THE IMPOSITION OF PUNITIVE DAMAGES: A COMPARATIVE ANALYSIS

BY

SAISIRI SIRIVIRIYAKUL

DISSERTATION

Submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in Law in the Graduate College of the University of Illinois at Urbana-Champaign, 2012

Urbana, Illinois

Doctoral Committee:

Professor Thomas S. Ulen, Co-chair and Co-director of research
Professor Nuno Garoupa, Co-chair and Co-director of research
Professor Dhammika Dharmapala
Professor Tom Ginsburg, University of Chicago
ABSTRACT

The purpose of this dissertation is to comparatively analyze the imposition of punitive damages in product liability and consumer protection cases. The main argument of this dissertation is based on the observation that the current Thai product liability and consumer protection system does not encourage plaintiffs to go to court to redress their harms, but instead plaintiffs pursue indirect methods to attract media attention. This is obviously the restraint to the well public order of any society with rule of law and the government needs to take care of such problem. This dissertation offers three potential means to attract people to file cases in court, they include: punitive damages, strict product liability, and class action proceedings. Thailand recently adopted punitive damages and the doctrine of strict product liability through the enactment of Product Liability Act and Civil Procedure for Consumer Cases Act. Class action proceedings, however, are still in the drafting phase but shall be enacted in the near future.

The dissertation begins with a discussion about the basic theories that underlie punitive damages, the policy considerations as well as a comparative study on the implication of punitive damages in other countries including, the United States, the United Kingdom, Australia, New Zealand, Canada, Germany, Switzerland, France, Italy, Japan, Hong Kong, The People’s Republic of China (PRC) and Thailand. The dissertation also discusses in further details regarding punitive damages in Thailand as well as the potential applications of punitive damages in other fields of law such as in medical malpractice and environmental liability in Thailand and other jurisdictions, particularly in the United States. This dissertation also explores in detail some potential methods of
applying punitive damages, such as, the methodology of anti-insurance where the punitive damages awards would be paid to a third-party instead of the plaintiff, the effects of punitive damages imposition on the insurance premium, the analysis of whether punitive damages can only be applied in jurisdictions with a jury system by using Quebec as a case study, as well as an overview of the amount of consumer cases submitted to the Supreme Court of Thailand from the available data.
ACKNOWLEDGEMENTS

This dissertation would not have been achievable without the support of many people. First, I would like to thank to Thomas S. Ulen and Nuno Garoupa, my co-advisers and co-chair committee members, who have always been helpful and supportive throughout the process, thoroughly reading my numerous revisions with patience and making wonderful suggestions and comments that add so much value to this dissertation. Also thanks to my other committee members, Dhammika Dharmapala, and Tom Ginsburg, who offered remarkable guidance and support. Thanks to Charlotte Ku, Ann Perry, and Christine Renshaw, who have been always supportive giving me suggestions in and helping me with all registrations and administrative issues from the beginning to the end of the process. Thanks to the University of Illinois at Urbana Champaign, College of Law for providing me with partial financial support to complete this dissertation and their faculties and staffs for friendly supports. Thanks to Professor Daniel Gardner from Laval University in Quebec, Canada for help with information and bibliography regarding the Canadian laws and other related legal resources. Finally, thanks to my parents, family and friends who endured this long process with me, always offering endless support and love.
# TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION ................................................................. 1  
1.1 WHAT ARE PUNITIVE DAMAGES? .................................................... 2  
1.2 THE DIFFERENCES BETWEEN COMPENSATORY AND PUNITIVE DAMAGES .................................................... 2  
1.3 BASIC THEORIES FOR PUNITIVE DAMAGES .................................... 5  

CHAPTER 2: ANALYSES ........................................................................... 15  
2.1 ASSESSING PUNITIVE DAMAGES ...................................................... 15  
2.2 ECONOMIC PERSPECTIVE ON PUNITIVE DAMAGES ......................... 19  
2.3 OTHER PERSPECTIVES ON PUNITIVE DAMAGES ............................... 21  

CHAPTER 3: LITERATURE REVIEW OF THE IMPLICATION OF PUNITIVE DAMAGES ............................................................ 25  
3.1 THE IMPLICATION OF PUNITIVE DAMAGES IN THE UNITED STATES ................................................................................. 25  
3.2 THE IMPLICATION OF PUNITIVE DAMAGES OUTSIDE THE UNITED STATES AND THAILAND ................................................................. 31  

CHAPTER 4: THE SITUATION OF PUNITIVE DAMAGES IN THAILAND ...... 53  
4.1 THE REASONS FOR THE INTRODUCTION OF PUNITIVE DAMAGES AND THE PASSAGE OF PRODUCT LIABILITY ACT AND CIVIL PROCEDURE FOR CONSUMER CASES ACT IN THAILAND ...................................................... 56  
4.2 SALIENT CASES .................................................................................. 63  
4.3 AN OVERVIEW OF THE AMOUNT OF CONSUMER CASES FROM 2008 TO PRESENT ................................................................................. 70  

CHAPTER 5: ELEMENTS OF EFFECTIVE PRODUCT LIABILITY ............ 78  
5.1 STRICT PRODUCT LIABILITY .............................................................. 78  
5.2 CLASS ACTION PROCEEDINGS .......................................................... 85  
5.3 ANTI-INSURANCE: THE IDEA OF PAYING PUNITIVE DAMAGES TO A THIRD-PARTY ................................................................. 105  
5.4 INSURANCE PREMIUM: THE EFFECT OF THE IMPLICATION OF PUNITIVE DAMAGES TO INSURANCE PREMIUM ...................................................... 110  

CHAPTER 6: IS A JURY SYSTEM NECESSARY IN ORDER TO ADOPT PUNITIVE DAMAGES? ................................................................................. 118  

CHAPTER 7: PUNITIVE DAMAGES EXTENSIONS .................................... 127  
7.1 MEDICAL MALPRACTICE IN THAILAND ........................................... 127  
7.2 ENVIRONMENTAL LIABILITY IN THAILAND .................................... 133  

CHAPTER 8: CONCLUSION ....................................................................... 141  

BIBLIOGRAPHY ....................................................................................... 143
CHAPTER 1: INTRODUCTION

The enactment of the Civil Procedure for Consumer Cases Act (2008) and the Liability for Damages Caused by Unsafe Goods Act (Product Liability Act) (2008) has sparked a debate in Thailand over the status of consumer rights within the Thai legal system. The rationale behind the legislation is to protect consumers, who relative to corporate defendants have a weaker position in legal actions due to their limited access to information as compared to corporate defendants with unrestricted funds. Another important rationale is to eliminate the perceived unfairness in the judiciary system, which has had an adverse effect on Thailand’s economy.

However, one of the most prominent disagreements against the two laws is the adoption of the American “punitive damages” into a more traditional civil law system. This adoption has become controversial to all parties involved: Judiciary Body, Business Entrepreneurs, Consumers, etc. since traditionally Thai law, as in most civil law countries, does not contemplate or apply “punitive damages.” Additionally, in most civil law countries, the conventional doctrines in private law have been quite critical of American “punitive damages” remedy.

Bringing together the above situations, one striking issue, which forms a main question in this dissertation, is whether or not Thailand should implement punitive damages as a policy instrument to achieve the purpose of consumer protection. Within the remit of this question, the main analysis focuses on what is the best approach to legal policy making for the Thai government and judges in order to develop the appropriate range and caps on punitive damages so as to be consistent with current Thai tort laws and other existing laws in the Thai legal system. The key objective of this research is to consider and recommend the possible development of punitive damages in a civil law system such as Thailand. To achieve this goal, the different literatures on punitive damages, economic principles and international experiences must be analyzed to identify the criterions, rules, and approaches. The implications for the Thai judges in awarding and implementing such damages and for the Thai government in doing legal reforms suitable and efficient within the current Thai legal system and Thai society are very relevant.
1.1 WHAT ARE PUNITIVE DAMAGES?¹

Punitive damages are damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specifically, damages assessed by way of penalizing the wrongdoer or making an example to others. Punitive damages, which are intended to punish and thereby deter blameworthy conduct, are generally not recoverable for breach of contract. The United States Supreme Court has held that three guidelines help determine whether a punitive-damages award violates constitutional due process: (1) the reprehensibility of the conduct; (2) the reasonableness of the relationship between the harm and the award; and (3) the difference between the award and the civil penalties authorized in comparable cases.²

1.2 THE DIFFERENCES BETWEEN COMPENSATORY AND PUNITIVE DAMAGES

In *Cooper Indus v. Leatherman Tool*, the United States Supreme Court explained that although punitive and compensatory damages are typically awarded at the same time by the same decision-maker, they serve distinct purposes. According to the United States Supreme Court, compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct. In contrast, punitive damages, which have been described as ‘quasi-criminal,’ operated as ‘private fines’ intended to punish the defendant and to deter future wrongdoing. They also asserted that a jury’s assessment of the extent of a plaintiff’s injuries for the purposes of compensatory damages is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation. *Cooper Indus. v. Leatherman Tool*, 532 U.S. 424, 432, 121 S.Ct. 1678, 1683 (2001) (per Stephens, J.).

Nevertheless, the difference can be further discerned from the standpoint of torts law and contract law as follows:

---

¹Punitive damages also termed as “exemplary damages”; “vindictive damages”; “punitory damages”; “presumptive damages”; “added damages”; “aggravated damages”; “speculative damages”; “imaginary damages”; “smart money”; “punies” and “treble damages” in the context of antitrust law.

1. **Torts**

Tort law involves civil liability between private parties. A plaintiff who wins a tort suit usually recovers the actual damages or compensatory damages that she suffered because of the tort. Depending on the facts of the case, these damages may be for direct and immediate harms, such as physical injuries, medical expenses, as well as lost pay and benefits, or for intangible harms such as loss of privacy, injury to reputation, and emotional distress.

In cases where the defendant’s behavior is particularly horrific, a plaintiff can recover punitive damages. However, punitive damages are not intended to compensate tort victims for their losses instead they are designed to punish flagrant wrongdoers and to deter them and others from engaging in similar conduct in the future. Theoretically, therefore, punitive damages are reserved for the worst kinds of wrongdoing.

2. **Breach of Contract**

Contract law seeks to encourage people to rely on the promises made to them by others. Contract remedies focus on the economic loss caused by breach of contract, not the moral obligation to perform the promise. The objective of granting a remedy in a case of breach of contract is simply to compensate the injured party.

The usual remedy is an award of money damages that will compensate the injured party for his losses. This is called a legal remedy or remedy at law, because the imposition of money damages in our legal system originated in courts of law. A person injured by a breach of contract is entitled to recover compensatory damages.

a. **Protected Interests**

In calculating a compensatory remedy, a court seeks to protect the expectation interest of the injured party by awarding the plaintiff “benefit of his bargain” (placing the plaintiff in the position he or she would have been in had the contract been performed as promised). To do this, the court must compensate the injured party.

In some cases, if a promisee cannot show that he or she is entitled to the expected damages with reasonable certainty, the promisee may seek a remedy based on his or her reliance on the promisor’s promise rather than for the expectation of profit. The promisee’s reliance interest is determined by the cost incurred by changing his or her position in reliance on the other party’s promise.

A restitution interest is a party’s interest in recovering the amount by which he has enriched or benefited the other party. Both the reliance and restitution interests involve promisees who have changed their position. The difference between the two is that the reliance interest involves a loss to the promisee that does not benefit the promisor, whereas the restitution interest involves a loss to the promisee that does constitute an unjust enrichment to the promisor. A remedy based on restitution
enables a party who has performed or partially performed her contract and has benefited the other party to obtain compensation for the value of the benefits that she has conferred.

b. Compensatory Damages

Normally, compensatory damages include considerably three factors: loss in value, consequential damages (or “special damages”), and incidental damages. The starting point in calculating compensatory damages is to determine the loss in value of the performance. The calculation of the loss in value experienced by an injured party differs according to the type of contract and the circumstances of the breach. In contracts involving nonperformance of the sale of real estate, for example, courts normally measure loss in value by the difference between the contract price and the market price of the property. Where a seller has failed to perform a contract for the sale of goods, courts may measure loss in value by the difference between the contract price and the price that the buyer had to pay to procure substitute goods.

Consequential damages are damages that do not flow directly and immediately from an act but rather flow from the results of the act; damages that are indirect consequences of a breach of contract. For example, XYZ Company buys a computer system from ABC Computers. The system fails to operate properly, and XYZ is forced to pay its employees to perform the tasks manually, spending $10,000 in overtime pay. In this situation, XYZ may seek to recover the $10,000 in overtime pay in addition to the loss of value that it has experienced. Lost profits flowing from a breach of contract can be recovered as consequential damages if they are foreseeable and can be proven with reasonable certainty.

Incidental damages compensate for reasonable costs that the injured party incurs after the breach in an effort to avoid further loss. For example, if the company breaches an employment contract with Billy, Billy could recover as incidental damages those reasonable expenses he must incur in an attempting to procure substitute employment, such as long-distance telephone tolls or the cost of printing new resumes.

c. Limitations on Recovery

An injured party’s ability to recover damages in a contract action is limited by three principles:

1. A party can recover damages only for those losses that he/she can prove with reasonable certainty. Losses that are purely speculative are not recoverable.

2. A breaching party is responsible for paying only those losses that were foreseeable to him/her at the time of contracting. A loss is foreseeable if it would ordinarily be expected to result from a breach or if the breaching party had reason to know of particular circumstances that would make his/her loss likely.

3. Plaintiffs injured by a breach of contract have the duty to mitigate (avoid or minimize) damages. A party cannot recover for losses
that he/she could have avoided without undue risk, burden, or humiliation.

d. Punitive Damages

Punitive damages are damages awarded in addition to a compensatory remedy to punish a defendant for particularly reprehensible behavior and to deter the defendant and others from committing similar behavior in the future. The traditional rule is that punitive damages are not recoverable in contract cases, unless permitted by a specific statutory provision (such as consumer protection statutes) or the defendant has committed fraud or another independent tort. A few states will permit the use of punitive damages in contract cases in which the defendant’s conduct, though not technically a tort, was malicious, oppressive, or tortuous in nature. ³

1.3 BASIC THEORIES FOR PUNITIVE DAMAGES

The imposition of punitive damages has become an important and controversial feature of the legal system in many countries. It also can be observed from many perspectives with various theories that support its application. The following section highlights some of the basic theories and consequences related to punitive damages.

1. The Concept of Deterrence

Deterrence is the act or process of discouraging certain behavior, particularly by fear of punishment. ⁴ As explained earlier, one of the main objectives of punitive damages is to “deter” the blameworthy conduct of the defendant. According to this objective, punitive damages ordinarily⁵ should be awarded if, and only if, a wrongdoer has a significant chance of escaping liability for the harm he/she caused. When this condition holds, punitive damages are needed to offset the deterrence-diluting effect of the chance of escaping liability. However, there are also some rationales for punitive damages that do not rely on the possibility of escaping liability, such as, the punitive damages may be needed to deprive individuals of the socially illicit gains that they obtain from malicious

---
⁴ BRYAN A. GARNER, BLACK’S LAW DICTIONARY 481 (8th ed. 2007).
acts.

a. Reprehensibility of Conduct

The law requires that the defendant’s conduct reprehensible, namely, in a way that is egregious, malicious, or undertaken with reckless disregard for the rights of others, before punitive damages can be imposed. If a defendant is found to have so acted, the degree of his reprehensibility is often treated as a key factor in determining the amount of punitive damages. For example, the United States Supreme Court in Gore observed that this factor is “[p]erhaps [the] most important” indicium of the reasonableness of a punitive damages award as well as in Haslip, which the Court considered the reprehensibility of the defendant’s conduct was one of the factors listed by the Court.

Whether reprehensibility per se affects the goal of punitive damages in providing deterrence is the key issue. Generally, the reprehensibility of a defendant’s conduct should not be taken into account for the purpose of determining optimal damages for deterrence. The notable exception to this conclusion occurs when the defendant is an individual whose conduct is motivated by malice and whose gains consequently are not included in social welfare.

b. Wealth of Defendants

Courts and juries frequently take into account the defendant’s financial status to determine the level of punitive damages, with the understanding that higher punitive damages may be appropriate because of a defendant’s wealth. Not surprisingly, most plaintiffs tend to emphasize this factor when defendants are wealthy, especially when they are large corporations. For example, in Exxon Valdez case, Exxon’s wealth was “virtually the exclusive focus of plaintiff’s Phase III [punitive damages] case.”

However, from the perspective of attaining proper deterrence, a defendant’s wealth generally should not be considered when the defendant is a corporation since it might lead to excessive precautions, undesirably curtail the corporation’s activities, such as setting prices above the proper level, and chilling consumption of their products. Furthermore, in extreme cases, such corporations might even withdraw their product

---

7 Polinsky & Shavell, Punitive Damages: An Economic Analysis, supra note 5, at 910.
from the marketplace regardless of the product’s value to society. Additionally, it may also increase the risk of harm because small firms may not have enough incentive to make it worthwhile for them to spend proper amount on precautions since the firm’s goal is to maximize profits. Therefore, if the cost of a precaution is higher than the damages incurred, the economic decision maker will not take such precaution. Consequently, if the cost of precaution is less than the damages incurred by not taking it, a firm will want to take the precaution. However, as long as a corporation expects to pay for the harms it causes, it will have a socially appropriate incentive to reduce the harms.

The idea of not including the defendant’s wealth into consideration in calculation of punitive damages is thus generally applied to individual defendants, except when the individual’s gain from committing the harmful act is socially illicit (as opposed to a firm in which is motivated by profits rather than by a desire to cause harm.)

c. Potential Harm

In awarding punitive damages, some courts consider not only the actual harm, but also the harm that might have occurred, or “the potential harm” and presume that the higher the potential harm, the higher the level of punitive damages that can be justified. The United States Supreme Court supported this notion in Haslip as well as in TXO Production Corp. v. Alliance Resources Corp, and in the Exxon Valdez oil spill case in which the court noted that, although 11 million gallons of oil spilled, another 45 million gallons in the Exxon Valdez could have spilled, making the potential harm much higher.

However, in the general view of deterrence, the potential harm should not be taken into account in determining punitive damages for two reasons. First, the “potential harm” factor can be used to raise damages when harm is low but does not to lower damages when harm is high. Second, it could likely increase the public and private costs of resolving legal disputes.

