

11-29-2018

Central America - A First Approach to Tort Liability in the Central American Civil Codes

Claudia María Castro Valle

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/jcls>

 Part of the [Civil Law Commons](#)

Repository Citation

Claudia María Castro Valle, *Central America - A First Approach to Tort Liability in the Central American Civil Codes*, 11 J. Civ. L. Stud. (2018)

Available at: <https://digitalcommons.law.lsu.edu/jcls/vol11/iss1/6>

This Civil Law in the World is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

A FIRST APPROACH TO TORT LIABILITY IN THE CENTRAL AMERICAN CIVIL CODES

Claudia María Castro Valle*

I. Introduction	190
II. The Characterization of Tort Liability in the Central American Civil Codes	191
III. The Nature of Tort Liability in Central America and its Application	192
A. The Criteria for the Imputation of Tort Liability	195
B. Strict Liability in Central America.....	199
1. Vicarious Responsibility	199
2. Damages Caused by Animals	201
3. Acts of Things.....	201
4. Unlawful Effects of Lawful Activities.....	204
5. Abuse of Rights.....	206
6. Available Defenses	208
IV. The Effects of the Tort Liability Models Available in the Central American Civil Codes	212
V. Conclusions	214

Keywords: civil law, tort liability, Central America, fault-based liability, strict liability

* Dean of Graduate Studies of the Universidad Tecnológica Centroamericana (UNITEC, Honduras), Bachelor's Degree in Legal and Social Sciences (Universidad de San Pedro Sula, Honduras), Master's Degree in Business Law (UNITEC, Honduras), Master's Degree in Law, Business and Justice (Universitat de Valencia, Spain), and Doctorate in Legal Studies, Political Science and Criminology (Universitat de Valencia, Spain). The author thanks the Center of Civil Law Studies at the Louisiana State University Paul M. Hebert Law Center for having hosted a two-month research visit in spring 2017.

I. INTRODUCTION

In order to achieve the proper protection of individual interests, tort rules need to be applied efficiently whenever these interests are subjected to any kind of harm. For that to be possible, the traditional approach has been the acceptance that any loss or injury sustained by legally protected interests must meet certain requirements. The requirements include the actual existence of specific regulation designed for their legal protection, compensability, imputability to a person other than the victim, and certainty.¹ Hence, tort is generated from the infringement of the general duty of respect due to any legally protected interest.² It is a non-contractual obligation imposed on a person, in order to compensate the holders of such interests, for any injuries or losses caused. These interests can be either material or moral.

The primary requirement for the application of tort law is that the sustained damages, losses, or injuries must originate from a negligent or intentional activity or omission. This means that care and precaution were omitted in the execution of such activity, and that the causation between this activity and the harmful effects can be proved in a court of justice. However, tort liability is essentially patrimonial. Its function is to grant, impede or repair a specific economic loss,³ while its application allows the reparation of indirect patrimonial injuries and non-pecuniary damages.⁴

1. Naveira Zarra & Maita María, *El evento dañoso*, in DERECHO DE RESPONSABILIDAD CIVIL EXTRA CONTRACTUAL 42 (José María Pena López ed., Cálamo 2004) [hereinafter RESPONSABILIDAD CIVIL EXTRA CONTRACTUAL].

2. José María Pena López, *La responsabilidad civil extracontractual. El sistema español de derecho de daños*, in RESPONSABILIDAD CIVIL EXTRA CONTRACTUAL, *supra* note 1, at 17.

3. RAMÓN MARTÍN MATEO, 1 TRATADO DE DERECHO AMBIENTAL 173 (Trivium 1991).

4. Tania García López, *El principio de reparación del daño ambiental en el derecho internacional público. Una aproximación a su recepción por parte del derecho mexicano*, 7 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 481, 487-88 (2007).

The aim of this paper is to compare the way that tort liability is regulated in the Central American civil codes (Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, and Panama), understanding the similarities and differences in their approach. This sort of analysis could be the base of any harmonization effort, so relevant in the actual regional context, in view of the recent developments of the Central American economic integration process.

II. THE CHARACTERIZATION OF TORT LIABILITY IN THE CENTRAL AMERICAN CIVIL CODES

Much like in Europe (think of art. 1382 of the Napoleonic Code), in the Central American civil codes, the concept of tort ordinarily rests on a general clause imposing fault-based liability, though it is possible to identify among these civil codes some interesting variations. For example, only in Honduras (art. 2236) and Panama (art. 1644) tort liability is characterized using elements such as: action or omission, fault or negligence, and obligation to compensate. Whereas, Costa Rica (art. 1045) and Nicaragua (art. 2509) add other elements to the characterization, such as fault and imprudence, and in the Nicaraguan text, the notion of malicious acts is also included. The Salvadoran Civil Code (arts. 2065 and 2080) is rooted in the classic construction of delict, quasi-delict or fault, although it also adds features such as malice and negligence. The exception to this trend will be the Guatemalan Civil Code (art. 1645). Although it uses terms such as intention, carelessness or recklessness as defining criteria, this provision is not really describing a fault based liability model, because it contains a rebuttable presumption of fault or negligence.

Another important feature of the tort liability models found in these codes is their obvious individual character. On the one hand, the interests that would be harmed according to the logic of the regulation are personal aspects of the individual, both material and moral. On the other hand, any claim regarding such losses or injuries

can only be made by the person who has suffered them.⁵ Additionally, the tort liability models have a distinct economic quality, because in spite of the possibility of addressing moral injuries, their structures are decidedly patrimonial, both from the perspective of the damages and the compensation.⁶

III. THE NATURE OF TORT LIABILITY IN CENTRAL AMERICA AND ITS APPLICATION

Renowned legal experts have tried to explain the lawmakers' intentions based on the way they have regulated tort liability. For Díez-Picazo the purpose of such legal institution is the distribution of misfortunes;⁷ for Pena López, the animus seems to be the social administration of harm.⁸ From these ideas one can gather that tort liability is not intended as a way to vanish the harm that the legally protected interests may suffer, but to transfer the loss to the person who caused it through compensation. In civil law, such a purpose does not have a punitive nature, contrary to common law where concepts such as punitive damages turn tort liability into a form of sanction.⁹

5. Francisco De la Barra Gili, *Responsabilidad extracontractual por daño ambiental: el problema de la legitimación activa*, 29 REVISTA CHILENA DE DERECHO 367, 369 (2002).

6. Gisela María Pérez Fuentes, *La responsabilidad civil por daños al medio ambiente en el derecho comparado*, XXII PROLEGÓMENOS, DERECHOS Y VALORES 35, 36 (2009).

