not directly relevant, see also the scholarly treatment of the philosophy underlying Soviet legal thought in Grzybowski, *Soviet Legal Institutions* (1962).

[13] This argument gains force from the fact that just at this spot in the Mexican Code, the draftsmen put a specific article (art. 1912) enacting into law the French judicially-created rules about *abus de droit,* and a little earlier they had also incorporated provisions to embody in some detail the French judicial concept of unjust enrichment.

differences are too wide to lend much support to this theory. In thumbnail summary, France creates a *presumption* of fault by one who has "under his guard" *any* thing which causes damage;[14] Mexico imposes liability *without* fault on one who "uses" a *dangerous* thing.

A more plausible suggestion is that article 1913 is a sort of distillation of the thinking of French writers like Josserand and Demogue, both of whom are highly respected and widely read and cited by Mexican jurists and law teachers.[15]

A very good argument can be made for the suggestion that the Mexican draftsmen, with all these materials before them, were essentially breaking new ground. This argument rests on the apparent absence in any other civil code I have seen of a rule just like article 1913.[16]

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[14] French Civil Code, art. 1384, par. 1°; von Mehren, *The Civil Law System,* (1957) pp. 383 ff.

[15] Not to mention law students. Over the years there have been, as might be expected, a number of degree theses on this general subject, expressing all sort of opinions, by graduating law students at the National Autonomous University of Mexico. See for example: Eduardo Alvarez Morales, *Responsabilidad Objetiva* (1961); Augusto de Gyves Osuna, *La Responsabilidad Objetiva en el Derecho Civil Mexicano,* (1963); Guillermo Alfonso Moncayo L., *Panorama de la Responsabilidad Civil en el Derecho Contemporáneo,* (1963).

[16] The new Guatemalan Civil Code of 1964 has a provision (article 1650) clearly inspired by Mexico's article 1913. This same code takes an even more significant step by inverting the burden of proof for tort actions in general:

"Article 1648. Fault is presumed, but this presumption admits of proof to the contrary. The injured person is obligated only to prove the damage or injury caused." (One is left to assume—I think correctly—that the burden of proving the causal relationship is still on the plaintiff).

Other Latin American codes have adopted a wide variety of provisions. A more or less random sampling:

Argentina. Velez Saarsfield's famous Civil Code of 1871: *"Art. 1109.* Every one who does an act which through his fault or negligence causes damage to another is obligated to make good the damage . . .

"Art. 1113. The obligation . . . extends to damages caused by persons under his control or by things which he uses or has under his care.

"Art. 1133. When damage to any person is caused by any inanimate object, its owner shall be responsible for the indemnity unless he proves that there was no fault on his part." (This article 1133 was repealed by Law 17,711 of 22 April 1968).

Brazil. "Art. 159. One who by voluntary act or omission, negligence, or imprudence, violates a right, or causes damage to another, is obligated to repair the damage . . ."

Grammatically, this sentence could (and perhaps should) be read as imposing liability for any voluntary act or omission which causes damage, whether or not it was negligent or imprudent. But other provisions of the Code, and Brazilian commentators, make it clear that this is intended to be a statement of classic fault doctrine. See Wilson Melo da Silva, *Responsabilidade sem Culpa e Socialização do Risco* (1962) pp. 127-138. See also Clovis Bevilaqua, *Codigo Civil* (11th ed., 1956) vol. I, pp. 342-3.

Chile. 1964 edition of Andres Bello's famous Civil Code of 1857, which was copied by a number of other Latin American states:

"Art. 2314. He who has committed a delict or quasi-delict which has inflicted damage on another is obligated to indemnify . . .

"Art. 2328. (note: the only provision for liability without fault) . . . a thing which falls from the upper part of a building . . . is imputable to all those persons who live in that part of the building . . ."

Colombia. Art. 2341 of Colombia's Civil Code of 1873, as amended, is almost

This inquiry into the origin of article 1913 is still of interest from the comparatist's point of view, and was of practical interest in the earlier years of its application. The Mexican Supreme Court, however, has now built up by its own decisions a principle that is broad enough and specific enough to stand on its own, with little need for going behind it to derivative interpretation based on interpretation or application of whatever foreign rule or rules may have originally been considered in its drafting. We turn, then, to the development of article 1913 in Mexican writings and particularly in decisions of the Mexican Supreme Court.

II. The Nature of the Cause of Action Created by Article 1913

A. Its relationship to articles 1910 and 1924

Article 1910 of the Mexican Civil Code is the general article impos-

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exactly like Chile's. See Ortega Torres, *Código Civil Anotado,* (6th ed. 1969) pp. 96 ff.).

Nicaragua's Code of 1904: articles 2509 ff. are based squarely on fault.

Panama's Civil Code of 1917, articles 1644-50, contain standard provisions for liability based only on fault. In *respondeat superior* cases, the defendant has the burden of exonerating himself by showing that he used "the care of a good paterfamilias to prevent the damage."

Perú's 1936 Civil Code contains an unqualified rule of strict liability equalled, so far as I am aware, only by the Russian article 403. Here is Perú's:

"*Art. 1136.* Anyone who by his acts, carelessness, or imprudence, causes a damage to another, is obligated to indemnify it."

Jorge Eugenio Castañeda, in his 1966 annotated edition of the Code, interprets it as imposing general liability without fault. Yet José León Barandiardan, writing in 1938, says that this is essentially the formula of the Napoleonic Code, art. 1383, which rests squarely on fault. Decisions of the Peruvian courts have been confused and contradictory. A distinguished Peruvian attorney, Eduardo Elejalde V., says in a letter of December 5, 1969, ". . . It should be noted that in those cases in which no guilt was proved, but notwithstanding the Supreme Court, based on the theory of risk, ordered the payment of indemnities, the amount of these were extremely low, as if the Court would have accepted such theory not in substance but from a formalistic point of view only."

El Salvador: another of the Civil Codes inspired by Andres Bello's Chilean code, with very similar provisions.

Uruguay: "*Art. 1319.* (Typical fault liability).

"*Art. 1321.* One who is exercising a right does not cause actionable damage to another so long as there is no excess on his part. The damage which may result is not imputable to him." (Another interesting example of statutory adoption of the French judicial concept of *abus de droit*).

"*Art. 1322.* No one is responsible for damage arising from a pure accident which he has not caused."