---

9 Green Oil Co. v. Hornsby, 539 So. 2d 218, 223 (Ala. 1989).
10 See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991); see also TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1993) (“It is appropriate to consider the magnitude of the potential harm that the defendant’s conduct would have caused....”)
11 “The evidence established that the Exxon Valdez spilled 11,000 gallons of crude oil, approximately one-fifth of its cargo. Had the remaining 45,000,000 gallons of oil spilled, the disaster and harm would have been many times greater.” In re The Exxon Valdez, No. A89-0095-CV, 1995 WL 527988, at *6 (D. Alaska Jan. 27, 1995).
d. Gain of Defendant

Alternatively, some courts award punitive damages to offset the defendants’ gain from his wrongful conduct. In the light of deterrence, a policy of removing the defendant’s gain generally may result in over-deterrence. However, it may be appropriate and necessary in cases when the defendant is an individual who acted maliciously to obtain a socially illicit gain. In this case, the question whether punitive damages should be imposed to remove the defendant’s gain only when his gain grossly exceeds the victim’s harm, otherwise, compensatory damages would eliminate the gain.

e. Litigation Costs

Several courts have suggested that the plaintiff’s litigation costs should be one factor to determine punitive damages. The purpose of considering the plaintiff’s litigation costs, when calculating punitive damages, is to prevent the defendant from escaping liability. High litigation can deter individuals harmed by the defendant’s wrongdoing from pursuing a lawsuit against the defendant. Conversely, some courts believe that punitive damages generally should not be augmented for the purpose of inducing suits that otherwise might not be brought because of the cost of litigation. Indeed, there are some states that adopted the policy of “decoupling punitive damages” which gives the plaintiff only a fraction of the punitive damages paid by the defendant, with the remainder going to the state. This policy is desirable because it decreases the volume of litigation without compromising deterrence since the amounts of defendant’s damage payments are unaffected. Therefore, the main justification for considering litigation costs in terms of deterrence is to prevent the defendant’s escape from liability because he or she would not be sued.

f. Related Private Litigation

Sometimes, a defendant may involve in multiple suits because of the repeated nature of the harm, or because of a single injury to many individuals and may be sued by several different parties. According to the United States Supreme Court, when there are prior judgments against a defendant for the same conduct, the court will endorse the notion that these judgments should be considered to mitigate the amount of punitive
damages awarded against the defendant. However, when the harm that originates from the defendant’s conduct is repetitive, as in Gore, it is not clear whether prior judgments against the defendant will be taken into account. Given the difficulty in predicting the amount of future litigation, courts might mistakenly believe that relatively few suits will be brought, and thus, perceive a greater need for punitive damages than is appropriate. If such mistakes occur, a defendant may be made to pay more than the harm he/she had caused, like the circumstances in Gore. One possible way to avoid the problem of excessive damages when there are multiple suits is to use “escrow accounts” for punitive damages. Under this approach, the defendant will pay punitive damages into an escrow account instead of directly to the plaintiff. In this way, the defendant will not be made to pay more in total damages than the harm done.

g. Related Public Penalties

The issue of whether or not public penalties that may be imposed in a private suit should affect the determination of punitive damages in that suit, has been answered in two ways by the courts. One is that punitive damages should be reduced to reflect any public penalties that the defendant has paid for the same conduct. In contrast, the Court in Gore took the view that potential public penalties should serve as a benchmark for punitive damages, namely, the higher possible public sanctions, the higher punitive damages should be.

From the view of deterrence, the defendant’s total payment should be such that his/her expected payment equals the harm done. If punitive damages are not reduced to reflect public penalties borne by the defendant, the defendant’s combined private and public payments would result in his/her expected payments exceeding the harm done. Therefore, the court should only use such public sanctions as an offset, but not as a

12 The seventh Green Oil Factor which was also echoed in the Restatement (Second) of Torts § 908 cmt. e (1979).
13 See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1607 (1996) (Breyer, J., concurring) (noting that the existence of prior actions was not a factor in Gore).
15 In Gore, the court expressed this as follows: “Comparing the punitive damages award and the civil and criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness.” BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1603 (1996).
benchmark in setting punitive damages\textsuperscript{16} to create effective deterrence.

h. Victim’s Precaution

It is clear that a victim who knows he or she can gain from an accident does not have incentives to prevent it. Supplementing full compensatory damages with punitive damages converts a reluctant victim into an eager one,\textsuperscript{17} especially in cases in which the harm suffered by the plaintiff is purely pecuniary. This problem is referred by economists as “bilateral precaution,” however it can be overcome by the doctrine of “contributory negligence.”\textsuperscript{18}

i. Insurance

The issue whether courts should allow a potential defendant to insure against punitive damages varies among jurisdictions. Most jurisdictions apparently extend insurance coverage to punitive damages, but some do not.\textsuperscript{19} The supporting view is relatively high especially in the cases when the liability is strict and harm is entirely monetary. One reason is because even if purchase of liability insurance can cause the potential defendant to take less care and thereby increase the frequency of accidents, a victim will be unaffected since he or she is more likely to be fully compensated. Namely, the insurance raises the well-being of potential defendants.

However, if the loss is non-monetary, a victim might not be fully compensated since full compensation may be impossible, such as, a loss of a person’s life, or a victim might not be compensated at all under the negligence rule because the potential defendant may not have been negligent.

Insurance involves both a moral hazard, which is the temptation of injurers to risk liability because they know the insurance company will bear all or part of it for them, and “adverse selection,” which is the tendency of high-risk policyholders to drive low risk policyholders out of the insurance market. Insurance thus substitutes \textit{ex ante} regulation of

\begin{itemize}
\item Polinsky & Shavell, \textit{Punitive Damages: An Economic Analysis, supra} note 5, at 926-928.
\item Contributory negligence is a plaintiff’s own negligence that played a part in causing the plaintiff’s injury and that is significant enough (in a few jurisdictions) to bar the plaintiff from recovering damages. In most jurisdictions, this defense has been superseded by comparative negligence (a plaintiff’s own negligence that proportionally reduces the damages recoverable from a defendant). BRYAN A. GARNER, BLACK’S LAW DICTIONARY 1062 (8th ed. 2007).
\item A majority of jurisdictions follow the approach exemplified in \textit{Lazenby v. Universal underwriters Insurance Co.}, 383 S. W. 2d 1 (Tenn. 1964), under which punitive damages are insurable.
\end{itemize}
policyholders by insurance companies for some of the \textit{ex post} liability imposed by courts and borne by defendants. However, the combination of risk aversion by firms and careful monitoring by insurance companies will produce beneficial selection.\textsuperscript{20} Reasonably, the tendency towards beneficial selection will be especially strong when insurance extends to punitive damages.

2. The Concept of Punishment

Punishment is a sanction, such as, a fine, penalty, confinement, or loss of property, right, or privilege, assessed against a person who violates the law.\textsuperscript{21} Society’s goal in punishing the individual with punitive damages is to impose appropriate sanctions on blameworthy parties.\textsuperscript{22} From an economic perspective, there is a relatively straightforward connection between punitive damages and punishment if the defendant is an individual, or if the defendant is a firm and the goal is to punish firms as entities (in other words, a view that a firm should be punished per se without reference to the punishment of the individual employees within it.).\textsuperscript{23}

However, if the defendant is a firm and the goal is to punish culpable employees, then the imposition of punitive damages on firms may not result in the direct punishment of blameworthy employees. Instead, punitive damages will penalize shareholders and customers who are not likely to be blameworthy.\textsuperscript{24} Thus, the ability of punitive damages in advancing the objectives of punishment in the case of firms is limited for many reasons. First, culpable employees may not be punished by firms because the firms may have difficulty identifying the wrongdoer. Second, even if identification is possible, imposing punitive damages on firms will have little to no marginal effect on their punishment. That is, the internal sanction for such employees may be less as a result of the firms’ bearing both punitive and compensatory damages than if the firm had borne

\textsuperscript{20} Cooter, \textit{Punitive Damages For Deterrence: When and How Much?}, supra note 17, at 1185.

\textsuperscript{21} BRYAN A. GARNER, \textit{BLACK’S LAW DICTIONARY} 1269 (8th ed. 2007).

\textsuperscript{22} See GEORGE P. FLETCHER, \textit{RETHINKING CRIMINAL LAW} §6.3.2, 417 (1978) (“[T]he offender is duty-bound to suffer punishment, for his offense creates an imbalance of benefits and burdens in the society as a whole.” (Citing Herbert Morris, \textit{On Guilt and Innocence} 34-36(1976))); Walter Moberly, \textit{The Ethics of Punishment} 95 (1968) (stating that, under a retributive theory, “punishment should serve both to express and to deepen the horror with which certain types of action ought to be regarded”).

\textsuperscript{23} However, many empirical studies and literatures have shown that this view could be problematic.

\textsuperscript{24} However, there is also a thought that customers could be partially blameworthy for harms caused by firms because, in the absence of customer interest in firms’ products, production and harms would not happen.
compensatory damages alone. Also, it may be possible that a single individual does not have requisite knowledge to be considered culpable. Individuals can change jobs, retire, or die, and because decisions in firms are often made by many individuals.

a. Reprehensibility of Conduct

Regarding reprehensibility, the punishment goal is met when sanctions are imposed on those who have acted reprehensibly. Therefore, considering the reprehensibility of the defendant’s conduct is intrinsic to satisfaction of the punishment objective. The law’s focus on reprehensibility clearly makes sense given this objective. However, the correlation between reprehensibility and punishment in the case of firms can be attenuated because it may not cause these firms to penalize their blameworthy employees who are individuals within the firm for their reprehensible behavior.

b. Wealth of Defendants

Regarding the wealth of defendants, there can be considered in two views: when the defendants are individuals, and when the defendants are firms. In the first view, the general belief is that the justified punitive damages should be higher for wealthier defendants. The punishment goal will be achieved if a proper punishment is imposed on a culpable individual, which can be reached by reducing the individual’s wealth by a particular amount. The economic reason supporting this belief is the concept of marginal utility of money, that is, in determining how much the penalty should increase the rate at which the marginal utility of money declines with wealth of the individual should be considered. Accordingly, because a lower penalty will be ineffective against the wealthy than the poor, so to accomplish the punishment goal, it is necessary to impose a higher penalty to the wealthy than if such individual is the poor.

In the second view when the defendant is a firm, the relationship between its wealth and punishment objective depends on whether the punishment objective is viewed in terms of punishing the firm as an entity or punishing culpable individual employees within the firm. If the goal is to punish the firm as an entity, the firm’s wealth might be relevant to the appropriate level of damages for punishment purposes. However, if under the second view, the firm’s wealth would be irrelevant because the level of damages necessary to induce a firm to punish its culpable employees ordinarily would not depend on its wealth.
Therefore, to the extent that the internal sanctions of the firms towards the culpable employees do not depend upon the wealth of the firms, the punishment objective will not be fulfilled by making punitive damages depend on the firms’ wealth.

3. The Predictability of Punitive Damages

One of the most contested issues of punitive damages concerns the predictability of punitive damages. This problem is not new, however, it is generally accepted that it is easier to predict when punitive damages will not be awarded than when they will be unless the case involves an intentional tort or a business-related tort such as employment claims, in which punitive damages will mostly never be awarded.25 There are some studies supporting that in each jurisdiction and case category jury decisions to award punitive damages are random. Nevertheless, there is also a view that even if the level of punitive damages can be predicted when punitive damages are awarded; it could be randomly determined whether punitive damages will be awarded.

Since unpredictable damages are neither fair nor efficient, one possible way to make punitive damages more predictable is by making the law more exact.26 According to empirical evidence, most states have a statute that outlines the conditions under which punitive damages should be awarded. These are usually attempts to state the common practices actually followed by the courts. However, these statutes merely provide guidelines for awarding punitive damages but not have been formulated into exact rules regarding the computation of punitive damages. Therefore, in practice, there is much uncertainty about when punitive damages can be awarded.

4. The Optimal Level of Punitive Damages

This dissertation does not address the issue of how much punitive damages should be awarded when the objectives of deterrence and punishment have different requirements for the proper measure of punitive damages. However, it is evident that the best level of punitive damages should be a compromise between the levels that are both


26 Cooter, Punitive Damages For Deterrence: When and How Much?, supra note 17, at 1146.
optimal for each objective when it is considered independently\textsuperscript{27} and the quantities of punitive damages that are separately optimal with respect to these two objectives should not be added to each other.

\textsuperscript{27}Polinsky & Shavell, \textit{Punitive Damages: An Economic Analysis}, supra note 5, at 955.
CHAPTER 2: ANALYSES

2.1 ASSESSING PUNITIVE DAMAGES

Some commentators in favor of awarding punitive damages have advanced three policies justifying the practice: deterrence, retribution, and compensation. For the deterrence objective, there is a claim that compensatory damages are insufficient to deter certain tortuous behavior, especially when the behavior is profitable and likely to go undetected. In such cases, punitive damages should be calculated, in the few instances where the defendant is caught in the act, to approximate a hypothetical compensatory award for all the damages the tortfeasor’s actions have caused in all the cases that have gone undetected. The contention that punitive damages deter undesirable behaviors has been contested. Those who justify punitive damage awards on the basis of retribution focus on the wrongful character of the defendant’s actions and argue that punitive damages should be awarded because bad actors deserve it and that wrongful actions should be punished in the interest of justice. One question that arises frequently related to punitive damages is the possibility that multiple punitive awards will be granted sequentially, to different plaintiffs, based on the same conduct that happens to cause harm to a number of victims. This may result, in the aggregate, unfair, and inefficiently exercise punishment. One scholar has suggested that a national registry of punitive awards be established, by which previous awards for the same conduct would be taken into account in setting appropriate punitive damages awards in the future. Finally, some commentators have viewed that punitive damages awards aid in ensuring the victims’ full

compensation for their losses. For instance, some jurisdictions such as the United States, do not allow the winner of a tort action to collect the attorneys’ fees from the losing party. Many plaintiffs who receive a compensatory damage award are not made completely whole, since the attorney takes a significant share of any award. Punitive damages can be used to pay attorneys’ fees, leaving the plaintiff more fully compensated for any harm he or she suffered.

On the other hand, some scholars criticize the controversial attributes of punitive damages that they provide an unfair windfall to the plaintiff. Nonetheless desirable it may be to deter wrongful behavior, there is no reason to convert the tort system into a lottery, awarding damages to one plaintiff based on harms that the defendant’s conduct may have caused to innumerable other plaintiffs. Furthermore, it is argued, punitive damages involve a kind of double jeopardy: the defendant can often be subject to criminal sanctions after paying a large punitive damage award. To the extent that both criminal (and maybe other civil) penalties and punitive damages seek to deter undesirable conduct and punish those whose conduct warrants punishment, the defendant can be said to have been punished twice for the same conduct. Critics also raise a skeptical issue of punitive damages awards when jurors in common law countries and judges in civil law countries have very little guidance in assessing them, which, it is claimed, leaded to exorbitantly high awards in some cases. As a result, some scholars have insisted on caps (outside limits) on punitive damage awards. Many legislatures have implemented this suggestion in one form or another.

The Arguments against Punitive Damage Outside of the United States

The general reaction outside the United States has been largely negative, even in less controversial areas such as antitrust law. This should come as no surprise as most

33 See, e.g., Richard W. Murphy, Punitive Damages, Explanatory Verdicts, and the Hard Look, 76 Wash. L. Rev. 995 (2001) (arguing that juries should be required to explain the factual bases for punitive damage awards).
civil law countries disallow punitive damages in private actions\textsuperscript{37} and limit recovery of damages in private actions to compensatory damages\textsuperscript{38} (even though there are some civil law countries, such as, Indonesia, Philippines, or South Africa that have adopted the practice of punitive damages, however, these countries have been considerably influenced by two common law countries; the United States and England, where punitive damages are an established concept). Additionally, even in those common law countries that allow awards of such damages (for example, England, New Zealand, Australia, and Canada), the size of the American awards dwarfs what is allowable in those countries. Most deterrents of punitive damages argue that they are inherently penal or punitive. They are improper to be included in torts or contract law because the standard of proof is too low, which may be applied too frequently and thus, against the public policy\textsuperscript{39} and incompatible with the constitutional principles in many civil law countries. Moreover, it


\textsuperscript{37}See Thomas Rouhette, \textit{The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?}, 74 DEF. COUNS. J. 320 (Oct 2007). (Stating that French courts, eminent French law professors and scholars, eager to protect the fundamental principles of civil procedure, have severely criticized the concept of punitive damages, calling it “shocking, in its essence as well as in its application.”); in Belgium, legal authors have criticized court decisions for granting damages that were not merely compensatory; in Spain, legal authors are resolutely opposed to the concept of punitive damages.)

\textsuperscript{38}Gotanda, \textit{Charting Developments Concerning Punitive Damages: Is the Tide Changing?}, supra note 36, footnote 16, at 4-5. (See, e.g., Schweizerisches Obligationenrecht [OR] arts. 45–47 (Switz.); Codice civile [C.C.], art. 1223 (Italy); Belgian Civil Code art. 1382; Código Civil [C.C.] arts. 1106, 1902 (Spain); Bürgerliches Gesetzbuch [BGB] [Civil Code] art. 249 (F.R.G.); Finland Damages Act of 1974, summarized in THE FINNISH LEGAL SYSTEM, 134 (J. Uotila ed., 2d ed. 1985); Astikos Kodikas [A.K.] [Civil Code] arts. 297–299 (Greece); Civil Code of the Polish People’s Republic art. 444; Grazhdanskii Kodeks RF [GK RF] [Civil Code] art. 15 (Russ.); Czech Republic Civil Code § 442 [Czech Civ. C.]; Burgerlijk Wetboek [BW] § 162 (Neth.).)