7. LUIS DÍEZ-PICAZO, DERECHO DE DAÑOS 41-42 (Civitas 1999).

8. Pena López, *supra* note 2, at 16.

9. In fact, one could discuss if the function of punitive damages is exclusively punitive. The civilian doctrine has started to change its position towards them. It now refers to punitive damages as being a useful tool to ensure private enforcement and justice through the mechanisms available in private law. The newly found utility has to do with the fact that many times, according to the civilian logic, the compensation granted through tort law is proportional to the loss suffered, this is not necessarily proportional to patrimonial profits obtained by the tortfeasor from such actions. This disproportion causes for the application of the civilian tort law to lose some of its effectiveness, by making it affordable for the wrongdoer to injure third parties. A solution such as punitive damages might strengthen the notion that tort law is an appropriate mechanism to enable individuals to compensate for the institutional weakness of some governments to resolve certain type of conflicts, and the gap caused by certain principles of public law

Regarding their foundations, tort liability models tend to subscribe to two ways of understanding and bringing to reality the concept of justice: corrective justice and distributive justice. Distributive justice is invoked when laws are designed with the purpose of objectively allocating the burdens and benefits of dangerous or risky activities, whereas corrective justice tends to use rules that categorize illicit activities, and they also tend to include notions such as compensation. The advantage offered by the distributive variant is that there is no need to focus exclusively on the contending parties (wrongdoer and victim) since it allows a much broader approach to the conflict and its possible solutions. Thus, the purpose of distributive justice is not to correct an error or injustice that has happened between two specific individuals. It aims to establish behaviors for private actors that are considered socially efficient.¹⁰

Applying these criteria to the analysis of the Central American civil codes helps to realize that lawmakers have incorporated elements that are specific to corrective justice when designing tort liability models. All these civil codes refer in some way or another to the obligation to compensate for the injuries caused.¹¹ In addition, the Salvadoran and Costa Rican Civil Codes also refer to the existence of liability generated from unlawful actions.¹²

This does not mean that distributive justice is excluded from Central American private law. On the contrary, legal experts have already commented that the fact that a legal system recognizes cor-

such as the *ultima ratio* of criminal law. See Lotte Meurkens, *The Punitive Damages Debate in Continental Europe: Food for Thought*, in THE POWER OF PUNITIVE DAMAGES: IS EUROPE MISSING OUT? 32-36 (Lotte Meurkens & Emily Nordin eds., Intersentia 2012).

10. LIESBETH ENNEKING, FOREIGN DIRECT LIABILITY AND BEYOND 546-47 (Eleven 2012).

11. GUAT. CIV. CODE art. 1645; EL SAL. CIV. CODE art. 2065; HOND. CIV. CODE art. 2236; NICAR. CIV. CODE art. 2509; COSTA RICA CIV. CODE art. 1045; and PAN. CIV. CODE art. 1644.

12. EL SAL. CIV. CODE art 2065; and COSTA RICA CIV. CODE 1046.

rective justice is not an obstacle to the inclusion of distributive justice as well.¹³ Nevertheless, it is true that most legal systems of the Western Hemisphere tend to favor corrective justice through monetary compensation.¹⁴

The analysis of these legal systems shows that the Central American lawmakers agree with this ampler idea of a dual system because it is possible to identify in the civil codes features that correspond to both systems. For example, the incorporation of some elements such as the principle *ubi emolumentum, ibi onus*,¹⁵ also known as *cuius commoda, eius incommode*,¹⁶ is an indicator of using distributive justice as a guiding notion. Through this principle, the mere fact of obtaining any economic benefit from an action that harms third parties is enough to constitute liability, even when the person who has carried out such action is not the one who benefits from them. An example of the application of this principle is the economic benefit obtained by the employer through the injuries caused by his employee. This principle is identifiable in all the civil codes of the region.¹⁷ Another principle that serves to incorporate distributive justice in a tort liability system is *res ipsa loquitur*. The latter will be addressed later.¹⁸

13. Hanoch Sheinman, *Tort Law and Distributive Justice*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 354-84 (John Oberdiek ed., Oxford U. Press 2014).

14. Richard J. Peltz-Steele, *Wrongs, Rights, and Remedies: A Yankee Romp in Recent European Tort Law*, 26 IND. INT'L & COMP. L. REV. 102, 104 (2016).

15. Latin aphorism which translates as "the one who benefits from an activity has to bear the risk it originates."

16. Fernando Reglero Campos, *Capítulo II. Los sistemas de responsabilidad civil*, in I TRATADO DE RESPONSABILIDAD CIVIL 281 (5th ed., L. Fernando Reglero Campos & José Manuel Busto Lago eds., Thomson Reuters-Aranzadi 2014) [hereinafter TRATADO DE RESPONSABILIDAD CIVIL].

17. GUAT. CIV. CODE arts. 1662, 1672; EL SAL. CIV. CODE art. 2073; HOND. CIV. CODE art. 2241; NICAR. CIV. CODE art. 2514; COSTA RICA CIV. CODE art. 1048; and PAN. CIV. CODE art. 1650.

18. See *infra*, Part. III. B.3. *Acts of Things*.

A. The Criteria for the Imputation of Tort Liability

As previously stated, corrective justice is usually manifested through fault and negligence based liability models, constituting a more traditional and voluntarist version of tort liability.¹⁹ Corrective justice focuses on the behavior of the person that has caused the harm, whether the person has complied with the usual level of diligence imposed by law, while reproaching some specific behaviors.²⁰

It is possible for some legal systems to have additional requirements for the configuration of these types of liability, such as the duty of care, for example, or the existence of lack of foreseeability and prudence. It is also possible for legal systems to restrict the scope of tort liability, limiting its application to personal injuries or property damages.²¹ Such diversity of subjective criteria has been the cause of extensive doctrinal debates in other parts of the world, aiming to establish their actual suitability in relation to certain types of injuries.

Peña López discusses the test of predictability or avoidability of harm, explaining that negligence can be established from foreseeable or avoidable harm even when due diligence has been applied. This entails that exoneration will be available if it is possible to demonstrate that such harm is unpredictable and inevitable.²² It means that one must exercise the utmost diligence to ensure that no injury is caused because otherwise, getting rid of the imputation will

19. When analyzing the concept of negligence, it is necessary to stop for a moment and focus on its standard of care, which is crucial to understand the adequacy of the rules governing it. These rules should pinpoint the standard of care that needs to be taken by the potential tortfeasor in order to avoid liability entirely. Therefore, taking the necessary care to avoid harm, also avoids compensation. See MICHAEL FAURE, *DETERRENCE, INSURABILITY, AND COMPENSATION IN ENVIRONMENTAL LIABILITY—FUTURE DEVELOPMENTS IN THE EUROPEAN UNION* 22 (Springer 2003).

20. Fernando Peña López, *El criterio de imputación (I. Generalidades)*, in *RESPONSABILIDAD CIVIL EXTRA CONTRACTUAL*, *supra* note 1, at 102.

