

Litigation: A Mechanism to Protect Mexican Nationals from Arms Trafficking and Sales in the United States*

*Alejandro Celorio Alcántara***

Introduction

On August 3, 2019, at about 10:40 a.m., a subject armed with a semi-automatic assault rifle entered a Walmart branch located in the Cielo Vista shopping mall in the city of El Paso, Texas. In compliance with a manifesto based on the doctrine of white nationalism, entitled *The Inconvenient Truth*, which he had published minutes earlier on the 8chan website, he opened fire—for several minutes and repeatedly—at people of Mexican and Hispanic origin. The attack claimed the lives of eight Mexicans and another eight Mexicans were seriously injured, out of a total of 22 dead and 24 injured.

Across all nations there are paradigms that become cornerstones in the shaping of each State's identity. Such individual characteristics are what differentiate them from the rest of the international community. With regards to the United States, one of these precepts that coined its national identity is founded on the Second Amendment of its Constitution, which states that “a well-regulated Militia, being necessary to the

* Spanish-English translation by Alexander Smith.

** Legal Consultant, the Ministry of Foreign Affairs (SRE).

security of a free State, the right of the people to keep and bear arms, shall not be infringed”.¹

These 26 words have become one of the greatest obstacles in stopping the violence that today identifies the United States as being one of the leading countries in the world—without a civil armed conflict—in terms of high rates of firearm-related deaths.²

According to figures from The Brady Plan, 310 people are injured by firearms in the United States while about 100 people die every day.³ On average, 36 383 people die each year. This problem can really be visualized by the number of mass shootings,⁴ that occur year on year in the US. According to data from the Gun Violence Archive, in 2015 there were 335 mass shootings; in 2017, 346; in 2018, 337; and in 2019 the record was 417.⁵

According to data provided by the Migration Policy Institute, in 2018, 25% of all foreigners residing in the United States were Mexican nationals, and this is precisely the reason why this is a priority issue for Mexico.

Consular protection and assistance are cornerstones of Mexican foreign policy; therefore, dismayed by the direct impact on the Mexican community of this type of incident, especially that which occurred in El Paso,

¹ The Second Amendment to the U.S. Constitution was passed by Congress on September 25, 1789, and subsequently ratified on December 15, 1791. It has been interpreted several times to protect the right to keep and bear arms. See *District of Columbia v. Heller* (2008) y *McDonald v. City of Chicago* (2020).

² Joe Myers, “In 2016, Half of All Gun Deaths Occurred in the Americas”, in *The World Economic Forum*, August 6, 2019, at <https://www.weforum.org/agenda/2019/08/gun-deaths-firearms-americas-homicide/> (date of access: March 27, 2020).

³ See The Brady Plan, “The Facts that Make Us Act”, at <https://www.bradyunited.org/key-statistics> (date of access: March 27, 2020).

⁴ Some examples of mass shootings: at the elementary school in Sandy Hook, Connecticut, where more than 20 children were killed in 2012; the massive attacks on the Pulse bar in Orlando, Florida, in 2016, which left 49 dead and 53 injured; also in San Bernardino in 2015 with 14 dead and 21 injured; as well as in Dayton, Ohio, with 9 people killed and 27 injured, one day after the attack in El Paso Texas. See Mark Follman, Gavin Aronsen & Deanna Pan, “US Mass Shootings, 1982-2019: Data from Mother Jones’ Investigation”, in *Mother Jones*, February 26, 2020, at <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/> (date of access: March 27, 2020).

⁵ See Gun Violence Archive, “GVA-Six Years Review”, 2020, at <https://www.gunviolencearchive.org/> (date of access: March 27, 2020).

Texas, the government of Mexico announced that it would undertake “a series of legal, diplomatic and protective measures to ensure justice for the victims of the shooting and to protect the rights of Mexican communities in the United States”.⁶

As such, this article aims to briefly describe the jurisdictional and litigation mechanisms available to victims of gunfire in the United States, as well as the current challenges in this area. The aim is to demonstrate the importance of the government of Mexico entering into the issue and fostering a bilateral relationship with its northern neighbor, under the premise of shared responsibility, in order to protect and safeguard the human dignity of Mexicans in the United States and co-nationals in the own country.