\textsuperscript{39}For example, German Courts have traditionally considered the prohibition of punitive damages awards in civil actions to be a matter of fundamental public policy.
is clear that all countries prohibit excessive awards of damages, including excessive awards of punitive damages. Although what constitutes an excessive award varies from country to country, the courts outside the United States are likely to view such punitive damages awards as excessive. Also many civil law courts and commentators have claimed that punitive damages are inappropriate in their jurisdictions because they “vent [ ] the indignation of the victimized,”40 discourage the injured party from engaging in self-help remedies,41 compensate victims for otherwise not compensable losses,42 and reimburse the plaintiff for litigation expenses that are not otherwise recoverable.43

Other arguments propose that civil law already contemplates alternatives to punitive damages which come in form of “a private penalty,”44 “penalty clauses,”45 “multiple damages” (for example, in cases involving infringement of the right to personality, the German Federal Supreme Court held that the amount of damages awarded by the lower court was too small to have a deterrent effect;46 or in antitrust cases such as the damages actions for breach of the European Commission Treaty antitrust rules in Green Paper published by the European Commission in which one of the proposals called for allowing double damages for horizontal cartels;47 and some

44 Rouhette, supra note 37. (In France, the judges of the Civil Supreme Court expressly mentioned the existence in French Law of civil penalties, when they decided that "the sanction of Article L122-14-4, [section] 2 of the Employment Code," which allows the judge to order an employer to reimburse to the organization concerned the indemnities paid to the employee who has been dismissed without serious and real cause, constitutes a "private penalty" within the statutory ceiling (Cass. soc., 12 June 2001). In addition, several articles of the French Civil Code and the French Commercial Code, inter alia, provide for the payment of a civil penalty ("amende civile") to the Public Treasury in addition to compensatory damages awarded to the victim, in order to prevent the occurrence of similar misconducts).
45 Id. (The penalty clause included in a contract is a very good example of a private penalty that exists in most European countries. It provides for the payment of a fixed amount of damages if one party fails to fulfill its obligations. Hence, it clearly has a deterrent purpose in addition to its natural compensatory function.)
46 BGHZ 128, 1 (1) (Caroline I) (F.R.G.).
provisions of French maritime law under certain conditions also allow awarding multiple damages), “forfeitures,” “periodic penalty payments,” “liability clauses,” “liability ceilings,” and confiscation. These practices could all be considered as some sort of substitutes for punitive damages in the civil law jurisdictions which make the implication of punitive damages in these countries seems to be less or even none necessary.

In summary, legal commentators in most civil law countries are likely against, rather than in favor of, the introduction of punitive damages in their countries basically because of the aforementioned reasons. However, the globalization and in particular, the development of international business transactions, in which inevitably leads to the international commercial litigations, among civil law and common law countries, have made it reasonably impossible for each civil law country to entirely adhere with their traditional absolute prohibition on the award of punitive damages. Accordingly, the courts in these jurisdictions may have to reconsider their positions on punitive damages, and most importantly, adopt this American damages into their legal system in the way that will be most suitable for their legal systems. For example, punitive damages are appropriate in a situation where it would serve multiple purposes in addition to punishing the defendant, such as preventing defendants from retaining profits obtained through unlawful conduct, deterring others from engaging in similar activity, encouraging enforcement of certain types of claims, or paying for attorneys’ fees and other costs.

2.2 ECONOMIC PERSPECTIVE ON PUNITIVE DAMAGES

There are a lot of literature reviews on the economic perspective on punitive damages. Some scholars believe that punitive damages can be explained in terms of economic efficiency suggesting many possibilities.\textsuperscript{48} For example, under the efficient theory a tortfeasor will try to minimize the combined costs of an accident and prevention

\textsuperscript{48} See, David Friedman, An Economic Explanation of Punitive Damages, http://www.daviddfriedman.com/Academic/Punitive/Punitive.html (last visited Apr. 4, 2012). (The paper discusses many models and theories, including the Ellis-Tullock-Stigler Out and Legal Rabbits from Efficient Hats, offers explanations why the common law permits punitive damages (that efficient damages are higher the higher the elasticity of supply of the offense, and that the categories used to justify punitive damages are proxies for offenses with highly elastic supply) then performs an examination on another economic explanation under certain assumptions and given the equation of efficient damage rule).
measure plus the victim’s cost since we require the tortfeasor to fully compensate his victim thus transferring the entire cost to the tortfeasor. The alternative solution is the “Hand Rule” in which instead of transferring the cost, the court will assume that the tortfeasor is deemed negligent only if the cost of preventing the accident is less than the harm imposed by the accident times the probability that the accident will occur. The “Hand Rule” has led contentious argument about it’s morality and the potential affect public safety. One scholar suggested an alternative framework that determines the conditions under which punitive damages should aim to internalize, or shift the losses generated by the defendant’s conduct to the defendant, and the condition under which the award should aim at eliminating the defendant’s gain and then concluded that the gain-elimination goal is preferable in most punitive damages cases. This suggests that society has little reason to fear the potential over-deterrence costs of punitive awards. Another attempt to provide an economic explanation for punitive damages implies that a “make-the plaintiff-whole” remedy can create incentives for a defendant to bypass negotiation in favor of an outright taking and that an efficient legal system often will opt for a remedy that makes a defendant whole rather than a plaintiff when the defendant intentionally takes, rather than negotiates for, a property-protected entitlement. This study also shows that in a case where a market price exists, the liability rules could be appropriate in terms that compensation levels can be readily set (as when markets are highly liquid) or when the cost of enforcing property rules would be prohibitive (as with ordinary traffic accidents). The model here merely refutes familiar arguments that non-corrective damages that systematically and intentionally over or under-compensate plaintiffs must be inefficient. All in all, there is no one absolute conclusion for the economic perspective on punitive damages and still, we need more studies, but all of the current and previous studies offer better understanding of punitive damages.

2.3 OTHER PERSPECTIVES ON PUNITIVE DAMAGES

1. Public Choice Perspectives Or Private Interest Explanations

There are some commentators who observe the relationship between politics and punitive damages.\(^5\) As a variety of interest groups all around the world and in the country who support punitive damage have been successful in strategically framing punitive damages as a compelling policy problem requiring governmental action. From the study, these interest groups invested substantial resources over the past 15 years or so in attaining a place on the policy agenda for their favored solutions and ensuring that their characterization of punitive damages and the civil justice in their jurisdictions became the accepted wisdom. The study further suggests the shocking result that such investments are essentially a political campaign, not a systematic research on the civil justice system, and the successful end result does not come from a reasoned set of argument based on a systematic empirical research, but from a sophisticated appeal to emotional and the tactical use of passion. The research states that although the accepted wisdom persists because it is politically successful, systematic empirical research is still needed to make a critical evaluation.

2. Constitutionality

In the United States and other jurisdictions in which the punitive damages are applicable, there exists some apprehension that the application of the punitive damages means raises constitutional and public policy concerns. For example in the United States, the Supreme Court ruled the well-known State Farm case. The Court stated that an award of punitive damages cannot violate the Due Process Clause.\(^5\) Some scholars have done much research to observe and figure out the impact and the trend as to how much the optimal award should be.\(^5\)

---


(Suggesting that after the decision in *State Farm*, there are three trends range of ratios between punitive and compensatory damages: punitive damage awards in excess of ten times compensatory damages; punitive damage awards greater than four times compensatory damages; and punitive damage awards which equal compensatory damages. It also proposes that the awards in excess of four times compensatory damages could be problematic however lower federal courts and state courts in the United States seem to have had little
3. Psychology of Punitive Damages Decision-Making

There is a certain belief that psychology has substantially affected on punitive damage decision-making. Many scholars examined the association between the psychology and the punitive damage decision-making and come out with many kinds of results. One study advocates that the determination of punitive damages by both the jury and the judge were influenced by the defendant’s wealth but the compensatory damage awards of judges were marginally more influenced by defendant wealth than those of the citizen juries.54 Another research looks at how jury deliberation affects the pre-deliberation judgments of individual jurors and finds that with respect to dollars, deliberation produces a severity shift, in which the jury’s dollar verdict is systematically higher than that of the median of its jurors’ pre-deliberation judgments.55 The study further argues that the severity shift is attributed to a rhetorical asymmetry, in which arguments for higher awards are more persuasive than arguments for lower awards and that when judgments are not determined in dollars but a rating scale of punishment severity, deliberation increased high ratings and decreased low ratings. The study also finds that deliberation does not alleviate the problem of erratic and unpredictable individual dollar awards, but in fact exacerbates it.

4. Punitive Damage as Social Damages

Many arguments criticizing the appropriateness of the punitive damages led scholars to develop solutions to remedy the system. For example, some scholars propose that courts recognize societal compensatory damages as a new category of damages which would retain some elements of punitive damages.56 Under the societal compensatory damage approach, the jury’s award would consist of two parts: individual damages designed to compensate the victim before the court, and societal damages designed to compensate others directly harmed but not before the court. This principal difficulty in affirming punitive damages awards up to four times compensatory. Moreover, the survey shows that it does not appear that the lower courts generally have been influenced by the Supreme Court’s dictum in State Farm).54 Jennifer K. Robbenolt, The Decisions of Citizens and Trial Court Judges, 26 LAW & HUM. BEHAV. 315 (June 2002).
56 Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 YALE L.J. 347 (Nov. 2003).
focusing on compensation for real and identifiable societal losses advance fairness and corrective justice goals yet; the focus upon societal damages is also closely linked to the economic theory of deterrence as it forces the defendant to internalize the costs in his or her cost-benefit decision-making. The key point from the study is that the societal damages approach might address the public impact of a defendant’s conduct through a variety of mechanisms: legislative setting of multipliers in specific categories, the establishment of corresponding proxy funds, the judicial exercise of inherent equitable authority to allocate juror-assessed societal damages to specifically identified third parties who have also been harmed, or the exercise of rule-making authority to restructure its law. In the views of the scholars who support societal damage, although this theory is not a perfect solution, the very creation of societal damages funds directed to specifically harmed individuals could ameliorate the double recovery concern of the punitive damages and that the new spilt-recovery mechanism based on the societal damages theory should mitigate the most salient constitutional objections to existing split-recovery schemes.57 The study also shows that there is a symbolic relationship between the jury and the societal damages and that such close relationship would appear to enhance the jury’s ability to achieve more rational awards of what have been undifferentiated punitive damages awards, while simultaneously though indirectly advancing efficiency objectives.

5. Empirical Work on Punitive Damages58

Many legal scholars both in the United States and other jurisdictions completed research which led to different conclusions about trends in the size of punitive damage verdicts. Commentaries criticizing the punitive damages system for being “out of control” include W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts, 87 GEO. L.J. 285, 333 (1998); and Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?, 140 U. PA. L. REV. 1147, 1254 (1992). Commentaries

57In this regard, it was claimed that the new split-recovery mechanism should mitigate, if not completely overcome, the constitutional objections to existing split-recovery schemes that the increased role of the state as an active participant in raising and receiving punitive damages implicates the Excessive Fines Clause; that directing portion of punitive damages to any party other than the plaintiff effects a taking of the plaintiff’s private property; and that instructing jurors that a portion of the punitive award will be directed to the state violates the Due Process Clause.

58TWERSKI & HENDERSON, Jr., supra note 28, at 698.
CHAPTER 3: LITERATURE REVIEW OF THE IMPLICATION OF PUNITIVE DAMAGES

3.1 THE IMPLICATION OF PUNITIVE DAMAGES IN THE UNITED STATES

The most widespread use of punitive damages is in the United States where the award is governed by both the state and federal law. However, there is the Due Process Clause under the United States Constitution constrains unreasonably large awards of punitive damages. In the United States, punitive damages basically serve two purposes, to punish a party from engaging in wrongful, malicious, or outrageous conduct, and to deter that party and others from engaging in the prohibited behavior in the future. A few states allow what they call “exemplary relief” to compensate the claimant when damages are difficult to ascertain, and not to punish the defendant. Punitive damages are allowed in a great majority of states, although the circumstances permitting such relief vary greatly. Punitive damages have been permitted in actions involving torts, contract, property, admiralty, employment, and family law. Five states either prohibit the award of punitive damages altogether or severely restrict their use. Nebraska and Washington do not allow punitive damages. Louisiana, New Hampshire and Massachusetts also

63 See RICHARD L. BLATT, ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE 12, 17 (2003) 236-552. It should be noted that States are currently divided on whether arbitrators have the authority to award punitive damages. Compare Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976) (prohibiting arbitrators from awarding punitive damages), with Complete interiors, Inc. v. Behan, 588 So.2d 48, 51 (Fla. Dist. Ct. App. 1990) (stating that arbitrators may not award punitive damages absent express provision in contract authorizing this relief) and with Baker v. Sadick, 162 Cal. App. 3d 618, 631 (4th Dist. 1984) (ruling that arbitrators may award punitive damages unless the parties expressly prohibit its award). In Mastrobuono v. Shearson Lehman Hutton, Inc., the Supreme Court ruled that parties are generally free to define the scope of their arbitration agreement and that Federal Arbitration Act ensures that such an agreement will be enforced according to its terms notwithstanding state law limits on arbitrability. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 55-64 (1995).
64 See JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW & PRACTICE 5-1, 6-1, 13-1 (2d ed. 2000).
prohibit punitive damages, unless they are expressly authorized by statute.66

Unlike Australia and New Zealand, the majority of American states allow punitive damages where the defendant has already been subject to criminal proceedings for the same conduct giving rise to a claim for damages or where the defendant’s wrongful conduct would expose him or her to criminal sanctions.67

There are two justifications for this rule:

1. The prohibition on double jeopardy68 applies only to multiple criminal prosecutions and thus such actions do not preclude punitive damages.69

2. The civil and criminal penalties serve different purposes: criminal sanctions redress a wrong to the public, whereas punitive damages in a civil action redress a wrong to a private party.70

With respect to determining the amount of punitive damages, the practice has been to give the jury “broad discretion.”71

A number of states limit the amount of punitive damages that may be awarded.72 For example, Alabama and Georgia place a cap on awards of punitive damages at $250,000.73 In New Jersey, there is a limit on punitive damages to 5 times compensatory

---

67See KIRCHER & WISEMAN, supra note 64 at § 3.:2 (citing cases).
68See U.S. Const. amend. V (stating “nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb”).
71See Missouri Pac. R. Co. v. Humes, 115 U.S. 512, 521 (1885) (stating, with respect to determining the amount of punitive damages, “[t]he discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice”); see also CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 3 (2002) (finding “the instructions presented to jurors for determination of the appropriate punitive damages verdict are extremely vague and employ terms that are largely undefined”).
72See, e.g., IND. CODE ANN. § 34-51-3-4 (1999) (stating punitive damages may not be more than times compensatory damages or $50,000, whichever is greater); TEX. CIV. PRAC & REM. CODE ANN. §41.008 (2001) (limiting in certain actions punitive damages to $200,000 or two times the economic damages and up to $750,000 in additional non-economic damages, whichever is greater); VA. CODE ANN. § 8.01-38.1 (1987) (imposing $350,000 cap on punitive damages); see also NEV. REV. STAT. § 42.005(1) (1991) (limiting punitive damages in certain cases to three times the amount of compensatory damages if the compensatory damages are less than $100,000).
73See ALA CODE § 6-11-21 (1975); GA. CODE ANN. § 51-12-5.1(g) (1997).
damages or $350,000 whichever is greater.74

On the federal level, a number of statutes explicitly authorize the award of punitive relief for specific violations.75 The Fair Credit Reporting Act, for example, provides that a court may award punitive damages when a consumer reporting agency willfully fails to comply with the requirements imposed by the Act.76 In addition, various other statutes permit treble damages, including the Clayton Act, the Racketeer Influenced and Corrupt Organization Act (RICO), and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).77

Conversely, a number of federal statutes, such as the Foreign Sovereign Immunities Act and the Federal Tort Claims Act, expressly preclude awards of punitive damages.78

For over 200 years, the Supreme Court declined to place any constitutional limits on jury-awards of punitive damages.79 The Court based this hands-off policy on the historic recognition of punitive damages in the United States and England.80 Then, starting in the mid-1990s, it issued a number of decisions limiting awards of punitive damages and setting forth procedures for courts to follow in reviewing such awards.81

In terms of cases, the Supreme Court’s recent decisions unambiguously illustrate
that the Court is deeply concerned with both the process for awarding punitive damages as well as the size of the awards. It has held that procedural due process mandates that safeguards be in place to ensure fairness in the awarding of punitive damages. Furthermore, it has ruled that substantive due process prohibits grossly excessive awards of punitive damages. Thus, it is likely that American courts in the coming years will more closely scrutinize punitive damages awards to ensure (by the United States Supreme Court standards) that they are reasonable and proportionate to the wrong committed.

Some famous cases on Punitive Damages in the United States include:


   In *BMW of North America, Inc. v. Gore*, 116S.Ct. 1589 (1996), the plaintiff, Ira Gore, Jr. purchased a new BMW sedan from an Alabama dealer. Subsequently, he learned that the defendant, BMW of North America, failed to disclose that it repainted part of the car due to the damage to the car before its arrival in the U.S. The jury awarded Gore $4,000 in compensatory damages for diminution in the value of the car, and $4 million in punitive damages. The Alabama Supreme Court reduced the punitive damages to $2 million, but the United States Supreme Court held even this award to be grossly excessive. After reconsideration, the Alabama Supreme Court reduced the punitive damage to $50,000.

   With regard to the probability that BMW would escape liability for selling a repainted car as new, there are two factors involved. One possibility is that BMW would escape notice for repainting the car; another is that a purchaser who did discover that his car had been repainted would sue.

   In this case, Gore, the plaintiff, drove the car for nine months without detecting any abnormalities in the paint on his car. It was only after he took his car to a detail shop that he learned that it had been repainted. Therefore, it seems reasonable to suppose that many purchasers of such repainted cars sold as new would never discover that their cars had been repainted. Also, whether the owner who discovered that his car was repainted would sue depends on the costs of litigation (time and out-of-pocket expense) and the amount that he could collect. If the harm is as low as the jury found in *Gore*, it is possible that many owners (or lawyers hired on a contingency fee) would not have a sufficient
financial incentive to sue. Thus, there may have been a significant chance that BMW would have escaped liability if damages were merely compensatory, because of victims’ inadequate motive to sue.


In Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991), an insurance agent had misappropriated premium payments. Cleopatra Haslip, the plaintiff, a city employee, was hospitalized, but apparently did not know at that time that the group health plan insurance policy bought by the municipality of Roosevelt City, Alabama, had lapsed because of the agent’s misappropriation. When the hospital and her physician sought payment from her, she and other Roosevelt City employees sued the agent and the Pacific Mutual Life Insurance Company for fraud.\(^82\) The jury awarded Haslip $1,040,000 in total damages, of which $200,000 appears to have been assessed as compensatory damages and $840,000 as punitive damages.\(^83\) The trial court, the Alabama Supreme Court, and the United States Supreme Court, all affirmed the award.

The key issue relating to deterrence in this case is whether a significant chance exists that an insurance company whose agent misappropriates premiums can escape liability denying individuals coverage that they expected to have. Also, the focus should be on the company’s probability to escape, not the agent’s. Clearly, if a policy has been invalidated by an agent’s misappropriation of premium payments, the invalidation will come to the attention of a person who applies for coverage under that policy. If the insurance company does not pay the individual voluntarily, the individual probably would sue the company, given the amount at stake is large enough.

Consider the compensatory damages in this case, $200,000, however, less than $4,000 of this amount represented out-of-pocket expenditures, the rest, $196,000, consists of non-economic losses such as emotional distress. Clearly, the prospect of

---

\(^{82}\) It is worth-noting that according to the facts in this case, the insurance policy that lapsed was not Pacific Mutual Life’s policy, but rather the policy of another company, Union Fidelity Life Insurance Company, which the agent was also representing. Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) at 4-5. However, premiums for the Union policy were collected through Pacific Mutual Life’s Birmingham office. Id. at 5. Pacific Mutual Life was sued for fraud under a theory of respondeat superior. Id. at 6.

