Expert Evidence in Product Liability Litigation:
A Latin American Perspective

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I. Introduction

In contrast to the U.S. model of presenting specialized evidence in civil litigation through the testimony of privately-retained experts, many countries throughout the world – including in Latin America – employ court-appointed experts. On its face, this would seem to circumvent at least some of the issues that give rise to criticisms of the U.S. model, such as the inevitably expensive “battle” of experts between the parties, the potential lack of objectivity of the retained experts, particularly when the parties “shop” for experts who will present their point of view in the most favorable light, and the potential for introduction of non-mainstream perspectives to decision-makers on technical issues (“junk science”). See e.g., Anthony Champagne et al., Are Court Appointed Experts the Solution to the Problems of Expert Testimony, 84 Judicature 178 (2001). At the same time, the court-appointed expert approach can arguably afford parties less control over the presentation of issues to decision-makers, both because of the limitations on each party’s ability to influence the outcome of the experts’ findings, and because of the broad discretion granted to judges in Latin America regarding the acceptance and evaluation of the evidence.

Regardless of whether one views this approach to expert evidence as more or less advantageous than the U.S. model, practitioners involved in cross-border or transnational product liability disputes can benefit from an understanding of the general role and procedure used for expert evidence in Latin America, and how to prepare in advance in order to best navigate what may be unfamiliar territory. While expert evidence is not always treated uniformly from country to country, certain legal trends – including changes in civil procedure regarding how evidence is received – have been observed at a regional level in recent years. William J. Crampston, Following Each Other’s Lead: Law Reform in Latin America, U.S. Chamber Institute for Legal Reform, 1, 16-17 (2014), avail. at http://www.instituteforlegalreform.com/uploads/sites/1/FollowingEachOthersLead_English.pdf. This paper reviews the general principles for handling expert evidence in product liability actions in a representative sample of Latin American jurisdictions, including Argentina, Brazil, Chile, Costa Rica and Mexico. As always, however, practitioners should consult the domestic law for any specific jurisdiction where they may find themselves facing litigation, as there are substantive differences in the rules governing expert evidence among these and other countries in the region.

II. Purpose and Nature of Expert Evidence

In civil litigation in Latin America, expert evidence is presented through the opinions of specially qualified third parties, and is meant to help the court resolve the dispute by explaining controverted issues of fact that require scientific or technical knowledge in order to be adequately evaluated. National Civil and Commercial Procedure Code (“NCCPC”) Art. 457 (Argentina); Gregory L. Fowler, International Product Liability Law: A Worldwide Desk Reference 18 (2004) (discussing Brazil); Southern University of Chile School of Legal and Social Sciences, Prueba en el Código de Procedimiento Civil Chileno (“Evidence in the Chilean Civil Procedure Code”) 60, avail. at http://derecho.uach.cl/documentos/PRUEBA_EN_EL_CODIGO_DE_PROCEDIMIENTO_CIVIL_CHILENO.pdf; Code of Civil Procedure (“CPC”) Art. 44.1 (Costa Rica); Federal Code of Civil Procedure (“FCPC”) Art. 143-44 (Mexico). Conversely, expert evidence should not be used for subjects that are commonly understood by laypersons, or – with some limited exceptions – domestic legal issues. See e.g., CPC Art. 464 (Brazil). In Latin American product liability litigation, physicians often act as medical experts in order to opine on the existence and extent of an alleged injury, as well as its possible causes. How-
ever, just as in the U.S., the broad scope of the rules permitting for expert evidence on any matter relevant to the litigation and requiring specialized knowledge means that professionals from any number of fields, from accounting to engineering to social sciences, can serve in this role.