Legal action

As is the case in most legal systems around the world, anyone who takes the life of another faces criminal charges of homicide with the corresponding aggravating factors. In the case of the El Paso attack, the Department of Justice charged the attacker with a hate crime and possession of a firearm in connection with the deaths of 22 people, as well as the attempted murder of 23 others.⁷ Subsequently, at the local level, he was charged with 22 counts of capital murder, for which he could face the death penalty.

In these types of criminal proceedings, victims and their families assist the prosecution by providing information and insight into the investigation and may participate as witnesses in the trial. From an international standpoint, States have the power to exert corresponding pressure, or even

⁶ The Ministry of Foreign Affairs (SRE) considers the attack in El Paso to be an act of terrorism against Mexicans in the United States. See SRE, “México considera el ataque en El Paso un acto de terrorismo contra mexicanos en Estados Unidos”, communication no. 256, August 4, 2019.

⁷ Office of Public Affairs-Department of Justice, “Texas Man Charged with Federal Hate Crimes and Firearm Offenses Related to August 3, 2019, Mass-Shooting in El Paso”, press release no. 20-148, February 6, 2020, at <https://www.justice.gov/opa/pr/texas-man-charged-federal-hate-crimes-and-firearm-offenses-related-august-3-2019-mass> (date of access: March 27, 2020).

exercise their jurisdiction (under the passive personality principle based on the bond of nationality) to initiate their own national investigations. Hence, both Mexico and the United States “agreed to exchange information on their respective investigations, in strict compliance with the regulatory frameworks of each country, agreeing on the importance of conducting a thorough investigation of the facts and their causes,”⁸ to stop this type of incident going unpunished.

Equally, there is the possibility for victims or their relatives to file civil lawsuits to determine liability and if necessary, to obtain compensation which, among other things, may be financial. This happened in November 2019, when the Foreign Ministry reported that, in coordination with the Consulate General of Mexico in El Paso, “10 Mexican citizens filed lawsuits against the company Walmart Inc. to “hold the company responsible for not taking reasonable and necessary measures to protect its customers from the attack on the Cielo Vista branch in El Paso, Texas.”⁹

As can be seen, in any legal strategy of a transnational nature, the starting point lies, firstly, in a conflictual analysis in which the jurisdictional links that allow the authorities of a third State to exercise their jurisdiction in order to represent a pressure factor—in criminal matters—on the local authorities where the event took place. On the other hand, the connection of the various people involved with the act is evaluated and, based on this, the relevant considerations are made to identify the subjects to be sued in civil proceedings.

Hence the relevance of the information obtained by the Consulate General of Mexico in El Paso, as well as that derived from interviews with federal and district prosecutors, to know that the attacker of the August 3 attack used a semi-automatic WASR-10 rifle; that this weapon is based on the AK-47 and was manufactured in Romania and imported as a sporting item

⁸ SRE, “Posicionamiento de la SRE sobre el proceso judicial por el caso de la masacre de El Paso”, communication num. 038, February 6, 2020, at <https://www.gob.mx/sre/prensa/posicionamiento-de-la-sre-respecto-de-las-imputaciones-de-cargos-federales> (date of access: March 27, 2020).

⁹ SRE, “Mexicanos presentan demandas tras ataque en El Paso, Texas”, communication num. 407, November 20, 2019, at <https://www.gob.mx/sre/prensa/mexicanos-presentan-demandas-tras-ataque-en-el-paso-texas?idiom=es> (date of access: March 27, 2020).

into the United States, and that the firearm, in addition to its ammunition, was purchased online, where it has an average price of US\$700.¹⁰

Beyond representing simple data, what is described in the previous paragraph symbolizes the connectors that allow the identification of the potential subjects that will be sued. To this end, we have different litigation scenarios, in which owners or operators of businesses where shootings occur can be held responsible,¹¹ as can event promoters, private security companies, local authorities and law enforcement agents,¹² parents or relatives of the shooter and the perpetrator himself,¹³ employers, mental health providers, retailers or gun stores,¹⁴ front men or straw buyers (arms dealers), organi-

¹⁰ “Century Arms GP WASR-10 AK-47 Semi Auto Rifle 7.62x39mm 16.25” Barrel 30 Round Detachable Box Magazine Stamped Receiver Wooden Furniture Matte Black Finish”, in *CheaperThanDirt!*, at <https://www.cheaperthandirt.com/century-arms-gp-wasr-10-ak-47-semi-auto-rifle-7.62x39mm-16.25-barrel-30-round-detachable-box-magazine-stamped-receiver-wooden-furniture-matte-black-finish/FC-787450074477.html> (date of access: March 27, 2020).