\(^{83}\) Although it was not entirely clear how the jury apportioned the total award between compensatory and punitive damages, the United States Supreme Court presumed that not more than $200,000 of the total represented compensatory damages and not less than $840,000 represented punitive damages. Id. at 7n.2.
obtaining this additional amount would increase a plaintiff’s incentive to sue if the likelihood of the latter recovery is high. On balance, therefore, although the suit seems reasonably likely in the circumstances of Haslip, some countervailing considerations might justify a modest punitive damages award, to offset the chance that a lawsuit would not be brought.


In this case, the Exxon Valdez, the defendant’s supertanker, crashed into a reef in Prince William Sound in Alaska, spilling 11 million gallons of oil and polluting over 1,000 miles of the Alaskan coastline. The supertanker’s captain, Joseph Hazelwood, had previously been treated for alcohol abuse and was found to have violated regulations governing alcohol consumption. In the private civil litigation against Exxon stemming from the accident, the plaintiffs, namely, various classes of fishermen and Alaskan natives, were awarded $287 million as compensation for fishing losses by the jury and $5 billion in punitive damages. The trial judge affirmed the punitive damages award and Exxon appealed the ruling many times. Finally, on June 25, 2008, Justice David Souter issued the judgment of the court, vacating the $2.5 billion award and remanding the case back to a lower court, finding that the damages were excessive with respect to maritime common law. The judgment limits punitive damages to the compensatory

---


See Seth Mydans, *Captain in Alaska Oil Spill Loses License for Nine Months*, N.Y. TIMES, July 26, 1990, at A 12 (noting that an administrative law judge for the Coast Guard found Hazelwood guilty of consuming alcohol within four hours of sailing and that Hazelwood had pleaded no contest to the charge); *A Question Recurs: Was Hazelwood Drunk?*, N.Y. TIMES, Feb. 25, 1990, at 29.

See *In re The Exxon Valdez*, No. A89-0095-CV, 1995 WL 527988, at *5 (D. Alaska Jan. 27, 1995). The court noted that, including other verdicts and settlements, the dollar amount of harm caused by the spill was between $288.7 million and $418.7 million (including the $287 million verdict.) See Id.


See http://en.wikipedia.org/wiki/Exxon_Valdez_oil_spill#cite_note-latimes_080626-16. (In June 1997, Exxon appealed the $5 billion punitive damages award entered against it. On December 6, 2002, Russel Holland, the original judge reduced the punitive damages to $4 billion. Exxon appealed again and the case returned to court to be considered in light of a recent Supreme Court ruling in a similar case, which caused Judge Holland to increase the punitive damages to $4.5 billion, plus interest. After more appeals, and oral arguments heard by the 9th Circuit Court of Appeals on January 27, 2006, the damages award was cut to $2.5 billion on December 22, 2006. After the 9th Circuit Court of Appeals denied a request for the third hearing and stand its ruling that Exxon owes $2.5 billion in punitive damages on May 23, 2007, Exxon then appealed to the Supreme Court, which agreed to hear the case).
damages, which for this case were calculated as $507.5 million. Some lawmakers, such as Senate Judiciary Committee Chairman Patrick J. Leahy, have decried the ruling as "another in a line of cases where this Supreme Court has misconstrued congressional intent to benefit large corporations." 90

It seems clear that in the circumstances of the Exxon Valdez accident, there was essentially no opportunity that the defendant company, Exxon Corporation, could escape liability. An accident of this magnitude obviously could not escape notice. Besides, since the tanker was stuck on a reef, the identity of the injurer was clear. Given the substantial compensatory damages involved, a lawsuit was inevitable. Consequently, punitive damages are unnecessary in this case because the injurer could not escape liability for compensatory damages. However, in another context involving oil spills, such as the intentional dumping of small amounts of waste oil that is unlikely to be detected or traced to the spiller, some punitive damages would be appropriate. 91

3.2 THE IMPLICATION OF PUNITIVE DAMAGES OUTSIDE THE UNITED STATES AND THAILAND

1. The United Kingdom (England) 92

In England, punitive damages are referred to as “exemplary damages.” Punitive damages in England are not available in breach of contract cases but are awarded in torts cases. 93 However, such award is still viewed as exception even when it is theoretically open to the court. Punitive damages can only be awarded when normal compensatory damages are inadequate and must also be granted in accordance with the guidelines in the underlying case of Rookes v. Barnard in which limits the application of punitive damages to three categories of cases. 94

The first category is the case of oppressive, arbitrary or unconstitutional action by

---

90 Id.
91 Punitive damages would be appropriate, for example, in the circumstances described in Matthew L. Wald, Royal Caribbean Cruise Line Indicted on Charges of Dumping Oil, N.Y. Times, Dec. 20, 1996, at A 26 (cruise line indicted for “routinely dump[ing] waste oil from five of its ships for years and falsif[y]ing] its log books to hide its activities”).
92 See Gotanda, Punitive Damages: A Comparative Analysis, supra note 59, at 8-19.
93 Torts of assault and battery, defamation, false imprisonment, malicious prosecution, private nuisance, tortuous interference with business, trespass to goods, and trespass to land.
the servants of the government. This category has been widely construed. The Court of Appeal in *Thompson v. Metropolitan Police Commissioner* held that punitive damages should only be awarded where there has been conduct including oppressive or arbitrary behavior by police officers or other agents of the state. Lord Devlin in *Rookes v. Barnard* had stressed that the extent of this category should not be extended to oppressive or arbitrary actions by corporations or individuals.

The second category is when the defendant’s conduct was calculated to make a profit to exceed compensation to a plaintiff. This category is not confined to making profit of a pecuniary nature, but can extend to any case where the defendant is seeking to gain an object at the claimant's expense. However, the mere fact that a tort committed in the course of business carried on for profit is not sufficient to bring a case within this category. In *Design Progression Limited v. Thurloe Properties Limited*, the court held that the calculation of punitive damages was not to be done by "nice legal principles," but was rather to be assessed by an appropriate amount, having regard to the defendant's conduct. The factors to consider when assessing the defendant's conduct include whether the misbehavior had the effect intended by the perpetrator, the means of the parties, the conduct itself, if any regret on the perpetrator's part has been expressed, and the amount of compensation awarded.

The Third category permits exemplary damages when expressly authorized by statute. Although Lord Devlin expressly referenced this category, in the subsequent *House of Lords case Cassell & Co. Ltd. v. Broome*, Lord Kilbrandon doubted whether any statutory recognition of the doctrine of exemplary damages could be found. In *AB v. South West Water Services Ltd.*, the court held that punitive damages may not be awarded for any cause of action for which they were not awarded prior to *Rookes v.*

---

97 See Rouhette, *supra* note 37, at 334.
99 Rouhette, *supra* note 37, at 335.
Therefore, the punitive damage awards in England are available but restricted. Nonetheless, regarding the case law in terms of the enforcement of foreign judgments or arbitral awards granting punitive damages, it is likely that the award of punitive or multiple damages, without a compensatory element, will not be enforceable in England. If, however, a judgment contains an award for punitive damages in addition to a compensatory element of damages, there is authority to suggest that the compensatory element will be enforceable. In the Court of Appeal case of Lewis v. Eliades, it was held that the whole of a foreign judgment would not be unenforceable in England merely because part of the judgment is unenforceable. If an unenforceable element of punitive damages in a judgment can be severed from an enforceable compensatory element, it appears that the compensatory element will be enforced. If, however, the punitive element is derived from a multiplication of a compensatory award, there are conflicting persuasive judgments in Lewis v. Eliades addressing whether the compensatory award itself may or may not be enforceable. Considering the judgment of Potter LJ, it would seem that the compensatory element would not be enforceable. However, Jacob LJ in his judgment states that the decision in Lewis v. Eliades does not rest on the enforceability of the compensatory element of a punitive award, and that this issue can be decided when it arises. Also in SA Consortium General Textiles v. Sun & Sand Agencies Ltd., Lord Denning said obiter dicta that there is nothing contrary to English Public Policy in enforcing a claim for punitive damages, considering that punitive damages are in accord with public policy in the U.S. and other commonwealth nations. It seems that it is an excessive award in which could be considered as contrary to the public policy.

2. Australia

Although in Australia, punitive damages may be awarded in a wide range of tort actions, they are considered an extraordinary remedy, appropriate only in cases of truly
outrageous conduct. Recently, a report by the Law Council of Australia noted that punitive damages “are hard to get, although it is a sad fact that more examples are emerging.”

Similar to the United States and England, the purpose of punitive damages in Australia is to punish and deter. But unlike England, Australia has declined to restrict punitive damages to certain categories as England’s House of Lords did. Instead, punitive damages are available in any torts action where the defendant has engaged in a “conscious wrongdoing in contumelious disregard of another’s rights.” Thus, in Australia, punitive damages may be awarded for trespass to chattel, trespass to land, trespass to the person, deceit, and defamation. Punitive damages also may be awarded in negligence cases, but only when the defendant acted with conscious wrongdoing or reckless indifference in contumelious disregard of the plaintiff’s rights. However, they are not awarded in breach of contract cases. There are other significant limitations on the availability of punitive damages. First, Australia has adopted Lord Devlin’s approach to the availability of punitive damages, “if, but only if” principle. Second, punitive damages may not be assessed against the defendant if he or she has already been substantially punished in a criminal proceeding. Gray v. Motor Accident Commission illustrates this principle. It also is important to note that some states have placed limitations on the awarding of exemplary damages.

In determining the amount of damages, any relevant fact may be considered.

---

113 See Gray v. Motor Accident Commission (1998) 196 C.L.R. 1, 14
114 See Jane Swanton & Barbara McDonalid, Commentary on the Report of the English Law Commission on Aggravated,
However, the principal focus is on the wrongdoer, and not on the wronged party or the torts. The seven most relevant factors include the nature of the defendant’s conduct, the extent of the injury caused by the defendant (insofar as it shows the heinousness of the defendant’s actions), the deterrent effect on the defendant and others, the extent to which the defendant derived any profit from the wrong doing, the plaintiff provoked the defendant, the defendant’s capacity to pay punitive damages (may be considered and can reduce or eliminate an award of such damages if it will cause an undue hardship), the extent to which punitive damages will provide a windfall to the plaintiff (as in setting the size of the award.) However, in Australia, the award of punitive damages need not be proportional to the amount of compensatory damages.

Australian courts have expressed concern about the size of punitive damages awards and, as a result, they have insisted that juries be appropriately instructed on the need for restraint and moderation.

Predictions that large awards of large punitive damages in other countries would cause an increase in large punitive damages awards in Australia have not come to fruition, although the number of claims for such damages may have increased in recent years. Commentators note that in personal injury cases, awards of punitive damages have been modest, often below AU$10,000. While there have been a number of awards for over AU$100,000, there have been no reported multi-million dollar awards.

Like England, Australia prohibits excessive awards of punitive damages. In general,
an award of punitive damages is excessive if no reasonable jury could have arrived at the number or the award is disproportionate to the circumstances of the case.\textsuperscript{122} This assessment is made on a case-by-case basis.\textsuperscript{123}

In short, punitive damages are available in a broad range of torts actions in Australia. While claims for such damages have increased in recent years, to date awards have been relatively modest, in part because Australian courts have insisted upon the need for restraint and moderation in awarding punitive damages.

3. New Zealand\textsuperscript{124}

Punitive damages are more widely available in New Zealand than in many other common law countries. However, the amount of such damages awarded is significantly smaller than in other countries. Like Australia, courts in New Zealand have explicitly rejected attempts to limit punitive damages to categories set forth by England’s House of Lords in \textit{Rookes v. Barnard}.\textsuperscript{125} As a result, punitive damages are available in many different cases including defamation and personal injury, as well as in certain negligence actions.\textsuperscript{126}

To determine whether punitive damages are warranted, courts look to see whether the defendant has engaged in truly outrageous conduct.\textsuperscript{127} Typically, punitive damages are awarded only where there has been a “contumelious disregard of the plaintiff’s rights” or

\textsuperscript{122} See Coyne v. Citizen Finance Ltd. (1991) 172 C.L.R. 211, 238.


\textsuperscript{124} See Gotanda, Punitive Damages: A Comparative Analysis, supra note 59, at 27-33.


some type of malice toward the plaintiff. These requirements apply even in cases involving negligence.

To determine the size of the punitive damages award, courts consider 6 factors: the gravity of the defendant’s misconduct, the principle that awards must be modest in size, the windfall to the plaintiff, the defendant’s resources, the injury or loss to the plaintiff, and any prior punishment of the defendant.

The central focus in determining the size of the award is on the gravity of the conduct. According to New Zealand courts, the amount of a punitive damages award must be proportionate to the defendant’s misconduct.

The first factor is limited by the second, which mandates that awards of punitive damages are to be modest in amount. New Zealand courts have stated that awards of between NZ$20,000 and NZ$30,000 are appropriate in negligence cases when the defendant’s conduct warrants punitive damages.

The third factor, “the benefit to plaintiff,” also serves to limit the size of any punitive damages awards. It is meant to emphasize that punitive damages do not have a compensatory component in New Zealand. In cases where the defendant is a public entity, the windfall may be at the expense of the public generally.

The fourth factor looks to the defendant’s ability to pay the punitive damages award. Here, the focus is on the net value of the defendant’s assets, debts, dependants, and income potential. The application of this factor also can limit the size of the punitive damages award to an amount that the defendant can afford to pay.

The fifth factor is the extent to which the plaintiff’s injuries show the heinousness of the defendant’s conduct.

The sixth factor considers whether the defendant has already been punished for his or her misconduct. The Court of Appeal held and the Privy Council later affirmed that

128 See, Taylor, 1982 NZLR LEXIS at *41.
133 Todd, supra note 129, at 190.
Punitive damages cannot be awarded if the defendant has already been subject to a criminal proceeding for the same conduct. Punitive damages are barred in the civil action if the defendant was convicted, penalized, or acquitted. Furthermore, a claim for punitive damages must be stayed if it is likely that a criminal proceeding will result from the defendant’s act.\(^{134}\)

Generally, punitive damages awards in New Zealand have been significantly lower than in other countries. Awards of such damages have ranged from NZ$10,000 to NZ$85,000, with NZ$31,000 being the average award. There are three primary reasons for this practice. First, the sole purpose of punitive damages in New Zealand is to punish the defendant.\(^{135}\) Second, judges, not juries typically award such damages.\(^{136}\) In New Zealand, a jury trial in civil cases is uncommon, except for defamation, malicious prosecution, and false imprisonment claims. One commentator notes that the highest punitive damages awards are in defamation cases.\(^{137}\) Third, and perhaps the most important reason, is that courts in New Zealand have consistently enforced the principle that punitive damages are to be modest in size.\(^{138}\) This principle was explained in *Williams v. Duvalier Investment Ltd.*

Similar to other countries, New Zealand prohibits excessive awards of punitive damages. There appear to be very few cases that have been overturned on appeal on the basis that the amount of punitive damages was exorbitantly high. Since the efforts by New Zealand courts to control the size of punitive damages awards, one notes that claims for punitive damages have become impracticable from an economic standpoint. The size of such awards typically is insufficient to cover the plaintiff’s legal fees and other expenses.\(^{139}\)


\(^{136}\) See Todd, supra note 129, at 194.

\(^{137}\) See Manning, supra note 129, at 182. See also New Zealand Television Ltd., [1996] 3 NZLR 24, 1996 NZLR LEXIS 788.


\(^{139}\) See Manning, supra note 129, at 184.
4. Canada

In terms of its procedures and rules on punitive damages, Canada has often looked to the experience in other countries, particularly the United States and England. The result has been that punitive damages are available in a broad range of actions in Canada, and they appear to be increasing in number and size.

The purpose of awarding punitive damages in Canada is to punish, and show the court’s disapproval of the defendant’s actions. Currently, all of the provinces and territories in Canada permit the award of punitive damages. This was not always the case. Traditionally, its availability depended on whether the province or territory whose law governed the dispute adopted a civil or common law system.

By contrast, in Quebec, a civil law jurisdiction, punitive damages were not awarded in private actions until 1991 when Quebec revised its civil code to allow the awarding of punitive damages.

Like Australia and New Zealand, Canada has declined to limit the scope of punitive damages to the categories set out in Lord Devlin's opinion in Rookes v. Barnard; namely cases involving abuse of power by the government, suits concerning torts committed for profit, and statutory claims which expressly allow for such damages. In Vorvis v.
Insurance Corp. of British Columbia, the Supreme Court of Canada ruled, that by rejecting the categorical approach, punitive damages may be awarded in any case when the defendant’s conduct has been harsh, vindictive, reprehensible, or malicious.\textsuperscript{148}

In \textit{Hill v. Church of Scientology}, it added that “punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.”\textsuperscript{149}

Punitive damages are primarily awarded in actions involving intentional torts, such as defamation,\textsuperscript{150} assault,\textsuperscript{151} and false imprisonment,\textsuperscript{152} and only where the defendant has engaged in “exceptionally objectionable conduct.”\textsuperscript{153} In addition, they may be awarded in negligence actions, but such awards are rare.\textsuperscript{154} Punitive damages also are available in breach of contract cases when the injury caused to the plaintiff is an independent actionable wrong.\textsuperscript{155}

A number of jurisdictions expressly prohibit punitive damages in survival actions on the grounds that such damages do not represent actual pecuniary loss to the deceased and wound unjustly enrich the estate.\textsuperscript{156} Furthermore, punitive damages may not be

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{148} See id. 1 S.C.R. at 1085.
\item \textsuperscript{149} See \textit{Hill v. Church of Scientology}, 2 S.C.R. at 1208.
\item \textsuperscript{153} See \textit{Vorvis}, 1 S.C.R. at 1104-05.
\item \textsuperscript{154} See \textit{Robitaille v. Vancouver Hockey Club}, [1979] 19 B.C.L.R. 158, 1979 CarswellBC 477, ¶ 85 (holding that punitive damages can be awarded for negligence); \textit{Coughlin v. Kuntz}, [1989] 42 B.C.L.R.2d 108, 2 W.W.R. 737 (allowing exemplary damages for negligence); see also \textit{Linden}, supra note 141, at 420 (stating that punitive damages in negligence cases are “still very rare.”) There is a split of authority on whether the negligent conduct had to be directed at the plaintiff. \textit{Compare Kaytor v. Lion’s Driving Range}, 35 D.L.R.2d 426, 430 (negligent conduct has to be “consciously directed against the person, reputation, or property of the plaintiff”) with \textit{Vlchek v. Koshel}, 52 D.L.R.4th 371, 375 (“The fact that the conduct was specifically and consciously directed at the plaintiff is a factor to consider, but specific intent is not a prerequisite.”)
\item \textsuperscript{156} See \textit{SURVIVAL OF ACTIONS ACT, Alta.}, § 5; \textit{Nfld.}, § 4(6); \textit{N.B.}, § 5; \textit{N.S.}, § 3(a); \textit{P.E.I.}, § 5(a); \textit{Yukon}, § 6(1); \textit{TRUSTEE ACT, Man.}, § 55(1).
\end{itemize}
\end{footnotesize}
awarded in a claim arising out of a statutory right unless the statute expressly provides for such remedy.\textsuperscript{157} Punitive damages may also be awarded even if the defendant has been punished in a criminal action. Canadian courts treat prior criminal punishment as a factor to consider when assessing punitive damages.\textsuperscript{158}

With respect to determining the amount of punitive damages to be awarded, traditionally juries were given “broad discretion” in fixing the award.\textsuperscript{159} In light of increasing punitive damages awards, the Supreme Court, in \textit{Whiten v. Pilot Insurance Co.}, stated that juries should be instructed on the function of punitive damages and the factors to be used in determining the appropriate amount of such damages. It then set forth 11 factors that juries should consider:

(1) Punitive damages are very much the exception rather than the rule.