21. Cees Van Dam, *European Tort Law: Features of a Diverse Landscape*, in *THE CAMBRIDGE COMPANION TO EUROPEAN UNION PRIVATE LAW* 167-68 (Christian Twigg-Flesner ed., Cambridge U. Press 2010).

22. Fernando Peña López, *El criterio de imputación (II. La Culpabilidad)*, in *RESPONSABILIDAD CIVIL EXTRA CONTRACTUAL*, *supra* note 1, at 119.

be almost impossible. Interestingly, Cabanillas Sánchez suggests that when the required level of diligence is much more rigorous than usual, the objectification of tort liability occurs.²³

The objectification of tort liability starts by including pseudo-objective imputation criteria in civil codes. Examples are rebuttable presumptions regarding the existence of fault or the exhaustion of due diligence.²⁴ In European law, an example of such regulation is section 836 of the German BGB²⁵ that imposes a rebuttable presumption of fault on the owner of buildings that when collapsing can harm third parties or their property, allowing the defendant to be exonerated if demonstrating having acted diligently to avoid such harm.²⁶

In the Central American civil codes, the use of rebuttable presumptions is very similar to the German model. Here pseudo-objective criteria are used to define liability for the acts of others.²⁷ However, in art. 1648 of the Guatemalan Civil Code it is possible to observe a different and much broader example, since the rebuttable presumption of fault is not limited to such specific cases. In this model, the presumption of fault is general. Regardless of the case, in order to have the right to compensation, the harmed party is only required to prove the existence of an injury or a loss and not the wrongdoer's fault.²⁸

23. Antonio Cabanillas Sánchez, *El daño ambiental*, REVISTA DE DERECHO AMBIENTAL 9, 13 (1994).

24. Pena López, *supra* note 2, at 26.

25. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], as promulgated on Jan. 2, 2002 (BGB I, p. 42, 2909; 2003 I page 738), § 836.

26. Franz Werro, *Liability for Harm Caused by Things*, in TOWARDS A EUROPEAN CIVIL CODE 925-26 (4th ed., Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud Hondius, Chantal Mak, & Edgar du Perron eds., Kluwer 2011) [hereinafter TOWARDS A EUROPEAN CIVIL CODE].

27. EL SAL. CIV. CODE art. 2073; HOND. CIV. CODE art. 2237; NICAR. CIV. CODE art. 2512; COSTA RICA CIV. CODE art. 1048; and PAN. CIV. CODE art. 1645.

28. The Civil Chamber of the Guatemalan Supreme Court of Justice has ruled on the matter in Nov. 28, 2007, stating that such a rule establishes the right of the defendant to contribute to the evidentiary process in order to weaken the presumed fault, but a correlative right is recognized to the plaintiff, who is only required to prove the existence of an injury, but not the defendant's fault. *See* Ruling of the Civil Chamber of Nov. 28, 2007 (Sentencia [S.] No. 462-2006, Nov. 28, 2007,

Pseudo-objectification of this sort of imputation criteria can also be found in the way that harm caused by animals is regulated. Both the Salvadorian Civil Code (art. 2077) and the Nicaraguan Civil Code (art. 2513) impute liability to the owner or the mere holder of the animal. But in the case of stray animals, animals that have been released, or animals that have fled, in order to impute liability, the owner or the holder should be responsible for releasing the animal or letting it escape previously to the occurrence of the harm object of the claim.

A third possibility of pseudo-objectification is offered by the injuries caused by the acts of things. In the Salvadoran Civil Code (art. 2079), liability for injuries caused by a thing that falls or is thrown from the top of a building is imputable to anyone who inhabits that part of the building, unless it is proven that the deed was exclusively carried out by someone in a faulty or fraudulent manner.

The appearance of these pseudo-objective criteria is indeed a reflection of the limited scope and anachronism of fault-based liability in the actual state of things. Fault-based liability corresponds to a reality that was typical of the nineteenth century or in preindustrial societies. Undoubtedly, the advent of industrialization has forced the revision of the system that has been put in place in order to assure the distribution of losses, thus, contemplating the possibility of including objective criteria instead.

This process of objectification certainly did not stop there. Strict liability regimes based on risk are available to date. They are a consequence of searching for possible alternatives to the traditional civilian mechanisms, due to a general understanding of the benefits that certain modern technologies bring to the community, and avoiding the need to resort to their prohibition. As a doctrine, strict liability positively reflects the spirit of sustainable development.

Objective imputation criteria are used to determine the liability of the wrongdoer of harmful actions or omissions, when these convey risks for others, regardless of whether or not there has been fault on their part; or, in the case of negligent behavior, to determine if the transgressor has acted with the maximum degree of care or not. These criteria are based on the agent's activity and not on its behavior, by focusing instead on the victim's due protection.²⁹ The logic used assumes that such activity is abnormal or extraordinary, and therefore it cannot be safely developed, despite the degree of diligence used.³⁰

If economic analysis is added to the mix, it is possible to conclude that when strict liability is applied, the burden of suffering all the social costs of the loss or injury therewith imposed on the tortfeasor has a precautionary effect. This is achieved by forcing the potential wrongdoer to take all the needed safeguards in order to bring his activity closer to the optimal level of care (sometimes even above the required level), with the objective of minimizing the expected costs.³¹

The fact that it is increasingly common to find strict liability rules in the Central American civil codes speaks of a new understanding of tort liability, which tends to socialize the economic losses increasingly. This aims at improving the position of the victims, by balancing their interests with those of the wrongdoers,³² while also balancing the distribution of losses caused, without

29. Roberto Paulino de Albuquerque Júnior, *Notas sobre a Teoria da responsabilidade Civil sem dano*, 6 REVISTA DE DIREITO CIVIL CONTEMPORÂNEO 89, 90 (2016).

30. Agustín Viguri Perea, *La responsabilidad civil por inmisiones*, in III CONFERENCIAS SOBRE EL MEDIO AMBIENTE. MUNICIPIO Y URBANISMO 115 (Agustín Viguri Perea ed., Comité Econòmic i Social de la Comunitat Valenciana 2000).

31. FAURE, *supra* note 19, at 22.

32. NICOLAS ROUILLER, INTERNATIONAL BUSINESS LAW—AN INTRODUCTION TO THE LEGAL INSTRUMENTS AND TO THE LEGAL ENVIRONMENT OF BUSINESS FROM AN INTERNATIONAL PERSPECTIVE 426 (Schulthess 2015).

implying an extra effort from society in general when trying to avoid harm.³³ Without a doubt this is a “win-win” solution.