Venezuela, Civil Code of 1942:

"*Art. 1185.* (Typical fault liability).

"*Art. 1193.* Every person is responsible for damage caused by things which he has under his guard, unless he proves that the damage was brought about by fault of the victim, by the act of a third party or by pure accident or *force majeure* . . ." (note: The French court decisions again.)

ing responsibility for damage caused by any person "acting illicitly or contrary to good customs."[17] Article 1924 is the *respondeat superior* article, with the employer exonerated if he can prove absence of any fault or negligence imputable to him.

Mexican procedural codes generally prohibit a plaintiff from asserting inconsistent or contradictory causes of action in the same suit.[18] In a number of fact situations, therefore, when plaintiffs have asserted rights based on article 1913 and on either or both of the other articles, defendants have objected. The Supreme Court has uniformly held that there is no contradiction or inconsistency, and that an action relying on both articles, or all three, is not objectionable.

As to the asserted conflict between articles 1910 and 1913, the plaintiff will naturally hope to be able to establish defendant's fault under article 1910, and thus be entitled to claim "moral" damages; but he will want to keep the ability to fall back on the surer recovery under article 1913. The Supreme Court allows him to do so.[19]

Similarly, there have been cases in which the plaintiff rested his cause of action on article 1913 and the defendant has argued that article 1924, with its much broader opportunity for the defendant to get off, should in a fact situation falling within its terms be applied to the exclusion of article 1913. Here again, the Supreme Court has consistently held that the two causes of action are quite separate. Responsibility under article 1924 arises from a rebuttable presumption of fault or negligence in the selection or supervision of one's employees; responsibility under article 1913 arises, quite independently of fault, from defendant's use of a dangerous mechanism, whether the use be by defendant himself or through one of his employees. Although the plaintiff is entitled to only one recovery from the defendant, he may claim it on either cause of action, and the circumstance that on the facts of the case article 1924 may be applicable does not make that article override plaintiff's right to claim under article 1913.[20]

When a telephone lineman is electrocuted by the falling of a power line across the telephone line, the indemnity paid to his widow by the telephone company under the rules of labor law is a contractual payment and precludes any other claim against the telephone company;

[17] The translation here, and throughout, is intentionally literal. The reader understands "illicitly" although he might not ordinarily use it in English; he is also alerted to the fact that it may not be exactly the same thing as "unlawfully."

[18] E.g., Code of Civil Procedure for the Federal District and Territories (1932) article 31. Pallares, *Tratado de las Acciones Civiles* (1945) pp. 102-4.

[19] *Fabrica Mexicana de Billar*, 70 *SJF5a* 1235 (1941). One can be using a dangerous mechanism and at the same time be guilty of fault or negligence. *Liborio Monge Perez*, 112 *SJF6a* 4:130 (1966); a gas company employee was filling butane tanks at plaintiff's home, there was an explosion and plaintiff's Ford "cauntri" sedan was damaged. In accord, *Choferes Unidos de Tampico*, 3 *SJF6a* 4:165 (1957).

[20] *Diaz Arochi*, 88 *SJF5a* 2010 (1946); *Fco. Hernandez Barrientos*, 65 *SJF5a* 1024 (1941).

but it does not preclude the widow from also recovering from the power company under article 1913.[21]

Article 1913 has also been held to apply to the relationship between a bus company and its passengers to the exclusion of any contractual liability existing or alleged to exist between them. "A transportation company is responsible for injuries which it causes by the vehicles with which it renders the service, both as regards passengers and ordinary passers-by. It would go against equity to find that the said responsibility should be subject to different standards depending on the fact that in one case there might be a contract and in the other not." [22]

B. To whom is the action given?

The question who is entitled to sue and recover under article 1913 has caused as much trouble as any other single question arising in its interpretation, and a good deal more than most. The answer is not found in the Civil Code, and has had to be built up case by case by the Supreme Court.

The Court has said many times that since the entitlement is to reparation of the damage, the right to claim the reparation must belong to the person or persons who have suffered the damage. This statement standing alone seems so obvious as to be unhelpful; but as applied by the Court, and by analogy to the Labor Code, it has furnished the basis for formulation of useful rules.

If the victim lives and recovers, it seems clear that the cause of action is his and his only. "Moral damages," which include the things we would call pain and suffering, mental anguish, loss of consortium and so on, may be given to the victim, or to his family if he dies, only if he is the victim of an illicit act, which the plaintiff must prove and which thus brings the case under article 1910 instead of 1913.[23] If the victim recovers, compensation to him for lost earnings precludes any similar compensation to his dependents, even though the statutory limit on what he, as the victim, may recover [24] may be substantially less than the support they have been accustomed to receive from him.

If the victim lives and recovers and later dies from some unrelated cause, any cause of action or unrecovered damage seems to be a part of his patrimony and to pass with the rest of his estate. If the victim is killed outright, or perhaps if he lingers only briefly, the Supreme Court has held that the right to recover damages (beyond such things as medical and funeral expenses which the estate is obligated to meet) belongs not to his estate or to his heirs as such, but to those who have in

[21] *Cia. Mexicana de Luz y Fuerza Motriz, S.A.*, 112 *SJF5a* 1239 (1952), infra note 36.
[22] *Autobuses de Occidente, S.A. de C.V.*, 59 *SJF6a* 4:211 (1962).
[23] Civil Code, article 1916.
[24] See "Measure of Damages" *infra.*

fact suffered the damages. Those who have suffered the damage, says the Court, are those persons who were "economically dependent on the victim, regardless of any other consideration such as relationship, heirship, and so on." The right is to claim reparation of damages; and the people who suffered the damage are those who have lost economic support they were receiving from the victim.[25] A plaintiff suing as "economically dependent" on the victim does not even have to allege or prove that he was the only person so dependent nor, apparently, join others similarly situated.

The difficult question arises when the victim survives long enough to have a claim for reparation of damages suffered by the victim personally and then dies as a result of the injury which the defendant has caused. Here, the Supreme Court relies by analogy on the provisions of the Labor Code. If the victim has been receiving compensation for a temporary disability, the right of those economically dependent to recover on his death is unaffected, and there is no deduction of amounts that have been paid to the victim. If the victim has been given a final award for permanent disability, whether total or partial, and whether a lump sum or in the form of payments over a term, persons economically dependent on him can still recover, but subject to deduction of amounts already received by him under the disability award.[26] The explanation of this distinction is the sort of fine-line logic that civilians delight in: in the first case, economically dependent plaintiffs' damages are based on the expectation of resumption of the former level of support from the victim, without deduction; in the second case, their expectancy is only to share in a permanent diminished support level from the date of the injury and therefore subject to deduction of any payments already made under an award.