(2) [Punitive damages are] imposed only if there has been high-handed, malicious, arbitrary or reprehensible misconduct that departs from the ordinary standard of decent behavior.

(3) Where they are awarded, punitive damages should be assessed is an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant . . . .

(4) [A]ny other fines or penalties suffered by the defendant for the misconduct in question [should be taken into account].

(5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation.

(6) Their purpose is not to compensate the plaintiff . . . .

(7) [The purpose of punitive damages is] to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community’s collective condemnation (denunciation) of what has happened.

(8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish


\textsuperscript{159} See \textit{Hill v. Church of Scientology}, 2 S.C.R. at 1195-96.
these objectives . . . .

(9) [T]hey are [to be] given in an amount that is no greater than necessary to rationally accomplish their purpose.

(10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a “windfall” in addition to compensatory damages.

(11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.”

In recent years, punitive damages awards have increased significantly in Canada. Canadian courts have more latitude than those in many other countries with respect to reviewing punitive damages awards for reasonableness. As Justice Cory explained in *Hill*: “Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court’s estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as a deterrence?”

In determining whether an award of punitive damages is “rational,” the appellate court considers 6 factors. The first is whether the award is proportionate to the defendant’s conduct. “The more reprehensible the conduct, the higher the rational limits to the potential award.” The second consideration is whether the award is proportionate to the degree of the financial or other vulnerability of the plaintiff and the abuse of that vulnerability by the defendant. The focus is on whether the amount of the award was needed to deter the defendant from exploiting vulnerable parties. The third factor is proportionate to the harm directed specifically at the plaintiff. The fourth is whether the

________________________

160 Whiten, 1 S.C.R. at 646 (emphasis in original.)
161 *Id.* at 621.
162 *Hill*, 2 S.C.R. at 1208-09.
163 *Whiten*, 1 S.C.R. at 650-51. The level of blameworthiness can be determined from seven factors:
(1) whether the misconduct was planned and deliberate;
(2) the intent and motive of the defendant;
(3) whether the defendant persisted in the outrageous conduct for over a lengthy period of time;
(4) whether the defendant concealed or attempted to cover-up its misconduct;
(5) the defendant’s awareness that what he or she was doing was wrong;
(6) whether the defendant profited from its misconduct; and
(7) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff or a thing that was irreplaceable.
164 *Id.* at 652-53.
165 *Id.* at 653-54.
award is proportionate to the need for deterrence. A court may consider a defendant’s financial resources to the extent that it shows the defendant will experience financial hardship because of the punitive damages award, it illustrates that the defendant’s financial power enabled him or her to engage in the outrageous behavior, or it may “rationally” be concluded from the circumstances that a lesser award of punitive damages would fail to deter the defendant because of the defendant’s financial wealth.\footnote{Id. at 654.}
The fifth factor is whether the award is proportionate to any civil or criminal penalties for the defendant’s misconduct. Where the defendant has already been punished through civil or criminal proceedings, or is likely to face such proceedings, a court may lessen or eliminate altogether an award of punitive damages if the objectives of retribution, deterrence and denunciation have been or will be satisfied through other proceedings.\footnote{Id. at 655 (“The key point is that punitive damages are awarded ‘if, but only if’ all other penalties have been taken into account and found to be inadequate to achieve the objective of [punitive damages].”)}
The sixth consideration is whether the award is proportionate to the advantage gained by the defendant. This factor considers whether the punitive damages award is sufficient to ensure that the defendant does not profit from his or her wrongful behavior.\footnote{Id. at 656-57.}

Another example of the availability of punitive damages is in the Quebec Civil Code in which has included the possibility of punitive damages under Article 1621 which stated that:

Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfill their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person. (1991, c. 64, a. 1621.)

It also should be noted that, unlike the United States Supreme Court, the Supreme
Court of Canada has rejected the use of a ratio between compensatory damages and punitive damages as a factor to determine whether a punitive damages award is excessive. The Court explained that “that relationship . . . is not even the most relevant because it puts the focus on the plaintiff’s loss rather than where it should be on the defendant’s misconduct.”

There also appears to be little uniformity among Canadian appellate courts with respect to determining what is the appropriate size of punitive damages awards. The degree of inconsistency suggests that determining whether such damages are unreasonable in Canada is highly factual, based on the individual circumstances of each case.

5. Germany

Punitive damages are not available under German law. This statement reflects the general attitude of German courts and scholarly writing from the introduction of the German Civil Code in 1900 to the present. The German code resolved this dispute differently than what the American did. In drafting the German Civil Code, all traces of punitive damages, which can be found in pre-Code German law, were erased. According to the drafters of the Code, civil torts awards were to be purely compensatory while punishment was available only in criminal law. The damage awards should return the plaintiff to the position in which he would have been had the damage not occurred—no more, no less. Damages should not enrich the plaintiff or aim to punish and deter the

---

169 Id. at 657-58.
170 See, e.g., Lauscher, 1999 Carswell Sask. at *164. In that case, the plaintiff purchased a house for CAN$88,000. It was later discovered that the house had been insulated with Urea Formaldehyde Foam, which was banned in Canada. Use of this insulation also was prohibited by the contract. The jury awarded CAN$271,000 in damages, which included CAN$121,000 in compensatory damages and CAN$150,000 in punitive damages. The trial judge reduced the award to CAN$18,900 for the reduction in the value of the house. The plaintiff appealed, arguing that the original damages award, including the punitive damages award, should be reinstated. The Court of Appeal refused to re-enter the punitive element for two reasons. First, the plaintiffs had not claimed punitive damages. Second, the court ruled that the CAN$150,000 punitive damages award was “so inordinately high as to shock the conscience and sense of justice.” Id. at ¶¶ 13-19. See also Walker v. Darcy, [1999] 117 O.A.C. 367, 1999 Carswell Ont. 457, at ¶ 5 (reducing punitive damages award from CAN$250,000 to CAN$5,000).
172 See Behr, Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts, supra note 171 at 127-29.
tortfeasor beyond the general effect that is inherent to all compensatory damages obligations.\textsuperscript{173} It also has even been questioned whether an introduction of punitive elements into civil law would be constitutional.\textsuperscript{174}

The German damages awards are not necessarily of a purely compensatory nature. They often rely on arguments that cannot be labeled compensatory but which perfectly fit into a punitive damages approach. Suing or being sued in Germany under domestic German law hence may lead to a judgment that may come fairly close to American punitive damages award. This is true as well in the case of infringement of the right to personality, discrimination in employment, intellectual property infringement, and unfair competition.

Article 40(3) of the Introductory Law to the German Civil Code which expressly forbids awarding non-compensatory damages, is not necessarily a prohibition against punitive damages because it applies only in the case of a decision under foreign laws. However, the German judgment will not openly address the awarded damages as being punitive damages. Currently, German courts are not ready to insert the notion of punitive damages into their judgments. Regardless, courts will award damages beyond pure compensation and based on punitive considerations. Such an award may happen by applying a method of damage calculation that not only focuses on the actual damages but additionally on the profit the tortfeasor received from his/her wrongful behavior or the German court will take into consideration that damages must have a real deterrent effect. Additionally in measuring damages, German courts will accept a calculation method that exceeds pure compensation.

However, in cases where German conflict-of-laws rules make the U.S. law applicable, the situation is somewhat delicate. In this case, Article 40(3) of the Introductory Code to the German Civil Code will be an obstacle to awarding punitive damages. The question then is how to fill the gap arising out of the inapplicability of the U.S. punitive damages law. The best solution seems to fill the gap by falling back on the German law. A recourse to a domestic law in order to fill gaps arising out of the

\textsuperscript{173}WOLFGANG GRUNSKY, MüNCHENER KOMMENTAR BüRGERLICHES GESETZBUCH, § 249 n.3 (3d ed. 1994) (citing among others, JOSEF ESSER & EIKE SCHMIDT, SCHULDRECHT, ALLGEMEIN-ER TEIL, § 30 II (7th ed. 1993)).

\textsuperscript{174}Christiane Siemes, Gewinnabschöpfung bei Zwangskommerzialisierung der Persönlichkeit durch die Presse, 201 Archiv für die zivilistische Praxis (AcP) 202, 212 (2001).
inapplicability of foreign laws due to public policy is advised by legal literature partly in a general way or at least in those cases where the gap cannot be filled by recourse to the applicable law. Considering that under the German law, non-compensatory damages would be awarded, it would be inconsistent to totally deny them based on U.S. law.

Also as far as enforcement of the U.S. money judgments is concerned, the German Federal Supreme Court's Decision of 1992 has indicated the existence of a loophole in coming to a solution, which is consistent with modern developments in a German domestic law. First of all, the court did not refuse enforcement of punitive damages per se. Instead, the court ruled that execution of punitive damages awards was barred “in general,” thus indicating that in special circumstances execution might be available. Moreover, the court noted the excessiveness of the award by stating that enforcement of punitive damages was denied where the punitive part of the judgment was not de minimis. Finally, the court compared punitive damages and the German idea of satisfaction in damages for pain and suffering and found that both concepts are not reconcilable. However, this decision was prior to Caroline I, in which the court changed its approach towards introducing plain punitive elements into the German law of damages for infringement of the right to personality. Hence, there is some indication that at least a reasonable amount of punitive damages could become enforceable in the future.

Whether punitive damages will be available under German laws and enforceable beyond specific areas must be answered by future developments in German courts and most notably in the German Federal Supreme Court. As far as enforcement of the U.S. punitive damages awards is concerned, it will be difficult to carry forward the reservation made in the landmark decision of the German Federal Supreme Court. Punitive elements in awarding damages and the idea of punishment by civil law damages are no longer as alien to the German law as it was developed by the German Civil Code of 1900 and sustained by German jurisprudence and legal literature throughout the twentieth century.

6. France

The French Civil Code explicitly provides for compensatory damages for torts and breaches of contract, without explicitly mentioning the possibility of punitive damages for either case. As with many other civil law countries, punishment is generally reserved for the criminal law. The French jurists such as Domat (Oeuvres complètes de J. Domat (1828), t. 1, Book II, Title VIII, Section IV) and Pothier (Oeuvres de Pothier (2nd ed. 1861), t. 2, Nos. 116 et seq.) have, since the seventeenth century, categorically excluded exemplary damages from the French system of civil liability. Compensation for prejudice is still the only recognized objective of damages, and no other consideration or purpose is permitted.

The Civil Supreme Court (Cour de Cassation) is in charge of controlling the correct application of the principle by the lower courts. On this ground, it has severe criticism on the decisions in which did not limit the granting of damages to a strict compensation of the damage actually suffered, or which, "more broadly, confess having taken into consideration, in order to evaluate the damages awarded, other elements than the importance of the damage itself." Similarly, the French Supreme Court systematically condemns the granting by lower courts of fixed damages. The lower courts therefore strictly observe the full compensation principle and have so far refused to take into consideration "fautes lucratives," a French name for a fault in which results in some pecuniary gain for the person who has committed it. In cases of breach of antitrust rules

176 "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer." CODE CIVIL [C. CIV.] art. 1382 (Fr.). Professor Crabb translates article 1382 to read: “Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.” THE FRENCH CIVIL CODE vii-xvii (John H. Crabb trans., rev. ed. 1995, at 252.) (Presenting an “Analytical Summary” of French Civil Code, as translated into English).
177 "Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après." CODE CIVIL [C. CIV.] art. 1149 (Fr.). Professor Crabb translates article 1149 to read: “Damages due to a creditor are, in general, from the loss which he incurred and from the gain of which he was deprived, apart from the hereinafter exceptions and modifications.”
178 JOHN YUKIO GOTANDA, SUPPLEMENTAL DAMAGES IN PRIVATE INTERNATIONAL LAW 195 & n.3 (1998), at 193.
179 See G. Viney and B. Markesinis, La réparation du dommage corporel: essai de comparaison des droits anglais et français (1985), at pp. 54-56.
180 See Rouhette, supra note 37 at 326.
181 Cass. Crim., 8 February 1977, Bull. Crim n° 52, at 120 (the Supreme Court reminds the judges that the role of civil litigation is not to deter.)
182 Cass. Com., 29 June 1999, no 97-10.740, unpublished (The Supreme Court quashed a Court of Appeal decision which granted nominal damages ("dommages de principe" i.e. a small amount fixed as damages) in a case of infringement.)
or privacy rights, for example, the author of the fault knows that the compensation of the victim's damage will almost always be insignificant in comparison with the profit resulting from the breach.\textsuperscript{183}

The award of punitive damages is a fortiori in breach of the principle of full compensation. Hence, a decision of the Court of Appeal of Paris dated July 3, 2006 clearly rejected "sui generis damages," explaining that "under French law, the indemnity necessary to compensate the damage suffered, shall be calculated in function of the value of the damage, without any consideration to the gravity of the fault."\textsuperscript{184} In addition to the French courts, eminent French law professors and scholars, eager to protect the fundamental principles of civil procedure, have severely criticized the concept of punitive damages, calling it "shocking, in its essence as well as in its application."\textsuperscript{185}

7. Switzerland\textsuperscript{186}

In Switzerland, the courts appear to be divided on the issue of enforcing foreign punitive damage awards. In a 1982 case, a Court of First Instance in the Canton of St. Gallen refused to recognize and enforce a United States judgment containing punitive damages on the ground that such damages were contrary to public policy.\textsuperscript{187} In that case, a Texas state court had “awarded the plaintiffs three times the amount of the actual damages, on the basis of the defendant’s misrepresentation in connection with the sale of real estate in Texas.”\textsuperscript{188} In refusing to enforce the punitive damages award, the Swiss court “held that the Texas judgment violated Swiss substantive public policy because it disregarded the fundamental Swiss principle of ... prohibition against unjust enrichment.

\textsuperscript{183}TGI Paris, 5 May 1999. "The profits made by a newspaper shall not be considered for the evaluation of damages," CA Versailles, 4 May 2000. Damages shall "compensate the damage suffered without any consideration for the gravity of the fault or the potential function of deterrence of the amount of damages granted." CA Paris, 31 May 2000 "The granting of damages in order to compensate a breach of privacy shall not result in the condemnation of a certain behavior nor have a deterrent effect on the press, as regards the profit made, but to repair the damage suffered by the victim."

\textsuperscript{184}CA Paris, Ch. 17., Sc. A, 3 July 2006.

\textsuperscript{185}Juglart: Treaty of Air Law, Tome 1, Du Pontavice, Dutheil de la Rochere & Miller, no 2171.

\textsuperscript{186}Gotanda, Charting Developments concerning Punitive Damages: Is the Tide Changing?, supra note 36, at 11-12.


\textsuperscript{188}Martin Bernet & Nicolas C. Ulmer, Recognition and Enforcement in Switzerland of US Judgments Containing an Award of Punitive Damages, 22(6) INT’L BUS. LAWYER 272(4), 273 (1994).
The court also held that the penal nature of the award was inappropriate in a civil case.  

By contrast, in a 1989 decision, the Appeals Court of Basel affirmed a lower court decision enforcing a California court’s award of punitive damages. In that case, a California court had awarded US$120,060 in actual damages and US$50,000 in punitive damages based on “the defendant’s fraudulent misappropriation of cargo containers.”

The Basel Court of First Instance recognized the judgment, finding that it did not contradict Swiss public policy because the “primary purpose [of the punitive damages] had been to force the defendant to restitute to the plaintiff the unjust profit the defendant had realized, and that punishment of the defendant had been of only secondary importance.”

8. Italy

In Italy, the Intermediate Court of Appeal in Venice refused to enforce an American award of punitive damages. At issue in that case was the attempted enforcement of an American judgment of US$100,000 for defective design of a motorcycle’s helmet, which allegedly contributed to the death of the plaintiff’s son. Although the American award did not differentiate between the categories of damages, the Italian court determined that the damages were punitive and, thus, contrary to the public order. The court stated:

Punitive damages . . . clearly have features in common with criminal law, since in punitive damages cases the private party exercises the capacity of public authority. Therefore, public damages are in contrast with public order since in torts actions (as well as in contract cases) the civil law principles of Italian legal system assume that compensation to the injured

189 Id.
190 Id.
191 Id.
192 Id.
193 Id.
195 See Parrot v. Fimez S.p.A. (Francesco Quarta, The Recognition and Enforcement of US Punitive Damages Award in Continental Europe-The Italian Supreme Court’s Veto Case (The Fimez case.))
196 See id.
party shall be due based on the damages that the party actually suffered.197

Unlike the United States practices, the Italian system of civil liability does not seek punishment. Also, in order to imposing the punitive damages, at least 6 objectives have to be identified: (1) punishing the wrongdoer; (2) deterring the wrongdoers and others from committing similar offenses; (3) preserving the peace; (4) inducing private law enforcement; (5) compensating victims for an otherwise non-compensable loss; and (6) paying the plaintiff’s attorneys’ fees.

Some Italian scholars suggest that enforcing courts should avoid an unfair total rejections of the U.S. punitive damages awards, and try to identify the amount of compensatory damages and limit their enforcement to the portion of damages that are not punitive when dealing with the U.S. awards of punitive damages and that such differentiation should be the enforcing judges’ responsibility.198 Also, some scholars argue that courts should adhere to Article 25 of the Italian Republic Constitution’s system of checks and balances, which states that no Italian judge may create new remedies in absence of statutory authority, especially if functionally criminal penalties imposed within civil proceedings is what is at stake.199 This causes a controversial issue on the punitive damage awards as the nature of the damages is also aiming at punishing the defendant.