B. Strict Liability in Central America

1. Vicarious Responsibility

Strict liability usually extends to cases dealing with vicarious liability. Some examples are the employer’s liability for the actions of its employees,³⁴ or the CEO’s liability for business activities.³⁵ The modern theory of vicarious liability is not based on fault, but on political and social considerations, as commented by Kodilinye.³⁶ This change is linked to the obvious unfairness and the fact that it is legally unjustifiable for a person who has not committed any fault to be responsible for another’s harmful behavior. In reality, it is possible to argue that a person who employs others in order to advance his or her own interests, especially if these are economic, should be held liable for any harm caused by the actions of such employees. Simultaneously, it can also be argued that the innocent victim must be able to sue someone who is financially capable of responding for that loss.

In Central America, this form of strict liability is present in Guatemala (arts.1663 and 1664) and in Costa Rica (art. 1048).³⁷ The logic used is that applying strict liability should derive from the possibility of obtaining economic profit. In other words, strict liability

33. JOHN M. CHURCH, WILLIAM R. CORBETT, THOMAS E. RICHARD, & JOHN V. WHITE, *TORT LAW, THE AMERICAN AND LOUISIANA PERSPECTIVES* 7 (Vandeplas Publishing 2008).

34. CODE CIVIL [C. CIV.][[CIVIL CODE] art. 1242, §5 (Fr.). *See* Reglero Campos, *supra* note 16, at 286.

35. BGB section 31 (Ger.); Gerhard Wagner, *Vicarious Liability, in TOWARDS A EUROPEAN CIVIL CODE*, *supra* note 26, at 912-13.

36. GILBERT KODILINYE, *COMMONWEALTH CARIBBEAN TORT LAW* 334 (5th ed., Routledge 2015).

37. In the case of Costa Rica, the lawmakers provided two different systems in this article, COSTA RICA CIV. CODE art. 1048, (1) pseudo-strict liability, by including a rebuttable presumption of fault, and (2) strict liability in the case of hazardous activities. *See* VÍCTOR PÉREZ VARGAS, *DERECHO PRIVADO* 563-72 (4th ed., Litografía e Imprenta Lil 2013).

rules should be linked with the principle *ubi emolumentum, ibi onus*, by means of which, the simple fact of obtaining an economic benefit through an action that harms third parties in any way, is enough cause for making the employer liable.

In Guatemala (art. 1665)³⁸ and Panama (art. 1645), vicarious liability also extends to the state, which may be liable for any harm caused by public servants in the exercise of their duties. This is an example of fault *in vigilando*. However, only in Guatemala it is possible to find true strict liability, because in the Panamanian case, fault or negligence are required. In Honduras (art. 2237) vicarious liability is limited to any harm caused by a special agent acting in the name of the state, and not for public servants exercising their duties. In this case, they are solely responsible for their actions. In the case of Costa Rica (art. 1048), there is no specific mention of vicarious liability in the case of the state, but the general clause available could be applied.

In these jurisdictions, the strict vicarious liability of the state is construed as joint liability. This approach is available in Guatemala, Honduras, and Costa Rica. In Guatemala, Constitutional art. 155 establishes joint liability on the part of the state or the state institutions where the wrongdoer is employed. This liability is further clarified in the Civil Code, through a strict liability regime. In Honduras, art. 2238 establishes a joint liability regime. In the case of Costa Rica, art. 1048 contains a general clause for joint liability. It is possible to assume that it could be also applied to the state.

38. GUAT. CIV. CODE art. 1665, originally, this article stated that such liability was subsidiary. However, it was amended by the Constitution through its art. 155. From then on, this became a joint liability, and it has a statute of limitation of twenty years. Moreover, the Guatemalan Constitutional Court, in a judgment of Dec. 6, 2004, said that in such cases the “jointness” attached to this form of liability is passive, giving the claimant a faculty of choice, having the possibility of targeting either, or if it is more convenient for his need, targeting both simultaneously. Nonetheless, it is understood that if the claim is directed against only one of them, it should entail the possibility of entirely covering the cost of compensation.

Costa Rican jurisprudence has also indicated that the state and its agencies shall be liable for all the losses caused by their operations, whether they are legitimate or illegitimate, normal or abnormal. The only exceptions allowed are *force majeure*, contributory negligence, or an action of a third party. It establishes requirements such as that the activity is actually generated from the state, that at least adequate causality can be established, the existence of a compensable loss or harm, and that the loss or injuries should be unlawful, true, effective, real, evaluable, and individualizable.³⁹

2. Damages Caused by Animals

A second example of strict liability is the one allocated on the owners or keepers of animals that cause any kind of damage. This is regulated in art. 1669 of the Guatemalan Civil Code. This form of liability is definitely strict because it reaches the owner, even if the animal was stray or had escaped without the owner's fault. The only exception admitted is the provocation or fault of the victim. The Honduran and Panamanian Civil Codes include similar regulations.⁴⁰ In both cases, liability is also strict, but besides allowing contributory negligence as a defense, these codes also allow the use of *casus fortuitus* or fortuitous event.

3. Acts of Things

Strict liability for the act of things is a third example.⁴¹ It relates to those cases where the head of the family is strictly liable for the

39. Judgements of the Corte Suprema de Justicia, Sala Primera [First Chamber of the Supreme Court of Justice of Costa Rica], no. 025-F-99, Jan. 22, 1999 and no. 589-F-99, Oct. 1, 1999; and Judgment of the Corte Suprema de Justicia, Sala Tercera [Third Chamber of the Supreme Court of Justice of Costa Rica], no. 252-F-01, Mar. 28, 2001.

40. HOND. CIV. CODE art. 2239; PAN. CIV. CODE art. 1647.

41. The act of things has been included in the French Civil Code, C. CIV. art. 1244, as well as in the Spanish Civil Code, CÓDIGO CIVIL [C.C.] art. 1910. See Werro, *supra* note 26, at 925-27; Ordonnance 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations [Ordonnance no. 2016-131 of Feb. 10, 2016 on the Reform of Contract Law, the General Scheme and Proof of Obligations], JOURNAL OFFICIEL DE LA

damages caused by the things that fall or are thrown from the house in which the family lives.⁴² In Central America, the regulation regarding this type of liability also follows this logic, but in some cases it has been extended to the damages caused by the ruin or collapse of a building. The Guatemalan Civil Code (art. 1671) includes a strict liability solution. It states that the owner is unconditionally liable, adding the possibility of joint liability for the constructor, if the harm originates from a construction defect. The Panamanian Civil Code (art. 1652) also uses strict liability, by making liable the head of the family who lives in a building or part of it. The Salvadoran Civil Code (art. 935) establishes that if a building falls because of its bad condition, and thereby the neighbors are harmed in any way, the caused injuries must be compensated, except in the instance of a fortuitous event.