C. How and when does the action expire?

> Civil Code, article 1934. "The action to demand reparation of damages caused, in the terms of this chapter prescribes in two years counting from the day on which the damage was caused."
>
> Civil Code, Article 1161. "The following prescribe in two years . . . V. Civil responsibility arising from illicit acts which are not crimes . . . The prescription runs from the day on which the acts were done."

The two articles obviously deal with the same subject, and seem at first glance to be identical in effect. One would think that only one of

[25] ". . . since the trend of modern civil legislation is to benefit not so much the heirs of a person, but those who because of the death or incapacity of the victim are left without protection . . ." *Cía. Ltda. de Luz Eléctrica de Veracruz*, 93 *SJF5a* 29 (1947); *Respardo y Resendiz*, 73 *SJF5a* 4203 (1942).

[26] *Juana de la Cruz de Chimal*, 117 *SJF5a* 463 (1963). Mario de la Cueva, *Derecho Mexicano del Trabajo* (5th ed., 1963) II, 160-161.

them would have been enough, and that in any event they should be interpreted so as not to conflict with each other. But in a case in which the plaintiff's son was struck and injured by a trolley on one day and died the following day, the Supreme Court held that the plaintiff's damage was suffered and her cause of action arose not from the injury but from the death, and that a suit brought by her within two years of the date of death was in time.[27]

It is tempting to say that the foregoing decisions suggest that, in common-law terms, article 1913 creates two actions: one an action given to the victim himself, with a survival statute built into it, and the other something very close to what we would call a wrongful death statute, creating a new cause of action in the name of persons economically dependent on the deceased victim.[28] But the safer course is just to suggest the thought rather than actually to draw the comparison.

III. Essential Elements of the Action

Mexican theory and practice since 1932 have established the following elements of the action created by article 1913, all of which must be proved by the plaintiff to make his case:

(1) "Use" by the defendant of a substance or thing;
(2) "Dangerousness" of the substance or thing;
(3) "Damages";
(4) "Causal relationship" between the defendant and the damage.

A fifth item, absence of inexcusable fault or negligence on the part of the plaintiff, is sometimes mentioned as a fifth element; but this is properly an affirmative defense to be pleaded and proved by the defendant. We shall take them up in order.

A. "Use" of a substance or thing by the defendant

There has been a good deal of confusion among Mexican authors, and even between Supreme Court decisions, over what constitutes use of a substance or thing by the defendant. We had better begin by subdividing.

1. What constitutes "use"? When a Pemex delivery truck loaded with gasoline was involved in an accident and caught fire, Pemex was "using" the gasoline.[29] A store which keeps turpentine or other flammable liquids on its premises for retail sale is "using" them, and is

[27] *Vda. de Silva,* 82 *SJF5a* 296 (1944). Article 1934 of the Code is from the chapter "Obligations which arise from illicit acts," of which article 1913 is also a part. Article 1161 is from the general chapter "Of Negative Prescription."

[28] The *Juana de la Cruz* case, *supra* n.26, almost states this in so many words.

[29] *Rangel Chavez,* 113 *SJF5a* 153 (1952).

liable for a fire of unknown origin[30] or even a fire caused when a customer dropped a lighted match on the floor.[31]

2. *What constitutes use "by the defendant"?* Two of Mexico's leading authors flatly disagree. José Gomís Soler says:

> "If my friend asks me to lend him my car for a pleasure drive and runs into a pedestrian, it is my friend who is liable and not I, for the simple reason that at the moment he was the user of the vehicle he had the enjoyment of it. If someone surreptitiously gets that same automobile into his power and with it causes damage to things or persons, that someone must be responsible and not the owner. We would find the same solution if the employee and the engineer used the vehicles outside the scope of their duty, since in such case they would be the 'users' and not the owner." [32]

Ernesto Gutiérrez González takes the same example (an owner lends his car to a friend, who has an accident) and gives a directly contrary answer:

> ". . . But the owner of the other car can also require Juan to pay the damages, based on article 1913, since Juan, as owner, put into circulation a dangerous machine, and must therefore answer for the damage that is done with that automobile . . . There is no fault whatever by Juan, and nevertheless he answers for the damage which the dangerous object causes, according to article 1913." [33]

The Supreme Court has dealt with this problem in a number of cases. Public utility companies are, of course, perennial defendants, and have tried all sorts of devices to escape liability. In one early case, a trolley company tried to defend on the ground that while it puts its trams into service, it does not (and as a corporation cannot) "use" them itself. The Supreme Court promptly shot this down.[34] Most attempts of this sort have been unsuccessful, although an occasional decision of the Court will still pull the reader up short.

A power company is "using" the electricity which flows through its lines, and is thus liable without fault for injury or death caused by

[30] *Ezequiel G. Hernandez*, 92 *SJF6a* 4:10 (1965).

[31] ". . . an act which might be normally foreseen." *Gonzalez Pena*, 113 *SJF5a* 590 (1952). The lower courts had given judgment for plaintiff and the Supreme Court refused to grant *amparo*. "Nevertheless," said the Court, "this does not preclude responsibility of the third party whose intentional or imprudent act turned the risk into reality." For a discussion of what happens when there are two or more people involved in the causal relationship, see *infra*.

[32] José Gomis Soler, *Derecho Civil Mexicano* (1944) vol. III, cap. XVII, pp. 439-448, at p. 445.

[33] Ernesto Gutierrez Gonzalez, *Derecho de las Obligaciones*, (1960) pp. 574-580, at p. 579. It may be noted, in passing, that the Code uses the singular, *"cause,"* rather than the plural *"causen,"* and thus refers necessarily to "the one who uses" rather than to the "mechanisms," etcetera.

