

by Allan Garro

## Damages Compensation System Might Improve in Costa Rica

Costa Rica has always had a Justice system that can be likened to a maze of epic proportions where it was often easy to get lost or simply abandon the challenge of bringing a lawsuit to an end; many take between five and ten years to get resolved. The reasons are multiple: the lengthy and formalistic procedures, excess of appeals allowed, slow times to resolve by the Courts of Appeal, and the lack of training of judges in courts located in rural areas, to name a few.

The damage compensation system is also unfair, sometimes breaking the balance of the scales of Justice. The country has established an all-or-nothing system to compensate for damages to the victim, and it benefits the person or entity responsible for repairing the damages, protecting them from liability of any kind. The problem is that civil jurisprudence has established that the damages must be certain and present, often ignoring the liability for potential future harm to those who were damaged.

As an example, "Person A" rents a farm for 10 years to grow pineapple, for which he or she acquires equipment and hires employees. Just before starting the operation, "Person B" invades the farm, destroys the machinery, and prevents the farm from being cultivated. "Person A" then sues "Person B" for damages, being likely to get the value of the machinery, starting salaries of the employees, plus statutory interest on that investment. The existing system, however, does not grant "Person A" any compensation for any future profits they have lost.

In recent years a trend of indexing certain amounts awarded by the judges on issues of liability was instituted. Indexing means computing past damage amounts in a formula that arrives at present value. The formula used is based on changes in the Consumer Price Index whose computation is carried out by the Institute of Statistics and Census. Thus a person who claims an amount of

damages that should have been paid in 2008, and an award is granted in 2015, may request that the 2008 sum is converted to present value using the indexing tool prepared by of Statistics and Census.

This works well for determining the present value of past damages, but does nothing to calculate present value of future damages.

In recent times, however, a tendency to award future damages, based on a theory called "loss of opportunity," has been gaining strength. The loss of opportunity is defined as the disappearance of the real and serious chance of a favorable event. Under this theory the Plaintiff can be compensated for present losses as a result of asset impairments of economic nature, and the loss of opportunities to earn a profit or save certain costs in the future. To be granted, the opportunity has to be serious and have a reasonable chance of realization.

In Costa Rica this theory was derived from the French doctrine proposed by a university professor, Federico Torrealba Navas. For him, a main element of determining the amount of the future loss of opportunity is the interruption of the normal course of events by an action attributable to facts which can be demonstrated as being the cause of the elimination, or weakening, of the existing opportunity.

Thanks to Professor Torrealba Navas's theories, the Costa Rican courts granted such compensation in an arbitration process during 2001. The compensation was initially awarded in an arbitration procedure, and required that the same be approved by the courts.

It was not until 2009 that the Supreme Court issued a ruling which mentions the possibility that the loss of opportunity theory applied. The decision immediately raised a series of questions.

The decree stated there was a necessity for the Plaintiff to prove the previous existence of a situation of real advantage which was frustrated as a result of an unlawful action.

Finally, in 2012, the Supreme Court issued a judgment granting compensation for loss of opportunity arguing that, "...this Court considers that there is room for compensation of the financial injury resulting from unlawful conduct, which was following the allocation of a real and serious possibility of making a profit or future situation of advantage, not a mere chance, a hypothesis or a mere risk, as was said, but in a secured probability, a high degree of certainty for the realization of the final energy supply contract."

The case was a lawsuit started by a producer of electrical energy which was affected by ICE – the Costa Rican electricity company – by ICE's cancellation of the possibility of participating in a contract, after the Plaintiff had made a sizable investment. The Plaintiff was granted the equivalent of 10% of the profits it would have generated from the project over the 15-year period that the contract would have lasted. This amount represents a lot of money that, under the past regulations, would have never been granted.

There are other possible scenarios for damage claims resulting from loss of opportunity. One we can mention is the case of a person who studied medicine, achieving excellent grades and establishing great potential to become a great doctor. The student was struck by a careless driver and his injuries reduced his opportunity to achieve his potential as a doctor. In this example, a compensation claim was filed based on the lost, future income that could have been obtained by the Plaintiff for practicing in his chosen profession over a number of years. To obtain a favorable judgment, it is necessary to prove the serious existence of such opportunity.

From the above we can conclude that a door is finally being opened for the judicial system to award damage compensation in a more just and equitable manner than the current system, which grants only existing damages when an unlawful act occurs. Hopefully in the near future more claims will be resolved and accepted in this direction. This can only improve our justice system significantly and grant fair compensations to all of those victims who suffer major damages due to the illegal actions of others.

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## LETTER TO THE EDITOR

Dear Editor:

I am starting a MONTHLY HAPPY HOUR for expats. The best way to make those events a success is to get the word out to the largest number of people possible. Would you please print the below invitation in *El Residente* so ARCR members can give me suggestions on what kind of gathering they would like to attend.

Thank you.

Xander

## EXPAT HAPPY HOUR IS COMING TO SAN JOSE IN 2016!

In February 2016, the expat community is invited to attend the first in a series of monthly happy hours.

The EXPAT HAPPY HOUR is a way to meet other people living in Costa Rica, all under one roof, to enjoy discount drinks, free appetizers, special guests, entertainment, and other surprises. It's an opportunity to gather with old friends and meet new ones as we share our joys and struggles of living in Costa Rica.

Here are some ideas for future events:

**MEET:** Once a month at a large venue (Hooters, etc) with FREE appetizers and discounted drinks.

**MUSIC:** Live band or Live DJ.

**DOOR PRIZES:** Donated giveaways possibly including dinners, jewelry, gift certificates, clothing.

**CHARITY RAFFLE:** \$1,000 Colone tickets for a chance to win a prize, with proceeds benefiting a local charity.

I need your help! Email me telling me your ideas on what will make the Expat Happy Hour a success! *What will make YOU want to come to the event?* Send your ideas to [XanderCostaRica@yahoo.com](mailto:XanderCostaRica@yahoo.com), I want to hear them! I will work hard to answer everybody.

If you want to guarantee that you will be notified of February's inaugural event, email me to be put on the mailing list.

Pura Vida!