¹¹ MGM Resorts International paid US\$800 million as part of an out-of-court settlement with victims for the 2017 Mandalay Bay Hotel incident in Las Vegas. See Richard Oppel, “MGM Agrees to Pay Las Vegas Shooting Victims up to \$800 Million”, *The New York Times*, at <https://www.nytimes.com/2019/10/03/us/mgm-las-vegas-shooting-settlement.html> (date of access: March 27, 2020). In the incident in El Paso, Texas, relatives of the Mexican victims sued Walmart, Inc.

¹² Relatives of the victims of the 2019 Aurora shooting, in which six people died, sued the city of Aurora and the Police Department for negligence in issuing a gun license to the perpetrator of the incident. See Sarah Freishtat and Megan Jones, “Families of Aurora Warehouse Shooting Victims Sue City and Police”, *Chicago Tribune*, February 16, 2020, at <https://www.chicagotribune.com/suburbs/aurora-beacon-news/ct-abn-henry-pratt-lawsuit-aurora-st-20200213-r6pingsonvd7Sercsibbpzhfmu-story.html> (date of access: March 27, 2020).

¹³ Relatives of the victims in El Paso, Texas, sued the perpetrator and his family. See Molly Smith, “Family of Woman Killed in Shooting Files Lawsuit against Crusius Family, 8chan website”, *El Paso Times*, October 29, 2019, at <https://www.elpasotimes.com/story/news/2019/10/29/el-paso-shooting-lawsuit-filed-against-patrick-crusius-family-8-chan/2498562001/> (date of access: March 27, 2020).

¹⁴ Relatives of the 17 victims of the 2016 Wichita, Kansas, shooting sued the store ‘A Pawn Shop’. The defendant paid US\$2.2 million as part of a settlement. See Chris Haxel, “Multimillion-Dollar Settlement Reached In Latest Gun Store Negligence Lawsuit”, in *Guns & America*, April 17, 2019, at <https://gunsandamerica.org/story/19/04/17/multimillion-dollar-settlement-reached-in-latest-gun-store-negligence-lawsuit/> (date of access: March 27, 2020).

zations that fail to inform the authorities, the arms manufacturer¹⁵ and anyone else who might have known or been involved in the shooter's activity.

It may also be that several potentially responsible actors are involved in the same case, as happened in 2017 in the shooting at the Mandalay Bay Hotel, where 58 people were killed and 850 injured. In this event, the owner of the hotel, the owner of the place where the concert was held (the MGM hotel), the promoter of the concert (Live Nation) and the security company that was hired, were all sued. All of them were questioned for not employing adequate security measures that could have prevented or mitigated the damages.¹⁶

Legal obstacles

Although there are different connectors for attributing civil liability to any of the parties involved that fall into the above-mentioned assumptions, it is important to note that, in practice, it is extremely complicated to construct a legal strategy that can bring legal action to fruition. This is due to the influence of the arms industry on the United States, which has avoided being affected by victims' claims in this type of incidents.

Apart from the political influence of the arms industry, there is the U.S. legal system itself, which establishes multiple constraints on this type of legal action. Historically, U.S. courts have upheld the criterion of "predictability of mass shootings", noting that, generally, the actions of those who

¹⁵ Relatives of the victims of the incident at the Mandalay Bay Hotel in Las Vegas sued gun manufacturers Colt, Daniel Defense, Patriot Ordnance Factory, & Noveske Rifleworks LLC. See James Parsons and Ann-Marie Parsons *v.* Colt's Manufacturing Company LLC, *et al.*, District Court, Clark County, Nevada. The relatives of the Sandy Hook School incident sued the gun manufacturer Remington. See Associated Press, "Newtown Families in Lawsuit Get Access to Shooter's Computer", in AP News, February 13, 2020, at <https://apnews.com/3f6cc157f36eefac786df0e93ae78ae4> (date of access: March 27, 2020).