[34] *Cía. Tranvías de Mexico, S.A.*, 78 *SJF5a* 562 (1943).

it.[35] This is true even in a case in which a power line had fallen across a telephone line and a telephone company employee some distance away was electrocuted by "this dangerous fluid."[36] But the power company is no longer "using" the electricity when it has reached the consumer's premises, and is not liable for the death of a customer who was killed by an electric shock in his own home. On these facts, it was not necessary to inquire whether the victim was inexcusably negligent; the case does not fall within article 1913 at all.[37]

A more difficult case to understand is the decision in a 1943 case against *Cía. Telefónica y Telegráfica Mexicana, S.A.*[38] Workmen on a roof were bothered by their nearness to a telephone line. They lifted it out of their way with a pole, not realizing that in doing so they had brought it into contact with a power line. Some time later, in a nearby house, plaintiff's decedent picked up the telephone to use it and was electrocuted. It is hard to see how a telephone company can be said to be using a "dangerous" instrumentality, and still harder to see how, on these facts, it could be argued that the telephone company was "using" the power company's admittedly dangerous electricity; but the Supreme Court held the telephone company liable under article 1913.[39]

Existence of an employer-employee or principal-agent relationship will naturally affect the decision as to whether an owner is "using" his dangerous thing for the purpose of applying article 1913. When one of defendant's employees drove off in defendant's truck that had been left with the keys in the lock, and had an accident, the lower court saw it as a *respondeat superior* case; and since there was no showing of fault imputable to the employer, the lower court declined to hold him liable. The Supreme Court granted *amparo,* finding that in view of the owner's negligent supervision of his employee, the "use" of the truck was imputable to the owner and he was liable under article 1913.[40]

In one very tough case, the Supreme Court held that a conditional vendor of an automobile (under a hire-purchase contract, the device

[35] *Cía. Mexicana de Luz y Fuerza Motriz,* 77 *SJF5a* 5228 (1943). *Cía. Mexicana de Luz etc.,* 125 *SJF5a* 2480 (1955).

[36] *Cía. Mexicana de Luz etc.,* 112 *SJF5a* 1239 (1952). The apparently incongruous conclusion in this case was due to the plaintiff's choice of which company to sue. The plaintiff here had already collected the full labor-law death benefit from decedent's employer, the telephone company. The Court held that such collection does not preclude a separate civil suit on plaintiff's own cause of action against a third party. Either company would probably have been liable as having "jointly" caused the damage.

[37] *Cía. Mexicana de Luz etc.,* 117 *SJF5a* 765 (1953).

[38] 78 *SJF5a* 1504 (1943).

[39] Here also it is probable that either the telephone company or the light company would have been liable as jointly having caused the injury, and the plaintiff, for reasons we do not know, chose to sue the telephone company.

[40] *Gabina Cordoba,* 56 *SJF6a* 4:127 (1962). The truck was parked inside the owner's premises, and the Court did *not* rest the owner's liability on his negligence in leaving the keys in the lock. I have not found any case in point on this question.

typically used in Mexico to get over the civilian's conceptual difficulty with divided ownership) is still the owner of it; the conditional buyer is using the automobile under authority from the conditional vendor; the latter is therefore liable under article 1913 for any damage caused by its use.[41]

One of the Court's most recent expressions on the question involved the owner of a bus who had taken it to a garage to be cleaned. While it was there, an employee of the garage took it out of the garage and while he was driving it was in collision with and damaged the plaintiff's station-wagon. The Court held that the owner of the bus was not "using" it, either directly or through any person who was in any way connected with him, and could therefore not be held liable under article 1913 for the resulting damage.[42]

It seems likely that this reasoning of the Court will stand up and may even be enlarged upon in future cases.

B. What makes a thing or substance "dangerous"?

Surprisingly enough, this question has arisen hardly at all in the reported decisions of the Supreme Court. The reader will recall that in the first case applying article 1913, a lower court felt called upon (unnecessarily, the Supreme Court held) to find that "a train is much more dangerous than a truck."[43] Three years later, in what can only be regarded as a very bad decision, the Third Chamber of the Supreme Court, by a 3-2 vote, upheld a judgment for defendant in an accident case, saying that "Since the fact of devoting the truck to the carriage of passengers is not in itself dangerous . . . the lower court was right in not applying article 1913."[44]

In a 1943 case, the Mexican Light and Power Company offered as a defense the assertion that its cables were not "dangerous" when, as was the case, all possible care had been taken to make them safe. The Supreme Court was not impressed. "Drawing a comparison, it could not be said that if an automobile is travelling at speeds permitted by the traffic regulations it ceases to be a dangerous mechanism."[45]

Ten years later, the same company, doubtless because of the fre-

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[41] *Vda.* de *Armendariz*, 36 *SJF6a* 4:70 (1960). Here is another example of an apparently thoughtless misreading by the Court of the code provisions. Article 1810 of the Civil Code of Coahuila, which is copied from Article 1913 of the Federal District Code, uses the singular ". . . *que cause* . . ." References in the article to "Mechanisms," etcetera are always in the plural, so *"cause"* can only refer to the "one who uses," not to the dangerous things. The result in this case seems to be a decision of very questionable soundness. It could hardly be argued here that the owner-vendor *caused* the damage.

[42] *Renovadora de Llantas, S. de R. L. de C.V.*, 84 *SJF6a* 4:84 (1964).

[43] *Ferrocarriles de Mexico*, 57 *SJF5a* 1127, *supra* note 5.

[44] *Lara Ramirez*, 67 *SJF5a* 3525 (1941).

[45] *Cia. Mexicana de Luz etc.*, 77 *SJF5a* 5228 (1943), supra note 35.

quency with which it found itself cast in the role of defendant in cases brought under article 1913, tried the device of getting a certificate from the General Electricity Office (the government regulatory agency) to the effect that its power lines

> ". . . are installed with every technical requirement to guarantee life and property, and are not in themselves dangerous."