It is also widely recognized by legal authors that numerals 2 and 4 of art. 1908 of the Spanish Civil Code, which refer to the damage caused by excessive smoke and by infectious materials, regulate a sort of strict liability. It is noteworthy that some legal authors (fewer, perhaps) also acknowledge that numerals 1 and 3 of that same article regulate cases of strict liability as well. These numerals refer to the explosion of machines, inflammation of explosive substances, and falling of trees.⁴³ This type of liability is also regulated in some Central American civil codes. In Honduras (art. 2241) and Panama (art. 1650), the wording is almost identical, and in Guatemala (art. 1672) the wording has some minor changes.

According to the legal doctrine, the notion of liability for the acts of things follows the principle *res ipsa loquitur*, since the damages caused to the neighboring estates are a result of the owner's lack of

RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], Feb. 10, 2016, No. 0035, NOR: JUSC1522466R; Royal Decree of July 24, 1889 (Real Decreto (R.D.), B.O.E 1889, 206) (Spain).

42. Reglero Campos, *supra* note 16, at 286.

43. Luis Martínez Vázquez de Castro, *La protección civil del medio ambiente*, in PRIMERAS CONFERENCIAS SOBRE EL MEDIO AMBIENTE 10 (Agustín Viguri Perea ed., Comité Econòmic i Social de la Comunitat Valenciana 1999).

care. The principle *res ipsa loquitur* corresponds to a technique based on *prima facie* evidence, which serves to reduce the uncertainty generated by the obligation of proving the causal link, which sometimes could be a real obstacle in order to achieve the complete and total compensation of the victim. *Prima facie* evidence can be identified under different names in different legal systems, such as *Anscheinsbeweis der Kausalität* in Germany or *causalité virtuelle* in France.⁴⁴

Some of these legal authors argue that applying this principle implies recognizing a form of strict liability based on negligence. In this case it is enough to demonstrate the existence of actual dangerousness unlike with fault based liability.⁴⁵ However, it is worth mentioning that there are other authors who point out that liability based on *res ipsa loquitur* is not really strict, because the effect is only the reversal of the burden of proof. In those cases, the defendant still has the option of proving that his behavior was neither negligent nor faulty.⁴⁶ If this doctrinal position is assumed as correct, one could not speak of a true form of strict liability, but of a pseudo-objectification of liability. Although viewed from a purely economic perspective, the effect is rather similar, since both negligence and strict liability induce risky actors to assume those precautions for which the cost is justifiable.⁴⁷ Regardless, if only the wording of these provisions is taken into account, it is evident that the lawmakers did not resort to the use of rebuttable presumptions. They actually deem the wrongdoer as liable in all the cases.

44. Fernando Reglero Campos & Luis Medina Alcoz, *Capítulo V. El nexo causal. La pérdida de oportunidad. Las causas de exoneración de responsabilidad: culpa de la víctima y fuerza mayor*, in I TRATADO DE RESPONSABILIDAD CIVIL, *supra* note 16, at 859.

45. JAVIER TAMAYO JARAMILLO, I DE LA RESPONSABILIDAD CIVIL 5 (Temis 1986).

46. KODILINYE, *supra* note 36, at 99.

47. Mark A. Geistfeld, *Fault Lines in the Positive Economic Analysis of Tort Law*, in 1 RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 157 (Arlen Jennifer ed., Edward Elgar 2013).

4. *Unlawful Effects of Lawful Activities*

The Costa Rican Supreme Court of Justice has pointed out that, historically, the notion of liability for lawful activities has been a prevailing criterion for applying strict liability. The court states that it should not be the victim's responsibility to prove the causal link between the tortious action and the sustained injuries or losses, when the tortfeasor has assumed the risk knowingly, by deciding to carry out a risky activity, even when the activity is a lawful one, contrary to what is expected to happen when dealing with fault-based liability.⁴⁸ This position has been reaffirmed by the Costa Rican High Court of Criminal Cassation in a judgement referring to the civil liability resulting from the commission of a crime.⁴⁹ Moreover, strict liability for the unlawful effects of lawful acts, is also applicable to the state and its agents, as it has been referred to by the Constitutional Chamber of the Costa Rican Supreme Court of Justice.⁵⁰ This opinion goes hand in hand with the recognition that this legal system makes of the abuse of rights doctrine in art. 22 of the Costa Rican Civil Code.

Even though it is not expressly mentioned in the aforementioned rulings, it is easy to deduce that the opinions are based on the notion

48. Judgement of the Corte Suprema de Justicia, Sala Primera [Supreme Court of Justice of Costa Rica, First Chamber], no. 398, June 6, 2001.

49. The High Court of Criminal Cassation has said that the foundation of strict liability is the social recognition that certain activities, while being legitimate and necessary for the actual social and technological development, concomitantly are risky and possibly tortious. In those cases, the risk should not be assumed by the one suffering the effects, but rather by the one obtaining any kind of benefit from such activity. *See* Judgment of the Tribunal Superior de Casación Penal [Superior Tribunal of Criminal Cassation of Costa Rica], no. 493-2004, May 20, 2004.

50. The Constitutional Chamber has stated that some fundamental rights, such as the right to a clean environment, may impose some limits on the scope of the state's activity. These are limits that need to be considered and established because of the role of the state. A role that includes a mandate to guarantee, defend, and preserve those rights. Therefore, the state has the obligation of omitting some of its own interventions, even if they are lawful, especially when their foreseeable results may harm in any way fundamental rights recognized by the Constitution. *See* Ruling of the Corte Suprema de Justicia, Sala Constitucional [Supreme Court of Justice of Costa Rica, Constitutional Chamber] no. 3248-2002, Apr. 9, 2002.

of unlawfulness of the effects of lawful conducts, understanding that even if a behavior is lawful, it may cause damages to third parties,⁵¹ affecting subjective rights or legally protected interests. In this case, the causation of such damages is what is deemed unlawful or illegal. This qualification is to be achieved when the duty of care is not met, putting legally protected interests at risk.⁵² Unlawfulness, as a presupposition of tort liability, implies not only a kind of objectification, but the recognition that the lives of others can be negatively affected by the decisions that a person may take, even when this person is legally enabled by rules that have not been analyzed properly.⁵³

This is one argument in favor of the need of readjusting the regulations regarding tort liability in the civil codes of Guatemala, El Salvador, Honduras, Nicaragua, and Panama,⁵⁴ because it is obvious that the lawmakers of the region did not include the concept of liability for lawful acts, contrary to what happens in Costa Rica, where this form of liability has been introduced in art. 1043.

51. Rivero Sánchez says that the liability for lawful act is a general principle of law under which even when a behavior is authorized by the law, but it causes harm of some kind, it must be accompanied by an adequate scheme of compensation for the damages caused. See JUAN MARCOS RIVERO SÁNCHEZ, III RESPONSABILIDAD CIVIL 61 (2d ed., Biblioteca Jurídica Diké 2001).