9. Hong Kong

In Hong Kong, the concept of punitive damages is called, “Exemplary Damages.” In addition, Hong Kong also recognizes another form of damages called “Aggravated Damages,” which are categorized as one kind of General Damages (Compensatory Damages.) As one court stated,

[A]ggravated and exemplary damages are easily confused. However, it is important to bear in mind the different functions of these two heads of damages: the former to compensate the plaintiff and the latter to punish and deter the defendant. As the learned authors of Salmond and Heuston

---

197 Id.
198 Francesco Quarta, The Recognition and Enforcement of US Punitive Damages Award in Continental Europe—The Italian Supreme Court’s Veto Case (The Fimez case).
199 Id.
on Tort, 20th edition, at p. 518, say, 'aggravated damages are given for conduct which shocks the plaintiff; exemplary damages for conduct which shocks the jury, and may serve the useful function of deterring others as well as punishing the defendant.' In my view, therefore, it requires a fairly high degree of 'culpability' in the defendant to merit an award of exemplary damages. After all, it is aimed at punishing him for such conduct as well as deterring him from repeating it.\(^\text{200}\)

Another important practice is the “Totality Rules” which means that some courts will award the damages which include both compensatory and punitive elements without distinguishing how much amount is exactly for the compensatory and punitive parts.\(^\text{201}\) Therefore, generally, exemplary damages are rarely awarded in the Hong Kong jurisdiction.

10. Japan

In a 1997 decision, the Supreme Court of Japan upheld a judgment of the Tokyo District Court that refused to enforce punitive damages awarded by a California court in a case involving misrepresentations with respect to a lease contract.\(^\text{202}\) The Supreme Court of Japan ruled that “(1) punitive damages contravened the principles of civil procedure and judicial justice of Japan; [and] (2) they would not come within the scope of Article 118 of the Code of Civil Procedure (CCP) and Article 24 of the Civil Execution Code, or at least run counter to public policy of Japan.”\(^\text{203}\)

In sum, Japanese courts do not award punitive damages as a matter of public policy, and Japanese law prohibits the enforcement of punitive damage awards obtained overseas.\(^\text{204}\) Moreover, the medical negligence and other kinds of negligence are

---


\(^\text{201}\) Id. at 71–72. In a subsequent case, the Japanese Supreme Court found that a Hong Kong court’s award of litigation costs, including attorneys’ fees, did not contradict public policy. Id. at 73.

\(^\text{202}\) General Act Related to the Application of Laws (法の適用に関する通則法) § 22(2) (2006) (‘Should a tort be
governed by the criminal code, which may impose much harsher penalties than a civil law. Hence, many causes of action which would subject a defendant to a potential punitive damage award in the U.S. would subject the same individual to prison time in Japan.

11. **The People’s Republic of China (PRC)**

The People’s Republic of China (PRC) recently passed the Tort Liability Law on December 26, 2009, after 4 revisions. The stated purpose of the law is to protect “the lawful rights and interests of civil law parties, explicitly defining tort liability, preventing and punishing torts, and promoting social harmony and stability.”

Of particular interest are the apparent expansion of protection against defective products, and notably, the introduction of punitive damages. This in large part appears to be a reaction to various product scares such as the Sanlu tainted milk incident, which left at least 6 infants dead and approximately 300,000 others suffering from kidney and other health ailments. This law makes clear that plaintiffs may seek damages from either the producer or seller of a product containing an existing defect, regardless of whether either party is at fault. Article 47 of the Tort Law provides that where a defendant knowingly produced or sold defective products causing injury to life or health, the injured party has the right to claim punitive damages, the first time this right has been clearly articulated in Chinese law. It is expected that further guidance will be issued to fill in the necessary details and supply principles to guide calculation of damage awards. With the Tort Law scheduled to formally take effect on July 1, 2010, it is likely that such guidance will be introduced in the first half of 2010.

---

205 Chinese Tort Law Article 1.
206 Chinese Tort Law Article 43.
CHAPTER 4: THE SITUATION OF PUNITIVE DAMAGES IN THAILAND

The globalization and in particular, the development of international business transactions between Thailand and other common law countries, have also raised the issue of the implication of punitive damages in Thailand. Shifting from the agricultural country to a more industrialized one requires a lot of time, patience, and adjustment from all parties in society and the law involved. The recent enforcement of the Civil Procedure for Consumer Cases Act B.E. 2551 (2008), specifically Section 42 which authorizes the courts to award punitive damages and the Liability for Damages Caused by Unsafe Goods Act (Product Liability Act) B.E. 2551 (2008), particularly Section 11 which allows the courts to determine punitive damages in addition to compensatory damages, are the prominent responses to such developments and have imposed a great challenge on Thai legal system and to most of other civil law system countries.

Before these laws, Thai courts did not award punitive damages. According to the Civil and Commercial Code, Title V, Chapter II: Compensation for Wrongful Acts, Section 438:

The court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act.

Compensation may include restitution of the property of which the injured person has been wrongfully deprived or its value as well as damages for any injury caused.

Accordingly, Section 438 has assured the rights of the victim who has been wrongfully injured by giving the court’s discretions to award compensations as the court believes appropriate in certain circumstances and the gravity of the wrongful acts in each case. In order to be awarded such damages, the plaintiff is entitled to the burden of proof

---

208 With respect to the LIABILITY FOR DAMAGES CAUSED BY UNSAFE GOODS ACT (PRODUCT LIABILITY ACT) B.E. 2551 (2008), the punitive damages will be awarded if there is a facts shown that the entrepreneur had produced, imported, or sold products and the entrepreneur had already known that such products are unsafe goods, or did not know such danger about the products due to the gross negligence, or fail to take appropriate action to prevent the damages after learning that the goods are unsafe. The judges have their own discretion to indicate punitive damages but may not exceed two times the actual compensatory damages awarded in that certain case by considering all circumstances such as the intensive of the damages occurred to the victim, the facts in which the entrepreneur does not know the danger of the products, the time period that the entrepreneur undisclosed the danger of the products, the action of the entrepreneur once knew that such products are unsafe, the gain of the entrepreneur, the wealth of the entrepreneur, the means in which the entrepreneur used in alleviate the occurred damages, as well as the victim’s causes of damages.
by offering evidence to the court to show the damages occurred to the plaintiff and the
requested compensations in which the plaintiff would request from the court. If the court
considered that such damages actually occurred and that the requested compensations are
reasonably related to the damages caused by the defendant, the court will authorize to
award the compensation requested by the plaintiff.

Probably, the most difficult interpretative issue presented by Section 438 is
defining its scope, especially, the second clause which states that the compensation may
include, “…. as well as damages for any injury caused.” One view is that this section is to
be broadly interpreted to cover any possible compensation (damages) that the plaintiff
can prove and request to the court, whether they will be economic loss, emotional
distress, business opportunity loss, and so on.209

Nevertheless, Section 438 is not the section which allows the court to award
“punitive damages” even though its second sentence will authorize the court’s discretion
to award “compensations as the court believes appropriate to the certain circumstances
and the gravity of the wrongful acts” in each case. The reason is because the purpose of
the provision is to “compensate” the victims, not to “punish” the defendants. Moreover,
the court has no authority to award such compensation more than the amount the plaintiff
had requested or more than the actual damages occurred.

Similarly, Thai Contract law (under Civil and Commercial Code Title II:
Contract), does not allow punitive damages and does not authorize the court to award
compensation more than the amount the plaintiff had requested or more than the actual
damages occurred. Although according to the principle of freedom of contract,210 the
parties of the contract can indicate the amount of the compensation within the contract as
the “penalty or liability clauses”, such clauses will only be enforced to the extent that its
object is not expressly prohibited by law or impossible, or is contrary to public order or

209 SUSOM SUBPHANIT, THE EXPLANATION OF CIVIL AND COMMERCIAL CODE: TOTS (สุษม ศุภนิตย์,
คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ลักษณะละเมิด) 191 (4th ed. 2003) (Thai.).
210 CIVIL AND COMMERCIAL CODE, TITLE VI, JURISTIC ACTS, CHAPTER I GENERAL PROVISION, Section 151 has ensured
the principle of freedom of the contract which is the freedom of individual parties to bargain among themselves the terms of their own
contracts, without government interference even though such acts are different from a provision of any law as long as such law does not
relate to public order or good moral.
good morals.\textsuperscript{211}

Therefore, even though, Thai law allows the courts to determine the related damages, for example, by stating in Torts law that “as well as damages for any injury caused” for the victims, yet those damages are “compensatory damages” not “punitive damages.” The purpose of the law is not to ‘deter’ or ‘punish’ the injurers but to ‘alleviate’ or ‘compensate’ the damages suffered by the victims. Moreover, such damages are limited to the extent that they cannot be more than the amount in which the plaintiff requested or the actual harm occurred. Therefore, the new laws, which enforced on February 20, 2009, are indeed an advanced and challenging step in Thai judiciary system and in Thai society.

Commentators are largely divided on this issue. Many of them argue that punitive damages are unnecessary since the case-by-case assessment of damages according to the existed law in the Civil and Commercial Code (if one broadly interprets Section 438) already provides sufficient flexibility as to the amount of award to be granted,\textsuperscript{212} prevent an unjust enrichment of the victim and provide adequate prevention and deterrence. Some legal authors and lawyers believe that the introduction of punitive damages in Thailand could backfire against Thai political and public policy and is incompatible with the constitutional principles in Thai civil legal system. Also they argue that Thai judges remain considerably attached to the function of compensatory damages, and that our legal system is not yet ready to adopt such American damages. However, the parties most upset with Americanized damages adoption appear to be the business entrepreneurs. Not surprisingly, they are the major opponents of the introduction of punitive damages law.

\textsuperscript{211} CIVIL AND COMMERCIAL CODE, TITLE VI, JURISTIC ACTS, CHAPTER I GENERAL PROVISIONS, Section 150 provides that “an act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good moral. However, since Section 151 indicates that in the particular case in which the act differs from a provision of any law; such acts may remain valid if the law does not relate to public order or good moral. (It is also worth-noting that Section 151 only mentions about the act that “differs from a provision of any law”, but does not mention about the validity of the act that “is impossible, or is contrary to public order or good moral.”) Regarding the penalty or liability clauses, the UNFAIR CONTRACT TERMS ACT B.E. 2540 (1997) was implemented, allowing parties to refer to the courts for a decision as to whether terms within a contract are unfair, that is whether the terms burden one party while giving excessive advantage to the other party, and therefore subject to limitation or voidance. Since the UNFAIR CONTRACT TERMS ACT B.E. 2540 (1997) is one of the laws that are considered as relating to public order or good moral, hence, any acts differ from a provision of any laws (for example, the unfair terms) must be void under Section 150, rather than valid under Section 151.

\textsuperscript{212} See SUBPHANIT, supra note 209, at 192-193.
and had been trying to convince the government about the potentially negative consequences for the overall Thai society such as the inappropriate increasing of the meritless cases filed in courts, the abrupt raising in service and goods’ price or insurance premiums in respond of the inexorable rising in their cost of production.  

Despite the negative views concerning Americanized awards of punitive damages, many eminent scholars, judges and particularly, the legislators have argued that such changes as proposed in these two laws are drastically necessary to ensure the appropriate enforcement of consumer protection policies. They argue that consumers generally have lower bargaining power in these transactions, less ability in accessing the information about the goods and services, and less affordability in filing claims or defenses, than the entrepreneurs. These commentators alleged that the existed practices do not effectively attain the level of necessary consumer protection and asserted that the pure compensatory damages are unsuccessful approaches in providing sufficient reward to the victims for bringing an action against the defendants. This point of view has been largely supported by most of Thai public society, which more likely are considered as “the consumers,” rather than “the entrepreneur” under the definition of these laws and therefore being protected rather than punished.

4.1 THE REASONS FOR THE INTRODUCTION OF PUNITIVE DAMAGES AND THE PASSAGE OF PRODUCT LIABILITY ACT AND CIVIL PROCEDURE FOR CONSUMER CASES ACT IN THAILAND

In this dissertation, I will make several arguments. First, I presume that both the Product Liability Act and the Civil Procedure for Consumer Cases Act were necessary due to problems with Thailand’s previous product liability situation and consumer protection laws. The introduction of both laws was necessary to encourage consumers to file lawsuits (to have more effective laws that persuade people to use the laws.)

---


214 Id.

215 However, there are still a lot of confusion among most Thai people about the definition of “the consumer” and “the entrepreneur” under these laws. (For further information, see Thai Law Forum, The Liability for Damages Caused by Unsafe Goods Act B.E. 2551, a report supported by Chaninat & Leeds, Thailand Law Forum (Dec. 16, 2008), http://www.thailawforum.com/database1/The-Liability-Act.html (last visited Apr. 4, 2012).
Additionally, both the Product Liability Act and the Civil Procedure for Consumer Cases Act would ensure the sufficient and fair justice for consumers in product liability and consumer cases. Second, I presume that one of the means to achieve this goal is to encourage potential consumer plaintiffs with higher damage awards i.e. punitive damages. However, in order to achieve this goal, I presume that we need also two other means as a complement to each other. The first is strict product liability, that is, to make it easier for the potential consumer plaintiffs to win a case by applying the assumption of the law to solve the complicated burden of proof problems. The second is class action proceeding which reduces the cost of filing lawsuits by dividing the cost between everyone in the group. I will use this section to explain the justification for these presumptions before I discuss in more details on the consequences or implications of each means later in the dissertation.

First, I will examine the content of two new laws and see if there are any evidences that support my assumptions. As in Thai law, if one wants to find the reason of enacting the law, one must look at the law’s Remarks because it will illustrate the reason there. According to the Translation\textsuperscript{216} of the Remarks in the Product Liability Act B.E. 2551 (2008)\textsuperscript{217}, the reason of promulgating this Act is as follows:

\[A\]s the products nowadays both manufactured within the country or by importation increasingly undergo scientific and hi-technical manufacturing process, detecting non-safety of the product is difficult for consumers. Such unsafe products, when being used, may be harmful to consumers’ or other people’s life, body, health, hygiene, mind or property. Filing a court case for compensation is currently complicated because the burden of proof according to the general principle of law is on the injured person to prove the willfulness or negligence of the manufacturer or importer due to the lack of the law protecting the consumers by implementing the provision of liability of the manufacturer or relevant persons. It is therefore appropriate to promulgate the Product Liability Law applying the strict liability. The result is that the injured persons have no burden to prove about the product unsafety and also are able to receive fair compensation.

From the above paragraph, a couple of main points have been reduced to law.

\textsuperscript{216} The Unofficial Translation of The Product Liability Act B.E. 2551 (2008) translated by officials of the Consumer Protection Plan and Development Bureau, OCPB. Translation is for the convenience of those who are not familiar with Thai Language. For official purpose, only the Thai Text will be relevant.

\textsuperscript{217} The exact Thai words are “the Liability to Damages caused by Unsafe Products.”
There are two major incentives for the potential consumer plaintiffs in using their rights against the manufacturer or importer. First, the law is being made to solve the complicated Burden of Proof problem by applying the doctrine of “strict liability.” Therefore, the injured persons have no burden to prove the product’s unsafe condition.

Second, the law created more incentives to encourage the potential consumer plaintiffs to exercise their rights by providing that they are now able to receive “fair compensation,” which is the more compensation, or the “punitive damage.” As the potential consumer plaintiffs can receive a higher amount of damages, they are more likely to file a case to the court and do not settle outside the law, which could mean both a higher transaction cost and a lot more problems in practice. To illustrate, it is practically very difficult to reach the entrepreneur, especially when the entrepreneur is a big company. It is also very difficult to try to find the one who will be responsible for the damages caused to the injured plaintiffs. Moreover, even if able to find the responsible defendant, most companies will not actually take it serious to pay for the damages of individual injured plaintiff. They will just pay some small amount of damages that does not fully compensate the plaintiff for his or her injuries. However, in most cases it is the quickest and most practical way to get the compensations or damages compared to filing a case in court which usually takes a longer time, costs more, and may even yield a lower amount of compensations or damages. More importantly, one can easily get stuck through the entire discussion or negotiation process because of the high corruptions in Thailand. In many cases, it could lead to aggressive approaches or severe confrontations between the entrepreneur and the injured consumers such as the salient case about the defective Honda CR-V car owner, who tried to call attention from the public by destroying her defective car in front of a police station. 218 These salient cases substantially support the passage of Consumer Product Liability Law too. 219 Therefore, it is very important and more appropriate for Thailand to have a legal mechanism to protect the potential consumer plaintiff’s interest in sufficient and fair compensation and justice. Having higher damage awards then could be a great incentive in the consumer product liability

218 More detail regarding salient cases will be discussed under Section 4.2 “SALIENT CASES.”
219 There were some discussions or concerns on the importance of product liability and consumer protection laws before the salient cases happened, however the salient cases were the events that eventually crystallized the need to address on this issue critically.
law and this brings the idea of having punitive damage awards in the judicial system. At the same time, this will influence the entrepreneur and the manufacturer to care more about the product safety and to deter them in trying to do any wrongs to the product to reduce the cost of productions.

Thus, from the Remarks in Product Liability Act B.E. 2551 (2008), two of my proposed means to promote more lawsuits in court are included, which are, punitive damages and strict product liability, but not class action proceedings.

Now I will look at the Remarks in the Civil Procedure for Consumer Cases Act B.E. 2551 (2008), which is the procedural law, and it has stated that

[It is appropriate to have the procedural law that aids the consumers in claiming for damages so that the injured consumers will be compensated quickly, inexpensively, and effectively as to protect the consumers’ rights. Also, this law will enhance the incentive for the entrepreneurs to have more concerns about developing their products and services . . . .]

This Remarks has made it clear that the lawmaker aims to have a “quick, inexpensive, and effective procedures” for consumers in filing a case to the court, which infers the possibility of having an easier process. To be more specific, I then look into the content of this procedural law, Section 42 and see that it allows the court to give

---

220สมควรให้มีระบบวิธีพิจารณาคดีที่เอื้อต่อการใช้สิทธิของผู้บริโภคโดยไม่จำเป็นต้องมีการพิจารณาเป็นการละเอียดเรื่องราวของข้อเท็จจริงแต่จะนับเป็นการพิจารณาในคดีต่อไปในทางที่จะช่วยให้ผู้ประกอบธุรกิจทำให้พัฒนาสินค้าและบริการให้มีคุณภาพสูงขึ้น จึงจำเป็นต้องตราพระราชบัญญัตินี้…” (The Original Text in Thai).