But the Supreme Court brushed this aside. The "dangerousness" called for by article 1913 is for the courts to decide; and ". . . the very fact that they caused a person's death establishes beyond doubt the danger that they represent." [46]

Dr. Rafael Rojina Villegas, one of Mexico's most prestigious jurists, suggests a test of "dangerousness" taking into account

> ". . . the *functional nature of the thing;* i.e., not the thing independently of its functioning, but the thing functioning; for example, an automobile is a dangerous thing when it is functioning, when it is moving, developing a certain speed . . . There can be things that are dangerous in themselves; this would occur only with explosive or flammable substances . . . The concept of 'dangerous thing' is still vague and imprecise . . ." [47]

Dr. Rojina's suggestion is of course rather like the line of reasoning taken by the French Court of Cassation in recent decisions holding that a thing under the guard of the defendant cannot be said to have caused an injury when it played a "purely passive role" in the accident.[48] Nevertheless, and despite its logic and Dr. Rojina's standing, there seems to be no case in which the Mexican Supreme Court has adopted this line of reasoning. Indeed, it seems to be almost flatly contradicted by the language quoted above from the 1943 Mexican Light and Power case.[48a]

One can only conclude that Mexican practitioners have found the highly pragmatic definition by example which article 1913 uses to be sufficiently clear. The proof of this is that litigants have almost never disagreed with a lower court finding on the issue of "dangerousness" vigorously enough to go with it to the Supreme Court.

C. Damage

In a case decided as recently as 1958, a defendant company had the temerity to argue that the plaintiff, father of a little boy who had been

[46] *Cía. Mexicana de Luz y Fuerza Motriz, S.A.*, 115 *SJF5a* 190 (1953).

[47] Rafael Rojina Villegas, *Compendio de Derecho Civil* (1962) vol. III, pp. 274-286, at p. 276.

[48] Poitiers, 10 April 1967; 1968 *D.* Somm. 13. *Desbons c. Consorts Deyssieu,* Cass. civ. 23 Jan. 1945, 1945 *D.* 317. Julliot de la Morandière, *Précis de droit civil,* (3e ed.) vol. II, No. 676, p. 356, and decisions there cited.

[48a] Supra note 35.

killed by defendant's truck, had not in fact suffered any damage; the father was not economically dependent on the victim, but rather the other way around. On paper, this is technically a pretty good argument; but the Supreme Court's decision is an angry one:

> ". . . The thesis which the petitioner corporation sustains . . . lacks legal justification and is repugnant to the most elementary principles of justice . . . The greatest possession of a father is the life of his child . . . Even from the strict property point of view, the fact that a minor is receiving no wage or remuneration of any kind at the time of the accident is no reason to consider that no injury is caused to the patrimony of the father. The minor constitutes a future economic support for the family, notwithstanding the fact that there are children who do not comply with that duty, and from that exceptional fact it cannot be concluded that the economic benefit which the minor represents is merely hypothetical or remote." [48b]

This and the 1942 *Cia. Mexicana de Luz* case [48c] are the only reported Mexican cases I have found in which there was any question as to the *fact* of damage; nor does any Mexican commentator seem to have dealt with it as a problem. The Mexican thinks of "damage" only in real terms—physical injury to person or property, loss of expected earnings, profit or support. If the plaintiff can establish none of these, he is not likely to sue. *Measure* of damages is more troublesome, and is considered later on.

D. The causal relationship between the damage and the user

We have already seen cases in which the Supreme Court has held that it is the user, and not necessarily the owner, of the dangerous thing who is liable, and have examined the circumstances under which the Court will find that someone other than the owner or his agent was in fact the user. We have seen that the Court in these cases is likely to say that the owner is exonerated because he did not "cause" the damage. But aside from these infrequent cases, once the facts—user-dangerous thing-damage—are established, the causal link between user and damage is almost never made the subject of specific scrutiny.

In one early case, the Supreme Court attempted to establish a basis for drawing a distinction which it was later to repent. In a collision between a trolley car and an automobile, in which passengers in the automobile were injured and sued the trolley company under article 1913, the Supreme Court said:

[48b] *Constructura Cros, S.A.*, 15 *SJF6a* 4:290 (1958).
[48c] 76 *SJF5a* 6559, infra note 65.

". . . when only one of the parties is using dangerous things or mechanisms . . . it is evident that the causing agent of the damage, both in the physical and the legal sense, is the one who used such mechanism . . . But this situation must be distinguished from the other situation in which both parties use dangerous instruments, since in such hypothesis it must be investigated which person or persons are the causing agents of the injuries.

"From the point of view of causation, obviously, in a collision of vehicles both are causing agents of the fact since both participate as specific determining causes of the event. But if this is clear in a physical sense, it is not from the legal point of view in the terms of Article 1913 of the Civil Code. In this sense the rule provides that the one who causes the damage . . . is obliged to answer for the same. In order to determine which person is the causing agent in the legal sense of a specified injury arising out of the collision of two vehicles, it must be investigated whether one of the parties was acting with fault or negligence, in which case the responsibility will fall on that party, or whether both parties were acting alike, in which hypothesis they will answer solidarily according to Article 1917 . . ." [49]

The Court, however, soon realized that application of the reasoning of this dictum would put the third party victim of a two-car accident right where he was before article 1913 was enacted—saddled with the burden of proving negligence on the part of one of the drivers. So this dictum was soon overruled.[50] In the *Morales de Ceballos* case, the Court took the step which had been fought so long and so hard in France:

"The Supreme Court has come to the conclusion that if a *dangerous mechanism participates in the damage,* even without any fault or imprudence on the part of the operator, its owner (*sic*) is liable jointly and severally (*solidariamente*) together with the other persons causing the damage . . ." (emphasis supplied).

A dynamite bomb explodes on a railroad track; a train goes off the rails and damage is caused. The railroad company is not obligated to

[49] *Cía. de Tranvías de Mexico,* 87 *SJF5a* 275 (1946). Since the courts found that both parties were negligent, and therefore jointly and severally liable, the need to distinguish between them did not arise and these paragraphs are pure dictum.

[50] Implicitly, in the case of *Cruz Hernandez,* 104 *SJF5a* 1466 (1950), and expressly, in the cases of *María Morales de Ceballos,* 10 *SJF6a* 4:207 (1958) and *Octavio González,* 20 *SJF6a* 4:197 (1959). In the *Cruz Hernandez* case, plaintiff's decedent was a passenger in a hired car. The driver, apparently grossly negligent, tried to beat a train to a crossing and lost. The Supreme Court held that, regardless of the recklessness of the driver and the absence of any fault on the part of the engineer, both were using dangerous mechanisms which participated in the accident, so they were jointly and severally liable and plaintiff could get full recovery from the railroad company.

make reparation, because its use of its dangerous mechanism did not *cause* the damage.[51]

In the *Rangel Chavez* case,[51a] when the gasoline spilled from the Pemex truck, a fire was started when a boy who was trying to carry a lighted lantern from a nearby coffee bar to a place of safety dropped it. Pemex argued that even if it was "using" the gasoline, its "use" did not *cause* the damage. But the Supreme Court held that it was natural to expect that in the general confusion resulting from gasoline flowing in the street something like this might happen; and it was not enough to break the causal relationship between Pemex's use of the dangerous substance and the damage.