52. Guilherme Henrique Lima Reinig, *Abuso de direito e responsabilidade por ato ilícito: críticas ao enunciado 37 da 1.a Jornada de Direito Civil*, 7 REVISTA DE DIREITO CIVIL CONTEMPORÂNEO 61, 87 (2016).

53. David Howarth, *The General Conditions of Unlawfulness*, in TOWARDS A EUROPEAN CIVIL CODE, *supra* note 26, at 874-81.

54. While it is true that Title VI of the Guatemalan Civil Code is called "Obligations derived from lawful acts without previous agreement," the lawmakers opted for a *numerus clausus* system, leaving out a general rule that could govern atypical situations. In the case of Honduras and Panama, lawmakers included general concepts related to quasi contracts in the Civil Code, but not a general rule regarding liability for lawful acts. In Nicaragua, even though the wording of art. 2507 of the Civil Code is almost identical to that of art. 1043 of the Costa Rican Civil Code, it only refers to liability for lawful acts, when they affect individuals that presumably have consented to them.

5. Abuse of Rights

The abuse of rights is regulated in almost all the Central American civil codes. Jordá Capitán is of the opinion that this doctrine represents a rupture from the Roman Law principle of *qui iure suo utitur neminem laedit*, by which it was understood that the exercise of one's legal rights could not cause harm to another.⁵⁵ Brazilian legal doctrine has actually described it as another form of strict liability, attending to its finalist nature, and seeing it as totally independent from fault, and perfectly useful as legal basis for an inhibitory action.⁵⁶

Art. 1653 of the Guatemalan Civil Code regulates the abuse of rights in the section dealing with tort liability. According to this article, the legitimacy of any right is limited by the notions of bad faith and excess—extremes that need to be proved in court. According to the Civil Chamber of the Supreme Court of Justice in this country, the test for bad faith and excess has to be based on the idea that the exercise of one's rights always has to have the purpose of defending legally protected interests.⁵⁷

In the case of the Costa Rican Civil Code, the abuse of rights is regulated in art. 22. This article states that the law does not protect the abuse of rights or their antisocial exercise. Any act or omission in a contract that clearly exceeds the normal limits of the exercise of a right, thus causing harm to third parties or to the counterparty, will lead to the corresponding compensation and the adoption of judicial or administrative measures in order to prevent the persistence of such abuse. The wording used is rather unfortunate because it limits its application exclusively to contractual liability cases.

55. EVA JORDÁ CAPITÁN, EL DERECHO A UN MEDIO AMBIENTE ADECUADO 268-69 (Aranzadi 2002).

56. Reining, *supra* note 52, at 64-66.

57. Ruling of the Corte Suprema de Justicia, Clase Civil, [Supreme Court of Justice of Guatemala, Civil Chamber], no. 141-2000, Feb. 26, 2001, GACETA DE LA CORTE SUPREMA DE JUSTICIA [Gazette of the Supreme Court of Justice].

In neither Honduras, El Salvador, nor Nicaragua has the abuse of rights been regulated yet. However, the Nicaraguan Supreme Court of Justice has referred to the doctrine of abuse of rights in a ruling of June 12, 1948 (Judicial Bulletin 14281), noting that the principle *nemo damnum facit qui suo jure utitur*⁵⁸ cannot be applied in an absolute manner because it would lead to many abuses, especially when someone acts with recklessness or in bad faith, damaging others. That is why jurisprudence has attenuated the rigor of the principle, meaning that, nowadays, no liability is possible when one's rights have been used with prudence and in good faith. Escobar Fornos also comments that in regards to Nicaragua, this doctrine should only be applicable when dealing with fault-based liability, since without fraud or fault there will be no abuse.⁵⁹

This position coincides with Von Bar's. He explains that in legal systems that do not have special provisions in relation to the abuse of rights, they can perfectly operate under a general clause for fault based liability because it is enough to have the concept of fault included in the regulation. Nevertheless, the clause of abuse rights is an advantage because it serves to dissolve the perception of subjective rights being absolute, which could be understood as a form of impunity for their holders.⁶⁰

In Panama, this principle is not regulated yet, but it has been addressed in judgment no. 484-2007, July 24, 2008. There, it was ruled that this doctrine arises from the need to affirm the existence of subjective rights and the care that is needed to avoid the excesses that may emerge when they are exercised in such a way that they do not become unfair. In order to consider the exercise of a right as

58. Latin maxim that can be translated as: no one can cause any harm when exercising their right.

59. Escobar Fornos indicates some examples where it could be inferred, such as in the case of the resignation of the partners in a company of limited duration, in the obligations concerning an agent after his resignation, or in the obligations concerning the cohabitation of the spouses. See IVÁN ESCOBAR FORNOS, II DERECHO DE OBLIGACIONES 252-56 (Imprenta UCA 1989).

60. CHRISTIAN VON BAR, I THE COMMON EUROPEAN LAW OF TORTS 56-57 (Oxford U. Press 1998).

abusive, its effects should be contrary to the economic and social aims of the law, which can be equated with the interests of the state itself.

6. Available Defenses

Liability models usually require some flexibility in order to accommodate to the specific circumstances of the deeds generating losses or injuries. Therefore, it is normal for them to include some kind of exemptions or mitigating circumstances. Oftentimes, their availability depends on the type of liability the model is dealing with because they could be different for fault-based liability and for strict liability. The available exceptions normally are: (1) fortuitous event, (2) *force majeure*, (3) contributory negligence, (4) necessity, and (5) statute of limitations.

In order to understand their scope, the first three need to be discussed simultaneously. Fortuitous event refers to statistically unpredictable events and is applicable both in fault based liability and strict liability.⁶¹ *Force majeure* could also be used in both cases and refers to unavoidable events. This defense can be used to determine if a harmful action actually could be imputed to the alleged tortfeasor for carrying it out voluntarily, since it makes no sense to consider a person as liable if they could not influence the inflicted risk.⁶²

The notion of contributory negligence implies that the faulty negligent behavior is actually caused by the victim who is, partially or totally, responsible for triggering the losses or injuries affecting him. Its application is in no way connected to the existence of an outstanding obligation owed by the victim to the wrongdoer. It should be enough to prove that the individual suffering the damages did not apply reasonable care, therefore contributing to his own harm.⁶³ Compensation should be reduced proportionally, and in

61. Reglero Campos & Medina Alcoz, *supra* note 44, at 895.

62. FAURE, *supra* note 19, at 53.

63. NATALIE PERSADIE & RAJENDRA RAMLOGAN, COMMONWEALTH CARIBBEAN BUSINESS LAW 264-65 (3d ed., Routledge 2016).

some cases even denied, depending on the weight of the contribution that the victim's faulty or negligent action represents in relation to the effect suffered. Some behaviors that could be considered as contributory negligence are the lack of care, renouncing to implementation of preventive measures, refraining from reacting, reacting weakly, reacting excessively, refusing to mitigate the effects of the inflicted losses or injuries, accepting the losses or injuries (*volenti non fit injuria*), or assuming unnecessary risks.⁶⁴