221For example, there is a sense of “precedence rule” in Section 30 of the CIVIL PROCEDURE FOR CONSUMER CASES ACT B.E. 2551 (2008), which reduces time and costs for proving the evidence by allowing the court to assume that the fact for cases having same facts and same entrepreneur defendants, to be enough and has no need to find any further evidence. It should be noted that this is quite a ‘new’ kind of practice in a civil law country like Thailand, as the court will usually attach to the code laws not the case laws. [See, “After the final judgment of the consumer cases, if there is any claim against the same entrepreneur as a consumer case, and the fact in the latter case is the same as the earlier one in which the court already had the judgment, the court in the latter case can have an order to assume that the same point of fact is enough and has no need to find any further evidence of proof. Unless the court perceives that the fact in the earlier case is not enough to judge or it will be more appropriate to ensure the fairness of another party in the case, the court has its own discretion to ask for more evidence or allow the parties to acquire more evidence into the case.” (An unofficial translation by me.)] (มาตรา๓๐ถ้าภายหลังที่ได้มีคำพิพากษาถึงที่สุดในคดีผู้บริโภคแล้วปรากฏว่ามีการฟ้องผู้ประกอบธุรกิจรายเดียวกันเป็นคดีผู้บริโภคนั้นซึ่งข้อเท็จจริงที่พิทักษ์เป็นอย่างเดียวกับในคดีก่อนและมี几家ในคดีก่อนมีความจำเป็นในการที่จะต้องมีการพิจารณาในคดีนั้นให้ถูกต้องในทางที่จะช่วยให้ผู้ประกอบธุรกิจทำให้พัฒนาสินค้าและบริการให้มีคุณภาพสูงขึ้น จึงจำเป็นต้องตราพระราชบัญญัตินี้…” (The Original Text in Thai). There is also Special Court Section for consumer cases in the Appellate Court and the Supreme Court level, which helps accommodating the consumers in filing a case.
“punitive damages” to the injured victim.\textsuperscript{222} Regardless, this procedural law does not mention the strict product liability or class action proceedings.

Thus, as to the focal concern of this dissertation regarding consumer product liability cases, both of these two new laws have introduced punitive damages in such cases to maintain and assure the fair judicial system and one of the two laws clearly allows the strict product liability (The Product Liability Act). Both of the two laws do not refer to the class action proceedings, however there is already an approval of Thai Cabinet in principle draft legislation on class action proceedings as an addition to Section 4 of the existed Thai Civil Procedure Code, entitled "Class Action," which will outline the criteria and procedure for Class Action lawsuits.\textsuperscript{223} I will discuss further details on each subject of the proposed means to increase the lawsuits in court system; punitive damages; strict product liability; and class action proceedings to prove my argument in the later part by observing the experience of applications for each means in other foreign jurisdictions, especially, the United States, to compare the benefits and the shortcomings of each means and the potential for application in Thailand.

However, it is helpful to note that prior to the enactment of both laws, opposition notices appeared in public outlining the consequence of both laws. In public, scholars, drafters, Thai parliament, as well as the media discussed the opposition notices. In one

\textsuperscript{222}Section 42 of the CIVIL PROCEDURE FOR CONSUMER CASES ACT B.E. 2551 (2008). ["If the entrepreneur intentionally takes advantage of the consumer unfairly or intentionally harm or grossly negligent ignoring the potential harm that could happen to the consumer or do something in the way that prohibited to the responsibility of acceptable businesses or entrepreneurs, the court is authorized to order the entrepreneur to pay punitive damage in addition to the compensatory damages the court already awarded, by considering circumstances, such as the consumers’ harms; the entrepreneurs’ gains; the entrepreneurs’ wealth; any actions of the entrepreneurs in trying to restore the harms as well as the consumers’ involvement in the cause of the harm. The court has its own discretion in awarding the amount of punitive damages but not more than two times of the compensatory damages the court already awarded unless such compensatory damages are not more than 50,000 Baht, in which the court can award punitive damages not more than five times of the compensatory damages the court already awarded. (An unofficial translation by me.)

(มาตรา๔๒ถ้าการกระทำที่ถูกฟ้องร้องเกิดจากการที่ผู้ประกอบธุรกิจกระทำโดยเจตนาเอาเปรียบผู้บริโภคโดยไม่เป็นธรรมหรือจงใจทำให้ผู้บริโภคได้รับความเสียหายหรือละเมิดบางมาตราของค่าเสียหายที่มีที่มาจากการกระทำที่ผู้ประกอบธุรกิจกระทำโดยเจตนาหรือจงใจในกรณีที่ค่าเสียหายที่มีมาจากการกระทำที่ผู้ประกอบธุรกิจกระทำโดยเจตนาหรือจงใจไม่มีการกระทำหรือละเมิดที่ผู้ประกอบธุรกิจกระทำโดยเจตนาหรือจงใจซึ่งเป็นการกระทำในการทำให้เกิดความเสียหายต่อภาย

การกำหนดค่าเสียหายเพื่อการลงโทษตามวรรคหนึ่งให้ศาลมีอำนาจกำหนดได้ไม่เกินสองเท่าของค่าเสียหายที่แท้จริงที่ศาลกำหนดแต่ถ้าค่าเสียหายที่แท้จริงที่ศาลกำหนดมีจำนวนเงินไม่เกินห้าหมื่นบาทให้ศาลมีอำนาจกำหนดค่าเสียหายเพื่อการลงโทษได้ไม่เกินห้าเท่าของค่าเสียหายที่แท้จริงที่ศาลกำหนด."

(The Original Text in Thai).] 223 The Thai Cabinet Resolution approval was on November 9, 2010.
debate, opponents worried that the new laws would increase the number of lawsuits filed which would overload the courts. 224 Other opponents believed that the new laws encourage entrepreneurs to file suits against the consumers in case of contractual indebtedness from the credit card holders or other leasing or loan contracts and this situation would greatly affect the consumers instead of helping them, which seems to be the core incentive of the new laws.

Nevertheless, most scholars and drafters of the new laws argued that the number of the cases would not increase too much as to overload the courts. Also, as the statistics showed after about 6 months of enactment of the two laws, the total numbers of the consumer cases in court are around 80,000 cases with around 96% cases that the entrepreneur filed the consumers for the nonpayment debts and around 4% cases that the consumers filed against the entrepreneur. (We will employ an analysis and will consider the amount of the consumer cases filed in court especially at the Supreme Court level more thoroughly later in another section of this dissertation.) One drafter of the new laws reacted positively to the 4%-consumer-filed cases. 225 In a statement to the press the drafter stated that the 4%-consumer-filed cases supports the presumption that Thai business entrepreneurs standards are still acceptable. 226 The drafter also did not view the percentage of consumer filed cases as a low number when compared to the situation before the enactment of the laws in which almost no consumers filed a case against business entrepreneurs. 227 Also, the 96% of cases filed by entrepreneurs is not too high as it is normal for businesses to file a case for the nonpayment’s debts against consumers. However, the benefits of the new laws are overwhelmed by some drawbacks earlier described as the new laws help the consumers with the presumptions of law by the strict liability rule and shift the burden of proof to the entrepreneurs and indicate that the court

224 A discussion about the debates and their responses are all from the special interview of Jarun Pakditanakul, Constitutional Court Judge, Secretary-General of the Supreme Court and the honorary member of the consumer protection committee (ข้อมูลจากนสพ.ประชาชาติธุรกิจ, วิพากษ์ระบบคุ้มครองผู้บริโภคแบบไทยๆ อย่าตื่นตระหนกเกินเหตุ 20-30 ปี,บทสัมภาษณ์พิเศษ "จรัญภักดีธนากุล"ตุลาการศาลรัฐธรรมนูญและกรรมการผู้ทรงคุณวุฒิในคณะกรรมการคุ้มครองสิทธิผู้บริโภค). See, Prachachart Turakij Newspaper, A Discussion on Thai Consumer Protection: The interview of Jarun Pakditanakul, Consumersouth Network (Mar. 5, 2009, 7:11 PM), available at http://consumersouth.org/paper/222 (last visited Apr. 4, 2012) (Thai.).

225 Id.

226 Id.

227 Id.
of the consumer case has to be the court in the consumer’s place of residence only. (Generally, Thai civil procedure rules will allow the plaintiff to choose to file a case to two courts; the court where the defendant resides or the court in which a substantial part of the events giving rise to the claim occurred. Before the new laws, most of the consumer cases regarding nonpayment contracts are dismissed or the defendants did not show up as the entrepreneur plaintiffs usually choose the court in Bangkok as the court where the contract occurred. This is because most defendants cannot afford to hire a lawyer to take a lawsuit or to get into Bangkok to defend the case. The new laws have changed the situation by restricting the venue of the consumer cases only to the court where the consumer resides. This also alleviates the burden of cases of the courts in Bangkok because cases are distributed to other courts in the country, which makes the entire legal system more efficiently managed.)

The product liability law in Thailand is seemingly new, however, the drafter stated that it is not new in theory as it is internationally accepted and used in many other developed countries such as in the European Union or the United States. However, Thai product liability law aims for a moderate level of consumer protection at the first phase to allow the business sectors to adapt with the new laws and it is likely to increase the level of protection in the next phase when the time is right or when the society, legal and business sector can already settle with the new rules. This will certainly need more time to grow. Also, in terms of the liability, the new law focuses on manufacturer and importer liability to improve and control the quality of the products.

As for the concern that the new laws will increase the cost of production and then burden consumers with a higher price for products, the proponent scholars consider that it is the most suitable mechanism. They view that the most important thing is to ensure the safety and quality of the products regardless of higher prices. This will eventually be beneficial, as it will enhance the welfare and safety of society, as well as, the overall image of Thai business sectors and manufacturers to a better standard than the current one. Moreover, although this is a possibility, there is no obvious increase of prices of any products so far.

Another skeptical notice from the public is that the new civil procedure law for consumer cases will increase the amount of consumer cases in court because the law will
allow not only the consumer but also qualified consumer protection associations to initiate the lawsuits against entrepreneurs or manufacturers. In response, the drafter argued that this would not occur because the associations must be qualified ones as required by the law. Moreover, only 4% of consumer cases were filed against entrepreneurs and manufacturers. Regardless, one alternative proposal Thailand should consider, as lawmakers in Brazil and Portugal have done, is to allow associations to substitute for the lack of class actions. This is because limiting the participation of associations could inevitably destroy the whole system and undercut the goal of protecting the consumers.228

All in all, the important aim of the new laws is to protect the consumers while at the same time ensure the business growth since both things are essential to the development of the country. The new laws are aimed to encourage the fairness of the society and promote the corporate social responsibility. The government is also a key sector that will help arranging the two sectors to get to the most well balanced deal by improving the laws. Time is one key factor needed to obtain more empirical evidence to prove whether this aim has been fulfilled or not.

In the later part of this dissertation, I will analyze the empirical evidence by comparing the amount of consumer cases filed at the Supreme Court level from the records available on this subject to support my assumption stated above whether the new laws have made it more available to file a consumer case to a court as to ensure the sufficient and fair justice for consumers in product liability cases.

### 4.2 SALIENT CASES

The following section will illustrate the motivation behind implementing punitive damages in product liability cases in Thailand. We will examine salient cases that occurred in Thailand prior to the enactment of the new laws, which led to the adoption of

---

228 Please see, Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311 (2003); M. F. Gouveia & N. Garoupa, *Class Action in Portugal in Class Actions for Europe: Perspectives from Law and Economics* (J. Backhaus, A. Cassone & G. Ramello (editors), Edward Elgar 2012). More discussion on class actions perspective will be provided under Section 5.2 “CLASS ACTION PROCEEDINGS.”
punitive damages and have altered specific rules regarding product liability. Nevertheless, these cases do not necessarily mean the laws before the introduction of punitive damages are bad or the judges are impotent, which are two different problems since the latter will not be solved by the legal reform. This section then, will offer some insight into both perceptions, but we must keep in mind that perceptions are not necessarily correct. Also due to the limited data available at the time of doing this dissertation, I will not attempt to prove my assumption that the new laws reduced the amount of salient cases due to a lack of data from empirical research. Rather, I will conclude this section with a discussion of what might occur and the kind of data the Thai government should collect to evaluate the new laws in the future.

The incident that influenced the enactment of the new Consumer Product Liability Law involved a Honda CR-V car owner who tried to destroy her car in front of a police station to call media attention to Honda’s failure to take action to fix her defective car. According to the owner, only two days after purchasing the car it did not work properly and Honda refused to replace the defective car or provide assistance. As a result, the owner decided to try a more aggressive approach to provoke action by destroying the car in front of a police station. Although this incident occurred in January 2005 and ended with negotiations between the parties, (with the officer from the Office of the Consumer Protection Board as the mediator) followed by the buy-back defective car at the price it was sold, it established a trend among other consumers to pursue similar aggressive and public tactics. From a single case between one victim and a car’s company to a trend that caught the attention of the local media (Television, Newspapers, Internet and all) and eventually to the international media, like, CNN. The problem is more extreme and

---

229 It is pretty much skeptical as to why Thailand chose to address product liability law rather than other fields such as medical malpractice and other issues. However, I believe that apart from the political considerations, which probably was the major concern of all, the salient cases were another key invocation of the preference as such aggressiveness had dragged attentions from the public dramatically and lasted for a long period of time.

230 At the time of doing this dissertation, the laws are also still quite new and the available data are very limited.


234 At that time, CNN news has made this as breaking news. See http://paepae.exteen.com/20050128/entry as well as many Thai media that had given attention to this situation, for example, the news that many other thirty potential victims of the defective cars made a
complex when viewed from the perspective of potential victims as an interesting and attractive choice in order to receive compensation. The situation quickly grew from one problem of one victim to a larger one as it imposed a great incentive on other potential product liability plaintiffs to start to do the same to protect their consumer rights and to call attention from the media, the manufacturers or the sellers as well as the central government and the Office of the Consumer Protection Board. The incident sparked both criticism and support from the public. Supporters believed that Honda Company should replace the new car to the victim. In fact, in online forums others with defective cars wanted to use the incident to create a similar forceful and collected means to protect their rights. Threatened with the law to seek justice and damages. Regardless, the practice of destroying defective cars was not limited to just Honda, other car owners also began destroying defective cars bought from other car companies. Furthermore, the practice expanded to other industries.

Prior to the Honda case, the problem of defective cars did exist; however, this did not lead to aggressive action by consumers. For example, sales agent refused to replace a defective BMW car that did not function properly after it ran for only 100 kilometers.

---

235 See, http://www.siamcar.com/wb_board/wb_subpost.php?id=17082. This will be more interesting action if the class action law in Thailand already applicable.

236 See, http://www.manager.co.th/Motoring/ViewNews.aspx?NewsID=9480000013860. (Others gave reasons that nothing is perfect or the victim shall beware as a buyer and that they still trusted the brand for its certain quality, etc.)

237 See the other cases of destroying defective cars in 2005 available at http://www.manager.co.th/Motoring/ViewNews.aspx?NewsID=9480000013664 and in 2009 available at http://www.decha.com/main/showTopic.php?id=5268 a link from (http://www.siamjurist.com/forums/1590.html) and the example of the consumer of the defective product, calling for justice with the similar behavior in other industry in the case of the homeowner painted black color to the entire of the defective house to call for attention from the media to ask for their consumer rights in April 2005 available at http://consumersouth.org/paper/291. (With respect to give more protection to homeowners’ consumer rights, defective home related laws is planned to add the section that allowing the availability of the central money to use to compensate for cases that some defects happen with the home or other immovable property. See http://www.manager.co.th/Crime/ViewNews.aspx?NewsID=9480000013753.)
The case ended eventually in the court and the consumer won the case.\textsuperscript{238} Thus, several pertinent questions arise from an examination of both responses. What makes the injured consumer chose to destroy a defective car in order to receive compensation and attention from the media rather than file a lawsuit in court? What problems exist in the judiciary system that cause owners of defective products to seek “indirect justice” through aggressive actions rather than file a motion with the Office of the Consumer Protection Board and then a lawsuit to the court?

One tragic answer is that the use of the media is allegedly more effective and easier to receive compensation as compared to filing a motion with the Office of the Consumer Protection Board and then a lawsuit to the court which is a long, costly, and complicated process. Moreover, some attorneys also believe that this is an easier way to receive compensations from large manufacturing company because of legal loopholes.\textsuperscript{239} This is because in terms of compensation for the injured damages, the Office of the Consumer Protection Board will still apply the Civil and Commercial Code, which does not allow the replacement unless the damage occurred, is a kind that is obvious or the defect is occurred at the important part of the product. If the defect is insignificant and repairable then the consumer may ask the manufacturer to repair the defective product. Thus, the consumers usually cannot demand more than this. The consumer plaintiff’s chances in winning the case in court is also practically very low and the amount of the awards is uncertain and usually not high. Also, the current applicable law is ineffective in protecting the consumers, so some attorneys at that time even stated that this indirect way to claim for damages through the media and eventually an informal negotiation between the parties and the government officer was the most effective and assured means to receive compensation.

Thus, the indirect way to claim for damages through the media followed negotiations allows consumers to avoid the drawbacks inherent within the judiciary, such as the complicated filing procedures, the high legal and administrative cost of filing cases, cost of hiring a lawyer, the lost of opportunity cost for the plaintiff to wait for a long time of the entire process to get to the end, and the uncertainty of the amount of

compensatory awards given, which usually is not high. These shortcomings motivate individuals to pursue an indirect method to protect their consumer rights, despite the fact that it may not always lead to a successful claim for damages. Additionally, the more people who pursue an indirect method to claim damages should naturally cause the government to worry about the consequences.

These situations demonstrated a need to create a legal mechanism to prevent disorder and protect consumer rights. The Thai government received political pressure to create a legal mechanism that attracts people to the court system rather than the streets.\textsuperscript{240} That is, to persuade people to file a motion to the Office of the Consumer Protection Board and a lawsuit to the court to establish and develop the organized dispute resolution system according to the law and under the law rather than let them go through such aggressive way of claiming for damages through the media that could lead to disorder society. Thus, these salient cases then were the most important factors that led Thailand to be more aware of consumer right protection, product liability and the importance of product liability law as well as other mechanisms such as punitive damages, strict product liability, and class action\textsuperscript{241} as incentives for people to go to the direct track of claiming for compensation.