Although newly adopted Codes of Civil Procedure in certain countries (e.g., Brazil, Chile, and Costa Rica) are incorporating more elements of oral advocacy into litigation, generally the civil law model for resolving cases throughout Latin America relies heavily on written submissions rather than in-court proceedings, which are often limited to brief hearings for the resolution of preliminary matters and the taking of fact witness testimony. Fowler, supra, at 133 (discussing Chile); Getting the Deal Through: Product Liability, 81 (Harvey Kaplan et al. eds., 2015) (discussing Mexico). Thus, even in jurisdictions where the use of oral proceedings is expanding, expert evidence is still primarily received in the form of reports attached to the case file by the expert or experts, as opposed to in-court testimony. See e.g., CPC Art. 473 et seq. (Brazil); CPC Art. 41.2, 44.1 (Costa Rica). It should be noted that certain jurisdictions require that all evidence the parties intend to submit during the case be presented with the complaint and answer. Crampton, supra at 19; see also CPC Art. 319 (Brazil); Kaplan, supra at 80 (Chile); CPC Art. 35.1(6) (Costa Rica). Expert evidence, however, is generally requested by the parties when the initial pleadings are filed (with a clear indication of what the requesting party hopes to have addressed) and thus only submitted later, during the so-called “evidentiary phase” of the proceedings. Therefore, expert evidence is one of the few forms of evidence for which parties have additional time to prepare and respond.

At the same time, as a result of the very limited pretrial discovery permitted in these jurisdictions, there are no analogues to the types of expert opinion disclosures, expert depositions, cross-examination or impeachment of experts found in U.S. practice. Instead, parties submit questions to the court for the expert to consider when developing their opinion. The court may also submit its own questions, and in some instances will adapt or only present a portion of the questions presented by the parties. NCCPC Art. 460 (Argentina); CPC, Art. 465 (Brazil); FCPC Art. 146 (Mexico).

As discussed further in Section IV below, courts follow various procedures for appointing an expert, but many jurisdictions rely on a list of previously-vetted specialists and can appoint an expert as they see fit, either at the request of the parties or sua sponte. See e.g., NCCPC Art. 475 (Argentina); CPC Art. 412 (Chile); CPC Art. 44.5 (Costa Rica). After an expert is appointed, they will review the evidence produced in the case which relates to the issue on which they are to opine and the questions submitted. In product-liability cases, this evidence often consists of medical (and sometimes employment-related) records, although any technical information relevant to the case may be subject to review. The expert may conduct physical or medical examinations as necessary, after which they issue a written report detailing their findings and responding to the questions posed. Expert examinations can be direct, i.e. an examination of the party or relevant physical material, or indirect, i.e. an examination of the documents relevant to the controverted issue. Parties are generally permitted to submit comments on these reports, either agreeing with or objecting to the expert’s conclusions, and can also seek further clarification or request a supplementary expert examination. See e.g., NCCPC Art. 473 (Argentina); CPC Art. 44.4 (Costa Rica). In some respects, this ability to submit questions before and seek clarification after the expert report is issued replaces the role parties in the U.S. would have to interrogate and challenge experts. However, the ability to challenge an expert before the decision-maker, i.e. the court, is still relatively limited compared to U.S. procedures allowing for depositions, cross-examinations, and challenges to whether such opinions are even admissible under standards such as Frye and Daubert.

III. Standards for Expert Evidence

While U.S. civil litigation employs clearly defined standards for admissibility of expert testimony in our courts, such as the Frye and Daubert tests, courts in Latin America generally have much broader discre-
tion in regards to expert evidence. It is important to keep in mind that with few exceptions, disputes are heard by judges, and not juries. Fowler, supra, at 18 (Argentina), 96 (Brazil), 494 (Mexico). As a result, there is less of an emphasis on “screening” evidence before it is presented to the court, and parties are permitted great latitude in attaching documentary evidence to the case file. Id. at 97 (Brazil).

Moreover, Latin American civil justice systems tend to view judges as “investigators” seeking an abstract concept of “truth,” i.e. the correct or just solution to a legal dispute, rather than the U.S. adversarial system where an approximation of truth can emerge from both sides presenting their version of events to a jury. Janeen Kerper, Trial Advocacy Lessons from Latin America, 74 Temp. L. Rev. 91, 97 (2001). This viewpoint is evident in the rules governing courts’ acceptance of expert evidence, which are more directed towards what weight the evidence should be given, as opposed to a gatekeeping function of “admissibility.”