Article 34-D from the Panamanian Civil Code is the only one available in the region that recognizes the differences between fortuitous event and *force majeure*. It establishes that a fortuitous event implies the occurrence of unpredictable natural events, and that *force majeure* is caused by irresistible human deeds. However, although legal doctrine has clearly instituted the differences between these two defenses, it is still possible to find legal systems in Central America where these are used indiscriminately as if they were synonyms. This is the case of art. 43 of the Salvadorian Civil Code.⁶⁵ This is also the case of art. 2512 from the Nicaraguan Civil Code, regarding vicarious liability. In this specific case, the wrongdoer is not considered liable if it is possible to prove that it was not in his reach to impede the harmful act, by having common and ordinary care or watchfulness. It is also important to note that although the

64. ROUILLER, *supra* note 32, at 433-37.

65. It is noteworthy that the Salvadoran case law, while recognizing the established doctrinal differences between these two defenses, continues to maintain as valid the original wording used by the lawmakers, where they are incorporated as equivalent, stating as a justification that their practical effects are the same, and that both defenses are different expressions of a general category called "Just Cause." This case law has also established its basic requirements: (a) that the harmful act is beyond the control of the alleging party, (b) that the harmful act is unforeseen and insurmountable, and (c) that its consequence is a permanent inability to perform an obligation. *See* Judgment of the Cámara Segunda de lo Civil de la Primera Sección Del Centro, San Salvador [Second Civil Chamber of the First Section of the Center of San Salvador] no. 14-2MC-14-A, Nov. 26, 2014; Judgment of the Cámara de la Tercera Sección del Centro, San Vicente [Chamber of the Third Section of the Center, San Vicente], no. C-05-PC-2015-CPCM, Feb. 16, 2015; and Judgment of the Cámara de la Segunda Sección de Occidente, Sonsonate [Chamber of the Second Section of the West, Sonsonate], no. INC-15-CPCM-2015, June 9, 2015.

defense of fortuitous event is available in all these legal systems, courts and legal experts seem to prefer the use of *force majeure*⁶⁶ and contributory negligence instead.⁶⁷

The use of *force majeure* in the case of strict liability in Central America is very limited, following the notion posed by legal doctrine that in such cases, one should resort to the use of fortuitous event as a defense.⁶⁸ *Force majeure* is available in Guatemala (art. 1672), Honduras (art. 2241), and Panama (art. 1650) in the case of strict liability that originates from the fall of a tree.

In most of the other legal systems of this region, *force majeure* is used as a defense in the case of liability for damage caused by animals, according to art. 2239 from the Honduran Civil Code, art. 2513 from the Nicaraguan Civil Code, and art. 1647 from the Panamanian Civil Code. It is also used in the case of liability for damage caused by motive machinery, imposed on the person who benefits from it, as it is regulated in art. 1048 of the Costa Rican Civil Code. In the case of art. 1650 of the Guatemalan Civil Code, *force majeure* is regulated as a defense for the liability originated from the use of machinery, appliances, and dangerous substances.

More or less, the same happens in the case of contributory negligence. Only art. 1645 from the Guatemalan Civil Code actually

66. In the Judgment of the Tribunal de Apelación de Sentencia Penal, II Circuito Judicial de San José [Criminal Court of Appeals, II Judicial Circuit of San José], no. 00418, May 15, 2003, the Court said that while it is true that there is a tendency to equate *force majeure* with the fortuitous events, because of their almost identical effects, the Costa Rican civil jurisprudence, since 1942, has made distinctions between the two defenses. It has argued that such differentiation was incorporated by the lawmaker, who sought important to establish strict liability in the event of unforeseen circumstances resulting from the normal development of the activity and risk created, and not in the case of *force majeure*, because in this case, forces different from the risk operate. Hence, the difference between the strict liability based on a fortuitous event and fault-based liability is predictability, because in the first case damage is unpredictable, something that is not possible when dealing with fault. These two defenses can also be differentiated upon their effects, since *force majeure* frees from liability in every case, because of its external origin.

67. Reglero explains that one of the characteristics of faultless liability, for example, is precisely the reduced number and scope of the available defenses. See Reglero Campos, *supra* note 16, at 309.

68. Van Dam, *supra* note 21, at 168.

includes it, as a general defense for any kind of tort liability. Central American lawmakers have also allowed the use of contributory negligence as a defense against the employer's vicarious liability, following the French model.

In the case of necessity, it presupposes that damages to legally protected interests have occurred when the victim of an unjustified attack tries to defend himself. In order to use this defense, the damage caused has to be proportional to the attack suffered. Following this logic, it becomes obvious that the real problem behind using this solution lies in the possibility of determining a valid hierarchy for the legally protected interests. Art. 1658 of the Guatemalan Civil Code uses necessity when the wrongdoer is trying to protect himself or a third party from imminent danger. The effect in this case is to transform the unlawful action causing the losses or injuries into a lawful one. Besides this sole example, the Guatemalan Civil Code actually considers that a state of necessity is insufficient to exempt the perpetrator from his liability.

Extinctive prescription (statute of limitation) is probably the most radical of all the defenses analyzed in this section due to its paralyzing effect.⁶⁹ Once the period set by law has elapsed, be it after the harmful action has occurred or once its effects have been suffered by the victim, any claim for recovery becomes impossible. Guatemala offers two different statutory periods: a general timeframe of one year (art. 1673), and a special timeframe of twenty years in the case of the state's vicarious liability for the acts of public servants (regulated by the Constitution). In Panama (art. 1706), the timeframe is one year for fault based or negligence based liability claims. In this case, the statutory period starts from the moment the victim realizes there has been a loss or injury. This can be interpreted as the moment when the effects are known.

The Honduran and Nicaraguan Civil Codes are not as specific as the Guatemalan and Panamanian counterparts regarding this topic.

69. ROUILLER, *supra* note 32, at 432.

In Honduras (art. 297) and in Nicaragua (art. 924), the Civil Codes establish that the statute of limitations starts the day the claim could be filed. The wording is rather imprecise; nevertheless, the interpretation should be similar to the one suggested in the case of Panama, meaning that it starts the moment the effects are known. In El Salvador (art. 2254) and Costa Rica (art. 868), the Civil Codes incorporate general statutes of limitations. In the first, the statutory period included in the general regime is of ten years for civil actions based on executable titles and of twenty years for ordinary civil actions; in the latter, the period is of ten years for all cases.