When the driver of a delivery truck got out to make a delivery, a friend who was riding with him started the truck moving; it climbed the sidewalk and killed the plaintiff's decedent. The Supreme Court upheld, 3 to 1, a judgment for defendant owner of the truck.[52] The owner having denied that there was any relationship between it and the person causing it to move, the burden was on the plaintiff to show that there was.

A number of cases have held that direct physical contact between the "dangerous mechanism" and the injured person or thing is not necessary to the causal relationship. The typical fact situation is that automobile *A* and automobile *B* are in collision, as a result of which automobile *B* is knocked off course and causes damage or injury to *C*. The owner of car *A* argues that his car obviously did not cause the damage, because it never even touched the plaintiff; the Supreme Court nevertheless has held him liable.[52a]

On an identical set of facts, the owner of car *B* argues that his car would not have struck the plaintiff if it had not been knocked off course by car *A*, so car *B* did not *cause* the damage. The Supreme Court has held him liable:

> "A determination as to which of the responsible parties was the direct or indirect causing agent in transforming the risk into reality does not interest the victim, but can in any case only be grounds for claims as between them." [53]

The rule adopted by the Court in these cases seems sound. If the

[51] Manuel Borja Soriano, supra note 9, I, 437-443, at 442, citing a Mexican Supreme Court decision (which I have not seen) published in *La Justicia,* November 30, 1938, vol. VIII, pp. 3309-11.

[51a] Supra note 29.

[52] "When the truck is not being driven by the owner or its employee but by a third party without permission, there is not the necessary causal relationship between the owner and the damage." *Garcia, Maclovia et als.,* 77 *SJF5a* 2134 (1942).

[52a] *Maria Morales de Ceballos,* 10 *SJF6a* 4:207 (1958).

[53] *Octavio Gonzalez,* 20 *SJF6a* 4:197 (1959). There has been at least one case in which there was no contact at all. A vehicle got too close to two animals, who were violently startled and caused damage. The Supreme Court held that the noise pro-

purpose of article 1913 is to relieve the injured plaintiff of what may be an impossible burden of proof, he may be even worse off if he has to prove which of two users of dangerous mechanisms, each of whom will be trying to put the blame on the other, was the *cause* of the accident on some sort of showing of comparative negligence or absence of it.

As regards liability as between the two drivers or users, for their own or a third party's damages, the Supreme Court's published decisions and the writings of recognized authorities are astonishingly barren.

As to damages suffered by third parties, when the owner of one of the vehicles has been required to pay them *in toto,* the Supreme Court often drops into its decision some such words as we have just seen in the *González* case, to the effect that holding one joint tortfeasor liable for the full damage is without prejudice to any claims they may have against each other.

As to their own damages in a two-car collision, it might be argued that, as in France, the imposition of strict liability not only still works, but works both ways, so that each owner pays for the damage suffered by the other; "you pay for my Cadillac and I'll pay for your VW!" However, friends tell me that in actual practice, the police and the lower courts do indeed inquire into who was at fault and particularly whether one of them had violated some rule of the road. The general rule of thumb, they say, is *"él que pegue, paga"*; he who hits, pays.

E. What is needed to establish the defense of "inexcusable fault or negligence"?

The short answer is, "Quite a lot!"

In one early case that favorite defendant, the trolley company, tried a novel approach based on a learned analysis of the pertinent words of article 1913. The plaintiff's son had tried to board a trolley car which was running past a passenger platform without stopping. He fell and was killed, and his mother got judgment against the trolley company in the lower courts. Before the Supreme Court in *amparo* proceedings, the company's lawyer argued: Roman law and consistent doctrinal writings (citing authorities all the way back to the *Siete Partidas*) bear out the intent of the legislator, as shown by the inclusion of both words, to have *culpa* and *negligencia* mean two different things, with *culpa* much the more serious of the two. So much the more serious, in fact, that while *negligencia* may or may not be "inexcusable," to speak of "excusable" *culpa* is a contradiction of terms. The word "inexcusable" in article 1913 must therefore modify only the word *negligencia*; any conduct of the victim meriting the label *culpa* cannot be excused,

duced by the motor of the vehicle should be considered as establishing its nature as a "dangerous mechanism" thus giving rise to liability under article 1913. *Gonzalez Pozos,* 119 *SJF5a* 855 (1954).

and must exonerate the defendant. Nevertheless, the Supreme Court held that *culpa* and *negligencia* in article 1913 are synonymous, and "inexcusable" applies to both. Under the circumstances, the boy's attempt to board the trolley was not "inexcusable." Amparo denied.[54]

It should be particularly remarked that in deciding whether the victim's fault or negligence is "inexcusable," Mexican courts make no attempt to apply any objective "reasonable man" test of conduct. They apply to each victim the standards of conduct they feel should fit the particular victim's age, state of health, education, and station in life. If this makes the test of "inexcusableness" a purely subjective one and the reasoning process circular, so much the better for the end of achieving a just result in the particular case. A few extracts will suffice to give the flavor.

The plaintiff's decedent was cutting down a tree. A power line hidden in the foliage snapped and fell to the ground, giving off sparks. He tried to move it out of danger with a stick; it touched his other hand and electrocuted him. The Court said:

> "The fault on the part of the victim, if there was any, was not inexcusable under the circumstances, since Ruiz to protect passersby from danger exposed his own life to remove the element of danger, taking the precautions which were available to him." [55]

A passenger who tries to get off a moving train, falls and is killed, is held guilty of inexcusable negligence, "especially if it is shown that he did not know how to do it." The fact that railroad employees do it constantly is no excuse for his attempting to imitate them.[56]

An old gentleman who is absent-mindedly jay-walking when he is struck and fatally injured by a tram is not guilty of "inexcusable negligence." Absent-mindedness, without any definite proof, is not enough to establish inexcusable negligence in any case, ". . . especially in the case of an old man in whom alertness and awareness of dangers are naturally diminished." [57]

In *Cía Telefónica y Telegráfica Mexicana, S.A.*,[57a] (a power line had short-circuited the telephone line; plaintiff's decedent picked up the telephone and was electrocuted), the Court said that failure of the victim to heed the warning of others in the room that the telephone line was "hot" was not inexcusable negligence, since they themselves had received a shock from the line without injury.