In this regard, judges in Latin American jurisdictions should give weight to expert opinions not because they are presented by an acknowledged expert, but rather because of their technical quality, as well as some demonstration by the expert in their report that they have sufficient knowledge of the subject matter and the issues under analysis to support the court's ruling. The opinion should be well-grounded, logical, clear, and convincing. If the conclusions of the expert report are inconsistent, or poorly supported, the opinion is not considered effective as expert evidence. See e.g., José Ramón González Pineda, Prueba Pericial y Valor de la Misma (“Expert Evidence and its Evaluation), avail. at http://www.conamed.gob.mx/comisiones_estatales/coesamed_nayarit/publicaciones/pdf/prueba.pdf (Mexico).

In general, judges are permitted to accept or reject evidence based on their “free judgment” or “free appraisal” of evidence. A frequently used standard for courts to use when assessing expert opinions is called “sana crítica,” or “sound judgment,” which is defined in its simplest terms as the application of logic and experience. González Pineda, supra (Mexico); see also NCCPC Art. 477 (Argentina); CPC Art. 375 (Brazil); CPC Art. 425 (Chile); CPC Art. 41.5 (Costa Rica). Despite the fact that this standard would seem to grant the judge discretion to accept or reject evidence based on whether they believe it comports with their own sense of logic and experience, this is considered to be an objective standard and is not meant to be used arbitrarily. In fact, in certain jurisdictions, such as Costa Rica, expert reports are required by law to be impartial and are considered to be issued under oath. CPC, Art. 41.4(2), 44.3. Ultimately, however, judges are not required to adopt the conclusions of an expert’s opinion, and such evidence does not become res judicata for other matters.

IV. Types and Appointment of Experts

As mentioned above, a commonly-employed model for the presentation of expert evidence in Latin American litigation involves court appointment of a neutral or third-party expert at the request of the parties, typically from either a list of pre-approved experts in various fields, or those recommended by the parties, assuming that they are part of a duly licensed profession. See e.g., CPC Art. 156 (Brazil); CPC Art. 44.2 (Costa Rica). Certain jurisdictions also allow parties to agree to an expert who falls outside of these parameters, and permit courts to order expert evidence sua sponte. See e.g., CPC Art. 413 (Chile).

A party must generally indicate the subject matter about which they wish the expert to opine (to which the opposing party can add or object), and the court will determine whether to appoint an expert for this purpose. See e.g., NCCPC Art. 459 (Argentina). The ultimate decision regarding the appointment is made by the court, although parties are permitted to object to the appointment of an expert based on a lack of proper qualifications or impartiality, and experts may be replaced. See e.g., Juan Diego Quirós Delgado, Curso Prueba Pericial en Derecho Civil (“Course on Expert Evidence in Civil Litigation”), avail at https://www.scribd.com/doc/62964844/Curso-Prueba-Pericial-en-Derecho-Civil (discussing Costa Rican procedure); CPC Art.
414 (Chile, which permits the court to choose the expert in the event the parties cannot agree). Such a lack of impartiality may be based on the prior issuance by the expert of an opinion on the same subject which was unfavorable to one of the parties (CPC Art. 18, Costa Rica), or when the expert has a certain type of personal relationship with one of the parties (CPC Art. 144, 467, Brazil), as in the case of a relative, former employee / employer, treating physician, etc. The expert may also decline the appointment, in which case a new expert will be named until a suitable candidate accepts the position.

There are notable exceptions to this model, such as in Argentina, where the parties can agree to the appointment of an expert or, if they believe there should be three, each proposes their own and then the court appoints a third. When the parties cannot agree, however, the court will name either one or three experts, depending on the value and complexity of the case. NCCPC Art. 457-58. Similarly, in product liability cases in Mexico, the parties will each select their own expert. In the event the expert’s opinions are contradictory, the court can then appoint a third expert to present another opinion. Each party is responsible for the costs of its own expert, and their share of the third expert’s fees. Kaplan, supra, at 81. In Chile, in the event that there are multiple experts appointed whose conclusions are not consistent, the court may appoint another expert in an effort to resolve the issues. If this expert does not agree with the others, the court must determine which opinion(s) to accept. CPC Art. 421-422. Finally, recent changes to Brazil’s Civil Procedure Code permit the parties to select an expert, but only when both sides of the dispute are in agreement as to the appointment. CPC, Art. 471.