IV. THE EFFECTS OF THE TORT LIABILITY MODELS AVAILABLE IN THE CENTRAL AMERICAN CIVIL CODES

As it was mentioned before, in addition to prevention, deterrence is a foreseeable effect of tort liability systems. It originates from the obligation to compensate imposed on the tortfeasor. Compensation is dissuasive because it seeks to avoid the possibility of the transgressor carrying out further harm. At the same time, it may have an exemplary effect for other potential transgressors.⁷⁰ It is possible to perceive this dissuasive effect from the way in which the general clauses for tort liability are worded. From the beginning, they already pose a threat for those who cause any damages: compensation.

However, deterrence can be viewed either from an *ex ante* or an *ex post* perspective. Faure points out that from an *ex ante* perspective, tort liability can be understood as an instrument that guides the behavior of people who could be involved in an accident.⁷¹ But from an *ex post* perspective, in Gilead's opinion, that deterrence can be understood as the solution proposed by tort law to the problem posed by the economic distortion triggered by the externalities caused by

70. H. BEAU BAEZ III, *TORT LAW IN THE UNITED STATES* 30 (2d ed., Kluwer 2014).

71. Michael Faure, *Tort Liability in France: An Introductory Economic Analysis*, in 6 *LAW AND ECONOMICS IN CIVIL LAW COUNTRIES* 169-81 (Bruno Deffains & Thierry Kirat eds., JAI 2001).

the injuries or losses suffered.⁷² Nevertheless, it is also possible to find legal authors who believe that this *ex post* effect is precisely what makes tort law ineffective from a preventive point of view.⁷³ This is something one can easily agree with because, in order to claim any kind of compensation, the harm suffered may be current or future, but inevitably, it must be true. And besides that, this fact has to be proven in court.⁷⁴

Having said that, there is a possibility contained in these codes that can actually have a real preventive effect: the inhibitory action.⁷⁵ This inhibitory action can be admitted simultaneously with a tort liability action. Art. 479 of the Guatemalan Civil Code, art. 1680 of the Nicaraguan Civil Code, art. 405 of the Costa Rican Civil Code, and art. 569 of the Panamanian Civil Code contain almost identical regulations to the art. 590 of the Spanish Civil Code where this solution has already been tried. In the case of art. 858 of the Salvadorian Civil Code and art. 835 of the Honduran Civil Code, the wording varies a little, but the spirit is the same: to avoid the causation of harm.

This inhibitory action is a very broad figure that, according to Llamas Pombo, complies with a triple function: injunction, precaution, and compensation. Its taxative nature can be used not only to request the cessation of nuisances, but actually for all types of

72. Israel Gilead, *Harm Screening Under Negligence Law*, in EMERGING ISSUES IN TORT LAW 264 (Jason W. Neyers, Erika Chamberlain, & Stephen G. A. Pitel eds., Hart 2007).

73. Katja Fach Gómez, *Acciones preventivas en supuestos de contaminación transfronteriza y aplicabilidad del artículo 5.3 Convenio de Bruselas*, ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN (ZEUS) 583, 590 (1999).

74. Elena Vicente Domingo, *Capítulo III. El Daño*, in I TRATADO DE RESPONSABILIDAD CIVIL, *supra* note 16, at 330-331.

75. Llamas Pombo defines the inhibitory action as an order or injunction issued by the court at the request of an individual who believes or fears that harm could be inflicted, or when harm has already been inflicted, that it could be repeated, continued, or worsened. The injunction is addressed to the individual that is able to avoid such results, by adopting certain preventive behaviors, or by refraining from carrying out activities that could generate such negative results. See Eugenio Llamas Pombo, *La tutela inhibitoria del daño (la otra manifestación del derecho de daños)*, in V.V. A.A. II ESTUDIOS JURÍDICOS EN HOMENAJE AL PROFESOR LUIS DIEZ-PICAZO 2217 (Thomson 2003).

risky activities that meet the description found in the law. These provisions might be the only real option for a preventive effect that one could find in Central American tort law. The features required by regulation in order to apply this solution are (a) the menace of injury towards a legally protected interest; (b) an unlawful behavior; (c) a causal link between an action or omission and the actual damage; and (d) a material possibility of avoiding the causation of an actual damage.⁷⁶

V. CONCLUSIONS

Undoubtedly, tort law is one of the fundamental elements of any legal system. The very specific purpose of granting the reparation for the injustices caused by the effects of harmful activities is enough justification for such qualification. Nevertheless, the way its solutions are devised will determine tort law's real possibilities.

Traditionally, tort law has required evidence of fault or negligence in order to grant compensation for any wrongdoing. Evidence of causation between the action and the harmful effects has also been required. Nevertheless, industrialization and technological development have imposed a burden on these legal systems, forcing them to provide adequate solutions for the new risks facing humankind. From the perspective of tort law, this has meant an evolution from the traditional idea of penalizing negligence or fault to the protection of the legal interests, and thereby, the equitable compensation of the victims. This shift from corrective to distributive justice, from imputation to equity and deterrence, has also taken place in the Central American civil codes.

However, this evolution has proved to be slow, meaning that some very traditional features of the way civil law has approached tort liability are still available in these codes. For example, they all use a general clause system in order to define tort liability, although in the case of Guatemala, this clause is rather ample. The wording

76. *Id.* at 2221-24.

used describes not only fault and negligence based liability but strict liability as well.

Having said that, the evolution undergone by Central American civil law is evident when it is possible to find in these codes the use of pseudo-objective criteria in order to characterize tort liability. Once again, the Guatemalan Civil Code is the one that offers a very particular approach, resorting to a general rebuttable presumption of fault. Nonetheless, this evolution has not stopped there. Strict liability has also been integrated in some of these codes, except the Nicaraguan Civil Code, especially through the application of principles such as *ubi emolumentum, ibi onus* and *res ipsa loquitur*. In El Salvador, strict liability is used when establishing responsibility for the acts of things. Honduras, Costa Rica, and Panama have integrated this solution in an ampler way, but the Guatemalan Civil Code has the strongest commitment with this modern take on torts.

Besides the need to harmonize the way these civil codes approach strict liability, there are still some pending issues, such as the recognition of possible unlawful effects of lawful deeds or activities. None of these civil codes explicitly regulates this possibility. Only the Costa Rican jurisprudence has recognized it. Unlawfulness needs to be recognized and regulated as a feature of tort liability in order to alert judges that even acting with a lawful behavior is not a free pass and that even lawful deeds may entail responsibility. This gap has been somehow resolved in Guatemala and Costa Rica by including in the civil codes the doctrine of abuse of rights, although it is not exactly equivalent. Nicaragua and Panama are not that far behind, since their jurisprudence has already established the applicability of this doctrine as well. Nevertheless, Honduras and El Salvador still need to address this gap.

It is evident from this first approach that there is still a long way to go in order to achieve some level of harmonization regarding tort liability models. The national lawmakers have their work cut out for them in order to provide the users of these legal systems adequate

tools to face the challenges of the undergoing economic integration process.