A 1945 decision against the power company [57b] involved a laborer in

[54] *Cía de Tranvías*, 85 *SJF5a* 1804 (1945).
[55] *Eustalia Gonzalez et als.*, 97 *SJF5a* 2693 (1947).
[56] *Ferrocarril Mexicano, Cía. Ltda.*, 84 *SJF5a* 369 (1945).
[57] *Servicio de Transportes Electricos*, 121 *SJF5a* 1925 (1954).
[57a] Supra note 38.
[57b] *Cía Mexicana de Luz, etc.*, 77 *SJF5a*, 5228 (1945)

a masonry shop who had let a long iron bar touch a power line and had been electrocuted. The Court said, ". . . it is not to be supposed that a rude and ignorant laborer . . . will have sufficient foresight, in moving an iron bar around and bending it, to avoid the fatal contact which occurred."

Or again, in another case with almost identical facts:

> "While it might well be agreed that he might have been somewhat careless in handling the metal bars, letting the ends of them project beyond the building under construction and moving them about in such fashion as to bring them into contact with the electric cables, it is evident that this is far from being the inexcusable negligence or fault to which the law refers. In the case of a laborer of the sort we are concerned with, by his lack of education, by his concentration of his faculties on his work, and because he might reasonably not know whether there was high tension current in the cable owned by the defendant, nor be familiar with the characteristics of the same, it is obvious that there could not be attributed to him the inexcusable imprudence or fault in question." [57c]

IV. Measures of Damages

The Civil Code of 1884, in common with most civil codes, had included definitions of "damages" and "loss," but had established no limits, one way or the other, on the power of the judge to assess the amount of them on the basis of the evidence presented to him.[58] However, it is safe to observe that plaintiffs' counsel in Mexico in those days, and even now, were and are nowhere near so imaginative and resourceful as are United States plaintiffs' counsel in discovering new and important kinds of damage for which to claim compensation. The statutory definitions quoted are moreover pretty specific, and calculated to inhibit any too-flexible expansion of the concepts.

Another factor tending to restrain any great expansion of the idea of "damages" was, and is, that the right of the plaintiff is, in the first instance, to have things restored to the *status quo ante* (or, in contract cases, to the state in which the parties would have been if the contract

[57c] *Cia Mexicana de Luz y Fuerza Motriz*, 125 *SJF5a* 2480 (1955).

[58] The 1884 Code, following the Roman tradition, did not separate damages for breach of contract from damages for illicit conduct causing injury. The two sources of obligation are *agreement* and *wrongful conduct*, and damages under both headings are in Book Third, Title III, Chapter IV, "Of Civil Responsibility." The pertinent articles are:

"*Article 1464.* By 'damages' is understood the loss or detriment which the contracting party has suffered in his patrimony through the default in the fulfilment of the obligation.

"*Article 1465.* By 'loss' is meant the deprivation of a lawful profit which would have been gained had the obligation been fulfilled."

had been properly performed); and only if this is not possible is the plaintiff entitled to money damages.[59] This provides a plain frame of reference for the courts' thinking which discourages flights of fancy.[60]

When the 1928 Code was enacted, the rule was restated in article 1915:

> "Article 1915.—The reparation of the damage shall consist of the re-establishment of the situation before the damage, and when this is impossible, of the payment of damages and losses."

The Courts were still left to their own judgment, on the evidence presented to them, to fix the amount of damages. In case of death, for example, an accepted practice was to use actuarial tables to calculate the probable future earnings of the victim and capitalize them at 9% into a lump sum judgment.[61]

Within a few years after the enactment of the 1928 Code, with its strict-liability article 1913, there began to be a feeling that this relationship was still out of balance, but this time on the plaintiff's side. Introduction of employers' absolute liability for industrial accidents had been balanced by limiting compensation to a fixed scale; but strict liability had been imposed on users of dangerous mechanisms without any such limit. It has been constantly reiterated that the purpose of strict liability was not in any way to punish or discourage such users but simply to correct the inequity that too often resulted from the near impossibility of plaintiffs' being able to prove negligence. Therefore in December, 1939, article 1915 was amended by adding paragraphs tying damages for personal injury or death generally to the scales established for industrial accident or death in the Labor Code.[62] The effect of these

[59] Unlike French courts, which tend to defer to an expressed wish of the plaintiff to have money damages instead of specific performance (von Mehren, *The Civil Law System,* (1957), p. 773) Mexican courts quite commonly take this provision literally, even if the result is not at all satisfactory to the plaintiff or, presumably, to either party. See, for example, *Castillo Diaz,* 60 *SJF6a* 4:42 (1962): plaintiff's house was damaged by defendant's excavation next door which removed lateral support; the Court ordered defendant, in the first instance, to repair plaintiff's house in spite of plaintiff's reasonable insistence that this kind of damage can never be totally "repaired." In accord, *Maria de la Cajiga de Inurreta,* 98 *SJF6a* 4:101 (1965); *Gomez de Rodriguez et als.,* 113 *SJF6a* 4:75 (1966); *Max Milstein,* 120 *SJF5a* 1799 (1954); *Ricardo Zavala* 44 *SJF6a* 4:148 (1961). But in *Carmen Castro de Bermudez,* 79 *SJF6a* 4:30 (1964) the Court observes that if plaintiff elects to sue for an indemnity in money and the defendant does not object, the trial court ought not to raise the question on its own motion.

[60] Even this can be interesting; a bag of money, which was in the car which the defendant hit, fell to the ground and was lost. The Supreme Court held that the value of the bag and its contents was properly within the damages defendant must pay, since "the cause of the cause is the cause of the consequences." *Jesus Vargas Mendez,* 47 *SJF5a* 916 (1936).

[61] *Ferrocarriles Nacionales de Mexico,* 119 *SJF5a* 2369 (1953).

[62] "Article 1915. . .