¹⁶ Michael Steinlage, "Liability for Mass Shootings: Are We at a Turning Point?", in the American Bar Association, February 7, 2020, at https://www.americanbar.org/groups/tort_trial_in_surance_practice/publications/the_brief/2019-20/winter/liability-mass-shootings-are-we-a-turning-point/ (date of access: March 27, 2020).

carry out a shooting are unexpected and remote, and therefore a third party could not be held responsible due to the lack of predictability.¹⁷

As an example of the application of this criterion, there are several cases, such as *Lopez v. McDonald's Corp.* where an unsuccessful attempt was made to hold up a restaurant in San Ysidro, California.¹⁸ At the same time, there is the example of *Commonwealth of Virginia v. Peterson*, where it was decided that a person does not have a duty to warn or protect another person because of the criminal acts of a third person, unless there is a special relationship between them. However, there are other cases that foresee a change of course, such as *Wagner v. Planned Parenthood Federation of America, Inc.*¹⁹

In the latter, the Colorado Court of Appeals decided to reverse the first court decision that had argued for predictability, in accordance with the law, and instead noted that the plaintiffs' contributions had been sufficient to determine that the conduct of the defendant—the owner of the clinic, who was aware of the possible actions of the shooter—had been a substantial factor. In addition, the plaintiffs called for the testimony of security experts who proved that the clinic could have avoided or mitigated the consequences under certain preventive measures.²⁰

In 2005, the U.S. Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA) to safeguard manufacturers and retailers from liability claims against them. This represented a turnaround in the efforts to repair the damage, through legal means, that had been generated by the sale and purchase of firearms in the United States.²¹ Since the implementation

¹⁷ John Culhane, "This Lawsuit Could Change how we Prosecute Mass Shootings," in *Politico Magazine*, March 18, 2019, at <https://www.politico.com/magazine/story/2019/03/18/lawsuit-mass-shootings-225812> (date of access: March 27, 2020).

¹⁸ In 1984, an armed individual entered a McDonald's restaurant in San Ysidro with a semi-automatic 9mm rifle, killing 21 people and wounding others before being killed by a policeman. The plaintiffs claimed damages, as a cause of wrongful death and personal injury, on the grounds of negligence and premises liability, arguing that McDonald's failed to provide adequate security devices or security personnel to protect customers from known potential risks.

¹⁹ J. Culhane, *op. cit.*

²⁰ *Idem.*

²¹ *Idem.*

of the PLCAA, the protectionist trend towards the firearms industry began to proliferate at the national level, and was replicated at the local level in 34 states,²² where it was enacted as state legislation replicating the civil liability immunities for the firearms industry.²³

Nevertheless, some exceptions to its application could be argued in the future, by citing the Connecticut Unfair Trade Practices Act (CUTPA), which opens the possibility to award compensation to victims and/or their families, for wrongful death and/or personal injury. However, in due course, this will have to be analyzed by the Supreme Court of the United States to determine whether the states can—through local legislation that replicates the immunities of the federal PLCAA—prioritize economic interests over the rights of the respective victims.²⁴

It should be noted that, prior to the enactment of the aforementioned protectionist law, as well as the judicial case known as *Soto v. Bushmaster Firearms International, LLC*, some courts in the state of Connecticut had allowed gun sellers to be sued under the theory of “public nuisance”. This presumption operates under the argument that the purchase and sale of guns is done through an “aggressive and deceptive” scheme and, consequently, they reach the hands of buyers who do not necessarily meet an adequate profile, either because a background check is not properly conducted or because the consumer is not old enough, among other factors.²⁵

On the other hand, some states have their own versions of gun industry immunity, which may not include the same exceptions that apply to the PLCAA. An example of this is the shooting that took place in a theater in Aurora, Colorado. In this case, the U. S. District Court for the District of Col-

²² According to Giffords Law Center, the states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, y West Virginia. See Gifford Law Center, “Gun Industry Immunity”, at <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/> (date of access: March 27, 2020).