Parties are also permitted to employ so-called “technical assistants,” who act as consultants to the parties and may have some limited interaction with the court-appointed expert and the court. For example, in the event that the court notifies the appointed expert to indicate the time and place of the physical or documentary investigation they will carry out in order to develop their opinion, the technical assistant (but not the parties directly) may be permitted to meet with the expert to discuss the case and provide any comments or clarifications they deem appropriate. In Costa Rica, these meetings must be requested. CPC Art. 406. In other jurisdictions, they are a matter of right. NCCPC Art. 471 (Argentina); CPC Art. 466 (Brazil). By contrast, in Chile, parties are not permitted to have any involvement in the expert examinations (CPC Art. 419). Technical assistants may also submit comments to the expert report, along with or separately from the comments submitted by the parties, and may also be permitted to testify at an evidentiary hearing.

V. Tips for Effectively Dealing with Expert Issues in Latin America

Given what may seem like a relative lack of control over the production and reception of expert evidence in litigation when compared to the U.S. model, practitioners dealing with disputes in Latin America may wonder what can be done to manage the impact of experts’ opinions in their cases. This is particularly relevant given the high level of credibility afforded to these opinions, in light of their perceived objectivity and the general construct of “truth seeking” embodied by the Latin American approach to legal disputes.

Perhaps the most important step counsel can take in preparation in the circumstances described above is the retention of a properly qualified technical assistant, or consultant. Although not required, and something that many parties fail to do, technical assistants can provide a number of services to parties facing product liability litigation in Latin America. For example, they can conduct preliminary analyses of records; assist with the drafting of an initial defense and determine what evidence may be relevant from a technical, scientific, or medical perspective; meet with experts before or during the examination in order to present the retaining party’s observations and arguments; and present comments to the court regarding the expert’s opinions (whether favorable or unfavorable, i.e. reinforcing the conclusions or providing context). Such comments can often be provided apart from those of the party, thereby allowing a defendant to present legal arguments
while a well-regarded technical assistant presents scientific arguments. Practitioners may even consider coordinating with co-defendants in order to present complementary comments in this regard. Another valuable service technical assistants can perform involves the drafting of questions for the expert examination, particularly in a jurisdiction like Argentina where revisions to the questions are not permitted, such that parties must draft questions long in advance of the examination when fact investigation may not yet be completed (and thus, not all possible defense arguments are known).

Another important issue to consider is whether to offer technical assistants as fact witnesses in litigation in Latin America. Although parties are generally permitted to offer the witnesses they choose, the subject matter of proffered witness testimony may be limited. For example, in Brazil, courts must deny offers of testimony from witnesses regarding facts already established through documents, by admission of a party, or which can only be proven through expert evidence. CPC, Art. 443. Certain jurisdictions, however, permit for oral expert testimony, where the parties can examine the expert during the evidentiary hearing with the help of their technical assistants. See e.g., CPC 41.4(5), 44.4 (Costa Rica). Similarly, in Brazil, experts or technical assistants can be heard to respond to previously-submitted questions for clarification, if not already answered in writing. CPC, Art. 361. If one decides to call a technical assistant to testify as fact witness, a party may be opening itself up to a similar proffer by their opponent, which could include pseudo-expert testimony by, for example, a treating physician on causation. This risk must be balanced against the value of such testimony to counteract unfavorable testimony offered by fact witnesses and treating physicians. Careful consideration should be employed in this regard to determine the best strategy.

VI. Conclusion

As demonstrated above, the rules and practices regarding expert evidence in civil law jurisdictions are quite different than those used in common law jurisdictions such as the U.S. There is little to no discovery permitted regarding the expert's qualifications, his/her opinions or the bases for same, in advance of the expert's written report. Nevertheless, the careful selection of the “third expert” where permitted, the identification of issues that require expert evidence, the strategic development of questions for the expert examination and the use of technical assistants to identify the weaknesses in plaintiff’s claims and to assist the court in understanding such weaknesses through well-written submissions commenting on the expert's conclusion can have a meaningful impact on the successful defense of a product liability case.

Endnote

1 It should also be noted that within certain jurisdictions, such as in Argentina, there can be important state or provincial variations to these rules which are beyond the scope of this paper. The references to procedural rules herein generally refer to national or federal codes, or commonly-employed standards.