I. When the damage is caused to persons and produces death or total, partial or temporary incapacity, the amount of the indemnity shall be fixed applying the rates

amendments was, as can be immediately seen, to limit sharply the amount of recovery for personal injury over and above actual medical expenses, on which there is still no limit. And since article 1916 limits "moral" damages to one-third of the actual damage, total possible liability for personal injury, even when defendant is at fault, is so low that one wonders how insurance companies can justify the liability rates they charge, especially for tourists and other short-term visitors.[63]

These amendments took effect on April 30, 1940. The transitional cases—involving injuries suffered prior to the amendment, with suit or judgment after the amendment—gave rise to some interesting questions as to whether the new language of article 1915 should or could constitutionally be applied retroactively. The Supreme Court held both ways, and the result was not always happy.

The first case to reach the Supreme Court on this point seemed easy. The victim was an eleven-year-old boy electrocuted when he climbed a high-line tower in May, 1939; his father was suing under article 1913 in his own name.[64] The Company had originally argued in the trial court that since the boy had no income the actual loss to the father was nil. The Supreme Court upheld the trial court's application of the Labor Code's minimum wage scale and term of payment under the amended article 1915. "Since the original article really gave the father no real right to recover and the amended article does, its retroactive application redounds not to his detriment but to his benefit, and therefore does not violate article 19 of the Constitution." Bravo for human rights!

But there was an ironic twist to the case. The trial court had indeed applied the amended article 1915 and granted damages based on the Labor Code minimum wage for a total award of 2140 pesos. But the appellate court decision, against which *amparo* proceedings were

established by Federal Labor Law, according to the circumstances of the victim, and taking as basis the income or salary he receives;

II. When the income or salary exceeds twenty-five pesos per day, only this sum shall be taken into account to fix the indemnity.

III. If the victim does not receive income or salary or this cannot be determined, the payment shall be set taking as a basis the minimum wage . . ."

The new Federal Labor Law, published April 1, 1970 to take effect May 1, 1970, provides: for permanent incapacity, 1095 days salary; for death 730 days salary; salary for computing indemnity to be actual salary, but not more than double the minimum wage established for the area or fifty pesos per day, whichever is the larger. New Labor Law, arts. 485-6.—Except for the death benefit period of 730 days, which remains the same, these are all substantial increases over the previous allowables. They leave Civil Code art. 1915, II, no longer in line with the Labor Law, and it may be anticipated that the Civil Code will be correspondingly amended. Cf. *Celso Espinoza,* 109 *SJF6a* 4:107 (1966); *Línea de Camiones "Flecha Roja,"* 109 *SJF6a* 4:108 (1966).

[63] This is not to be taken as a serious recommendation that tourists in Mexico not take out liability insurance, just that they complain about the rates a little. After all, some states still do not limit recovery; and anywhere in Mexico the help of an insurance company can be invaluable in time of trouble.

[64] *Cía. Mexicana de Luz y Fuerza Motriz,* 76 *SJF5a* 6559 (1942), *supra.*

brought, had held that the original wording of Article 1915 should apply and, using life expectancy tables and probable future earnings of the boy, had awarded the father a total of 28,980 pesos material damages plus 3000 pesos moral damages. Thus the real effect of the Supreme Court's decision was to reduce the father's recovery from 31,980 pesos to 2140 pesos!

There was a directly contrary case a year later. On almost identical procedural facts the trial court used amended article 1915 to grant low recovery; the appellate court used the original wording, capitalized probable future earnings, and awarded high recovery. The Supreme Court upheld the application by the appellate court of the original wording of article 1915 to the case and said that under that wording the court has discretion to weigh the evidence and assess damages so long as it does not "depart from logic nor alter the facts." Amparo denied; the high recovery stands.[65]

Nevertheless, the first of these two decisions[66] was the one that was followed so long as it was relevant—i.e., so long as accident cases arising before March 30, 1940 continued to come before the courts. The Supreme Court, however, was a little more careful in later cases in its choice of words:

> "The amendments to article 1915 do not change the substantive rights of the parties, but simply lay down rules for assessment of damages which had theretofore been left to the discretion of judges, with varying and contradictory results . . . The application of amended article 1915 to cases of accidents occurring before March 30, 1940 is therefore not a 'retroactive' application forbidden by article 19 of the Constitution, since it does no damage to any substantive right."[67]

Conclusion

Whatever the source or inspiration of article 1913, it was and is so far as I know[68] unique as a statutory enactment of general application of the theory of "created risk" in a civil code (as distinguished from specialized rules such as highway codes and traffic regulations). Its wording, perhaps intentionally general in terms, has left room for the Supreme Court to build on, but on the whole has given rise to surprisingly few questions or doubts of real importance. This is attested by the fact that cases involving its interpretation began to reach the

[65] *Cía. Tranvías de Mexico, S.A.*, 78 *SJF5a* 562 (1943).
[66] *Cía. Mexicana de Luz y Fuerza Motriz*, 76 *SJF5a* 6559 (1942).
[67] *Respardo Resendez*, 87 *SJF5a* 2115 (1946); *Cía. de Tranvías de Mexico*, 87 *SJF5a* 225 (1945); *Ferrocarriles Nacionales de Mexico*, 98 *SJF5a* 495 (1948).
[68] Except for Guatemala, which drew its provision from the Mexican Code, and Peru. See supra note 16.

Supreme Court in 1938, hit a sort of peak about 1945-1950 and have been declining ever since. One author sees a need for further development and refinement, especially in the field of two-car accidents;[69] but the man in the street seems to be reasonably satisfied with it as it stands. This writer believes they are both right.

[69] "It is not out of place to say, however, that at the present time the legal text that in 1928 represented a great step forward in Mexican legislation is now insufficient to regulate the grave problems presented by the increase in the number and the speed of automobiles, the most perfect dangerous thing, and the consequent increase of land traffic in the cities and on the highways of our country. There is thus an evident need for Mexican legislation, as other laws such as the Italians have done, to regulate realistically and with greater breadth and precision all the hypotheses of damage caused by the use of automobiles: responsibility of the owner and the user respectively; responsibility in gratuitous transportation, in cases of concurring liability (collisions) etcetera." Antonio Aguilar Gutierrez, *Panorama del Derecho Mexicano* (1965) II, pp. 84-5.