²³ *Idem.*

²⁴ *Idem.*

²⁵ *Idem.*

orado dismissed claims against gun stores selling ammunition and weapons equipment, which were used in this incident, by dismissing the PLCAA exceptions under the local immunity statute.²⁶

Moreover, victims of mass shootings and their families have filed lawsuits against media and content providers, claiming that they have encouraged or incited violence. As was the case in the 2002 Columbine School shooting in Colorado or the 2016 Pulse nightclub shooting in Orlando, Florida.²⁷

On the other hand, the victims are faced with a buying and selling dynamic, including little standardization of the regulation that exists around the Second Amendment, evidencing the vulnerability of their situation, when analyzing cases such as *Hamilton v. Beretta*. Through this litigation, it was objected that manufacturers supplied weapons in excess to vendors in states characterized by weak controls, resulting in the sale and resale in states with stronger controls—in this case the state of New York—to individuals who used them to commit crimes. Specifically, it was noted that, from 1989 to 1997, 40% of weapons used in crimes committed in New York State’s jurisdiction were sold in five states with weak controls.²⁸

It is currently estimated that in 30 different states of the United States, firearms can be purchased over the internet, as well as in private sales, without a permit or a background check requirement, despite the Brady Handgun Violence Prevention Act. Despite the efforts of the Federal Bureau of Investigation (FBI) to have an instant verification system that brings together all checks through the National Instant Criminal Background Check System (NICS), much remains to be done.²⁹

²⁶ M. Steinlage, *op. cit.*

²⁷ *Idem.*

²⁸ Timothy D. Lytton, “Introduction: An Overview of Lawsuits against the Gun Industry”, in T. D. Lytton (ed), *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts*, Ann Arbor, University of Michigan Press, 2005, pp. 1-35, at <https://www.press.umich.edu/pdf/0472115103-intro.pdf> (date of access: March 27, 2020).

²⁹ Mariano Zafra, Ana Elena Azpurua and Javier Figueroa, “Éstos son los estados más permisivos con las armas de fuego: sus tasas de muerte son hasta cinco veces más altas”, in Univision Noticias, November 26, 2018, at <https://www.univision.com/especiales/noticias/infografias/2018/armas-estados-mas-y-menos-restrictivos-relacion-muerte-suicidios/> (date of access: March 27, 2020).

In addition, only 18 states have the NICS system in place for private purchases; 22 states have laws controlling the use of lethal force; 7 prohibit the carrying of weapons by civilians, and only 8 have a weapons registry.³⁰

Conclusion

The incidents described above, especially those inspired by white nationalism and the desire to hurt victims because of their national origin, have triggered a series of reflections on the widespread availability of firearms in the neighboring northern country, as well as the ease of acquiring high-powered firearms; the constitutional freedoms to possess and trade them; the absence of a regulatory framework at the regional, national or international level, in order to prevent an individual, inspired by supremacist ideologies, from obtaining a rifle with high firing capacity in the United States; or that any person acquires a firearm and then illegally enters Mexican territory to supply arms to organized crime groups.

Mexico shares a border of more than 3000 kilometers with a country where the right to possess and carry arms is constitutionally recognized. It is disturbing that arms manufacturers and vendors in the United States enjoy the immunities described in this article, while high-powered weapons are increasingly accessible in the United States. It is troubling not only because of the possibility of an armed person crossing the border from the United States, but also because of the reality of the illicit trafficking of these firearms into Mexico.

Although gun litigation in the United States can be seen as one side of the political battle between those in favor of gun control and those for the relaxing of controls on the design and sale of guns, it is a valid and useful mechanism for compensating potential and actual victims of gun violence.

³⁰ “Gun Laws by State. The Complete Guide,” in *Guns to Carry*, at <https://www.gunstocarry.com/gun-laws-state/> (date of access: March 27, 2020).

The government of Mexico will always be respectful of the sovereignty of other States as well as the internal regulations that they decide to create and preserve, in order to safeguard the legal security of their citizens, as well as to maintain their own rule of law. However, the government of Mexico must complete all actions within its reach to protect the interests of Mexicans abroad.

While litigation in this area is an uphill battle, especially because of the current state of the U.S. legal system which has not won any constitutional recourse against the PLCAA, firm and strategic action is needed to protect the lives of Mexicans who have made the United States their second home, while ensuring that high-powered weapons are not illegally trafficked into our country.