As mentioned earlier, due to the limited available data, I cannot conduct an empirical analysis to determine whether salient cases declined after the enactment of the new laws in Thailand. However, according to the available records from the news, the numbers of such aggressive incidents are likely to decrease. However, I should note that the decrease of the number of such cases might not solely always result from the new laws, but many other factors. For example, manufacturers who are aware of cases of defective products may implement more care and safety measures to protect their company’s public reputation.

Thus, in the following paragraphs, I will discuss expected consumer behavior and how it relates to the type of data the Thai government should collect to evaluate the effectiveness of the laws. Additionally, I will discuss the need for the Thai government to

\textsuperscript{240} One senator stated the need to promote the establishment of private or non-governmental consumer protection organization according to Section 57 of Radthathammanoon (B.E. 2534) – 1997 (Thai Constitution) to augmentally protect the consumers’ rights after such issue had been ignored for 8 years. See, http://www.manager.co.th/Politics/ViewNews.aspx?NewsID=9480000013768.

\textsuperscript{241} At that time, class action had already been mentioned by the government and was in progress of drafting.
balance the mechanisms that will encourage consumer to voice the rights through the court system and the mechanisms that will protect the interests of entrepreneurial and manufacturing companies.

First, to encourage consumers to seek redress through the legal system, the government must be attentive to the concerns of customers and their available options. Economically, consumers have two options, the voice option and the exit option after there is a change in the market of the certain product. The exit option usually occurs in a market that has a lot of substitute products so the consumer can exit from consuming product A and move onto product B. The voice option usually occurs in the market of a durable and high-priced or high-value product such as cars or homes. So it is generally difficult for the consumers to exit out of the first product and go to the second one. Rather the consumers will usually voice their discontent and claim for either damages or remedies. This voice option is very important information for the prospective consumers that are still deciding whether to purchase a product. For the company that is in a competitive market, there is a huge need to adapt to improve and resolve the situation to retain customers. However, for the company that is in a monopoly market, the company may ignore the voices of their customers. Thus, the government office that works on the consumer rights protection, especially, the Office of the Consumer Protection Board, should take a more active role and listen to the consumer complaints. Additionally, the procedural structure of filing a motion requires improvement so that it is more efficient, less complicated and less time-consuming. If the government part is adjusted like this, it will more or less catch the attention of potential victims than before and eventually direct consumers to the product liability system. Therefore, the first data that needs to be considered is the voice or complaints of the consumers.

The government should also obtain data about competition among the companies in the same industry. As mentioned earlier, companies in a competitive market will likely behave in a fair manner towards consumers. Therefore, if the government encourages fair competition among the businesses in the same industry, it would compel companies to treat consumers fairly and respond to their complaints.

Second, the government should not ignore the interests of businesses and

---

manufacturers. After the first salient incident in January, a 25% (about 16,340 cars in total) drop in Honda’s car sales occurred and lasted until the end of the year (December).\(^\text{243}\) This number does not account for loss of reputation and brand royalty to the company. Although, it may be considered as a small loss in the entire Thai economy, Honda’s experience was felt in the entire car industry as well as other industries. This eventually forced the government to be more conscious of the situations. Therefore, while controlling businesses to organize in a fair and competitive fashion, the government shall have the strategies that protect the business sector’s interests too.

Last but not least, I think it is necessary for the Thai government to promote the recognition of reconciliation and harmonization within society. For instance, there should be more emphasis on corporate social responsibility,\(^\text{244}\) or preventing the possibility of unmerited claims from the consumers, as well as the improvement of the government administration, management, the supporting of establishment of private or non-governmental consumer protection organization under the Constitution Section 57 to additionally protect the consumers’ rights. Also, the government could serve as a “middleman” for the business sector and the consumers. The government could enact the law regarding consumer’s safety concerns by requiring all car manufacturers or other industrial manufacturers to recall defective cars or products immediately after a dangerous defect is discovered or businesses could add this strategy without a government requirement to earn the trust of customers.\(^\text{245}\)

As mentioned before one of the reasons that Thai society is not very litigious is because it has lost hope on the legal system.\(^\text{246}\) Thus, it is important for the government to

---


\(^\text{244}\) The business sector shall be responsible for the society as it is a part of the entire society as well. For example, the business shall not take advantages of the consumers by selling the products that the quality is below than was advertised, such that happened in the case of Honda CR-V standard and Honda CR-V full option in Nakornsawan province in 2003. The dealer had sold Honda CR-V standard for the Honda CR-V full option series, which the two series have different price and quality and Honda Company could only compensate to some of the complaints from almost 100 complainers. See, http://www.manager.co.th/QOL/ViewNews.aspx?NewsID=9480000013173.

\(^\text{245}\) This is one of the common practices that applied in other countries, like, the United States. For example, in the case of Toyota Company that called back for its 3.8 million defective cars after found the problem regarding the floor mat that could resist the accelerator and caused a serious accident.

\(^\text{246}\) This should not be interpreted that the litigious society is what Thailand should become or expect. It should only mean that the more proper optimal level of litigations (as well as the more proper optimal level of media exposure) should have been reached to stop the aggressive behaviors, like those in the salient cases, in the society and to restrain the appropriate public order to the society.
regain this trust through the introduction of punitive damages\textsuperscript{247} and the strict liability in product liability and consumer cases as seen in the current new laws as well as the draft on class action that is currently in consideration.

However, even having the new Product Liability law and the new Civil Procedure law for Consumer available in Thailand now, it does not mean that such laws will be applied by the judges. Thus we need some evidence to see whether Thai judges really apply the new laws. I will collect the currently available data of the amount of product liability and consumer cases being filed in Thai courts, to examine whether judges apply the new laws. Although so far I do not have enough cases to make a systematically efficient empirical analysis, what is developed and studied here will provide many possibilities and guidelines to develop and revise the laws in Thailand and in many other civil law countries that are willing to adopt punitive damages in product liability law in their countries in the future. This dissertation will help them see the potential problems in Thailand, a civil law country without a jury system as well as the potential resolutions to such problems to respond Thailand’s unique needs.

4.3 AN OVERVIEW OF THE AMOUNT OF CONSUMER CASES FROM 2008 TO PRESENT

In this part, I will try to determine whether Thai judges really apply the new laws. In order to prove this, I will collect the currently available data of the amount of product liability and consumer cases being filed in Thai courts to see if there is an increasing trend. Thailand is a civil law country where judges are compelled to apply the law from the Code law, thus the new laws must be applied whether judges want to or not. However, this is just an academic presumption, a more practical study is preferable and more helpful in vindicating this presumption in practice.

As to the comparison of cases, although my initial thought is to compare the cases

\textsuperscript{247} One of the basic ideas behind punitive damages is deterrence and there are certain perceptions on this. Some believe that deterrence would lessen the importance of the court and the media because deterrence would deter the accidents, the cause of litigations and the media’s attention. However, others argue that it does not necessarily mean that deterrence would lessen the importance of both institutions. Instead, they believe that deterrence would optimize the level of workload for both institutions. I believe that the key thing is to have the “optimal level of deterrence,” which will make all institutions work well together with the optimal level of workload and will eventually provide the optimal level of legal protection to the consumers.
of product liability cases only but since I am going to see only from the Supreme Court level as it is most systematically collected record so I changed to the consumer cases as a whole so I can get a larger set of data instead of none.

Before proceeding, I will highlight some limitations. First, data on consumer cases in Thailand were first specifically collected on October 1, 2007. The Consumer Case Procedure Act B.E. 2551 (2008) came into force on August 23, 2008. Thus, the consumer cases before the new law was enforced would have been included in the general civil cases with no specific collection of data and such data is unfortunately unavailable. Second, although we have the data of the consumer cases after the enactment of the new laws, they are just the data collected about 4 years after the new law imposition and the available data is very general, which makes it difficult to make a systematically empirical analysis as I planned. Therefore, I will instead try to predict the amount of consumer cases in court and analyze the situation as well as offer the potential choices for courts in order to balance the need to induce people to go to court and claim for their compensation and controlling the number of cases to an optimal level so as not to overload the entire judiciary system.

According to the records, the number of cases in general was decreased from 2008 to 2009, however the number of consumer cases increased. The first day in which the statistics of consumer cases were separately and systematically collected was on October 1, 2007. In year 2007, there was no consumer cases that came before the Supreme Court. However, it should not be interpreted that there were no consumer cases that came before the Supreme Court at all since some cases might still be pending in the Civil Cases Section. In year 2008, there were 17 new consumer cases at the Supreme Court level. In year 2009, there were 44 new consumer cases at the Supreme Court level. In year 2010, there were 74 new consumer cases at the Supreme Court level and in 2011 until July 31, 2011, there were 67 new consumer cases at the Supreme Court level.
<table>
<thead>
<tr>
<th>Year</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011 January through July</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount of new consumer cases submitted to the Supreme Court (Cases)</td>
<td>0</td>
<td>17</td>
<td>44</td>
<td>74</td>
<td>67</td>
</tr>
</tbody>
</table>

Table 1. Amount of New Consumer Cases Submitted to Thai Supreme Court level from 2007 to July 31, 2011

According to the above data, we see a gradually increasing trend of consumer cases filed at the Supreme Court level of Thailand after the new laws had been applied. Although this may not be enough to positively prove my assumption that the application of new laws cause the increase of consumer cases filed since the increase of number of cases could be skeptical. That is, it could be either because of the effectiveness of the new
laws or other legal uncertainty created by the new laws. Moreover, this is only the number of the cases filed at the Supreme Court level, and there are limitations of the expansion of time period here, the data here however did briefly illustrate us the increasing potential trend of consumer cases filed in Supreme Court level.

However, it is recorded that there were 183 civil consumer cases and 260 criminal civil cases in year 2008 that came before the Appellate Court. There were 111 civil consumer cases and 110 criminal consumer cases in year 2007 that came before the Appellate Court. Thus, in Appellate Court level there are 72 civil consumer cases increasing from 2007 to 2008 and counted for 64.86 percents increasing; and 150 criminal consumer cases increasing from 2007 to 2008 and counted for 136.36 percents increasing. There were also 97,546 civil consumer cases in year 2008 that came before the Court of First Instance and none are in year 2007. However, the number of civil cases that came before the Court of First Instance is decreasing from 626,080 cases in year 2007 to 606,485 cases in year 2008. That is 19,595 cases decreasing and counted for 3.13 percent decreasing. It is very likely that the decreasing number of cases is the result of some civil consumer cases that used to go to Civil Cases Section would now go to Consumer Cases Section instead. However, there is no such decreasing trend in Criminal Cases Section as the total number of criminal cases was still increasing from year 2007 to year 2008 for 5 percents (number of criminal cases in 2007 is 596,741 and 626,596 in 2008. Thus, the increase number of criminal cases from 2007 to 2008 is 29,855.)

This brought to the possible assumption that most consumer cases are involving civil matter, therefore, the new Section of Consumer Cases would not really affect the number of Criminal Cases matter.

Moreover, in term of subject of consumer cases, from the most current year of the record, which is year 2010, the top five categories of consumer cases submitted to Supreme Court in 2010 are; 1. personal loans/ loans/ suretyships (29 cases), 2. juristic person condominium (14 cases), 3. hire-purchases of other properties other than cars (10 cases),
cases), 4. hire-purchases of cars (7 cases), and 5. credit cards (2 cases), general insurances (2 cases), contract of sales of empty land (2 cases), contract of sales of others that are not land (2 cases). All are in civil matter. This infers that most consumer cases are generally civil matters.

To this point and from the available and systematical data I have obtained, it is very likely to predict an increasing trend of consumer cases in court in the future. Thus, now I will try to provide some suggestions as to balance the willingness to increase the direct claim of the plaintiff to the court instead of going to the indirect way through the media and the concern of not overloading the judiciary system.

The methodology we have already seen is the methodology of mediation to be an alternative in order to reduce cases submitted to and cases pending in the courts. According to the record, there is a record shown that mediation in consumer cases is an alternative dispute resolution, which parties increasingly choose according to the volume of cases submitted to the process of alternative resolution in courts of first instance in 2008 and 2009. Also, from the comparison of the number of cases submitted to courts of the first instance in 2008 and 2009, it is found that the number of cases submitted to and the number of cases pending are decreased.

<table>
<thead>
<tr>
<th>Year</th>
<th>CIVIL CASES</th>
<th>CONSUMER CASES</th>
<th>CRIMINAL CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Cases Using Mediation</td>
<td>Total</td>
<td>Success</td>
</tr>
<tr>
<td>2008</td>
<td>Total</td>
<td>152,366</td>
<td>104,922</td>
</tr>
<tr>
<td>2009</td>
<td>Total</td>
<td>111,130</td>
<td>67,343</td>
</tr>
</tbody>
</table>

Table 2. Number of Cases Using Mediation in Thai Courts of First Instance Comparison in 2008 and 2009

250 The statistics of consumer cases have been collected since August 20, 2008.
Chart 2. Number of Cases Using Mediation in Thai Courts of First Instance
Comparison in 2008 and 2009
Thus, to balance the increasing number of cases submitted in courts, the systematically alternative dispute resolution is one best choice for controlling and keep balance the number of consumer cases in court system to be optimal.

Another means to keep balance of the cases submitted to courts is the imposition of class action proceedings. Although I have earlier suggested that the imposition of class action proceedings is one of the way to help persuading potential plaintiffs to go to courts by dividing the costs of litigation by the class members, it also helps reducing many numbers of small similar claims to the courts and changes it to a single claim. This is how class action proceedings help balancing the entire judiciary system in terms of number of cases filed to courts.

Also, it is necessary to emphasize the importance of collecting the statistical data of cases systematically. As to our study here, there are some lack of available systematic and reliable data of cases. Most are not on file and those are on file may have some flaws or the same data are not in the same way as to, for example, there is a different in number

**Chart 3. Percentage of Successful Mediation Cases in Thai Courts of First Instance Comparison in 2008 and 2009**

<table>
<thead>
<tr>
<th>Type of Cases</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Cases</td>
<td>68.86</td>
<td>60.6</td>
</tr>
<tr>
<td>Consumer Cases</td>
<td>77.41</td>
<td>64.12</td>
</tr>
<tr>
<td>Criminal Cases</td>
<td>52.41</td>
<td>48.64</td>
</tr>
</tbody>
</table>
of cases of the same year between the data collect online through the Court of Justice website and those collected by hard copy and this affects the reliability of the data and makes me have to not include the data into the comparison. Thus, I think in terms of better evaluation and development of the new laws regarding consumer cases and product liability cases, it is very important that the Court of Justice shall support the collecting of these information and have them become available to public in a more systematical and reliable way so in future scholars can do a comparison of different kind of cases to check the trend more generally to improve the overall Thai legal system.

All in all, although due to the limited available data, there is no positive proof of trend of increasing number of consumer cases caused by the punitive damages or strict liability measures, as they are the new structures in the new laws, it is very likely that they are the reasons to attracts more people to file more cases to the courts. Thus, together with class action procedure that is now finished as a draft law and would likely become effective in a near future, the stronger and more efficient judicial system regarding consumer protection on product liability shall be instituted and would eventually bring us all to the new phase of the one more step developed era of justice in Thailand.
CHAPTER 5: ELEMENTS OF EFFECTIVE PRODUCT LIABILITY

5.1 STRICT PRODUCT LIABILITY

The application of strict product liability can help potential consumer plaintiffs to file lawsuits because it removes the complicated burden of proof requirement. The main benefit of strict liability is that it makes it easier for the potential consumer plaintiffs to win the case by applying the assumption of law to solve the complicated burden of proof problems.

However, strict liability is problematic in many circumstances because even if correctly implemented, it might not generate social benefits that are worth its costs. As to the focal point of this dissertation, I will focus on the product liability cases particularly. According to A. Mitchell Polinsky and Steven Shavell in the Uneasy Case for Product Liability, the favorable view of product liability held by many people stems from the belief that such liability satisfies basic notions of fairness and yields significant product safety and compensation benefits. However, Polinsky and Shavell think that this judgment does not recognize that the benefits of product liability are incremental in nature; only the enhancement to the level of product safety already generated by market forces and regulation should be counted, and only the addition to the level of compensation already yielded by insurance coverage should be included. Moreover, the proponents of product liability ordinarily ignore the high litigation costs that it engenders.

In sum, Polinsky and Shavell viewed that product liability is problematic. According to Polinsky and Shavell, market forces and safety regulation will reduce the need for product liability to encourage safety, especially for products sold in high volume. They also stated that available empirical evidence suggests that the safety benefit of product liability for widely sold products is often small. Second, the price-signaling benefit of product liability is limited and is likely to be largely, if not entirely, offset by the price distortions caused by litigation costs and awards for non-monetary losses. Third, product liability does not promote the compensation goal because this objective is already achieved to a significant extent through private and public insurance. Also, it seems that product liability detracts from the compensation goal because it provides awards for non-

monetary losses. Finally, the product liability system generates high legal expenses, equaling or exceeding the payments received by plaintiffs. Therefore, as Polinsky and Shavell suggested in their paper several factors must be considered before making product liability available. Such factors include the consideration of consumers’ knowledge about a product’s risk or whether the product is subject to significant safety regulation or the chance that the plaintiff has insurance coverage sufficient to compensate for the monetary losses sustained. Polinsky and Shavell suggested that if such factors are applied, it would lead to more efficiency which would encourage the courts to reduce the product liability when such liability would be unlikely to significantly promote product safety or compensation, but still allow for the imposition of product liability when it would be beneficial. They also proposed to change the law by limiting or eliminating the scope of product liability to certain widely sold products or in many certain industries.

The influence of market forces on product safety mentioned in Polinsky and Shavell’s paper is likely to be particularly important for widely sold products. Moreover, large firms and firms that sell products in large volume have more incentive to invest in product safety since they often offer multiple product lines and have long time horizons as well as have more to lose if consumers think that their products are dangerous and more to gain if consumers believe that their products are safe. Also, if the problem is with a popular product that can affect many individuals, for example, products like Tylenol or Audi, the media would be more eager to report the defects and this would probably attract the attention of regulators. In contrast, market forces usually will be less effective for products that are not widely sold and the companies that sell these products will tend to have weaker incentives to increase their safety. For example, according to Polinsky

---

252 Tylenol’s market share fell from 35% to 5% since the deaths in 1982 of seven individuals who had ingested contaminated Tylenol capsules. See Tamar Lewin, Tylenol Posts an Apparent Recovery, N.Y. TIMES, Dec. 25, 1982, at 30 (noting that Tylenol had a 35% market share before the deaths and quoting a company executive who said that “[w]e lost 87 percent of our market”). After Johnson & Johnson switched to tamper-resistant packaging of its Tylenol product and instituted an extensive coupon campaign offering free Tylenol, Tylenol’s market share returned to 24%, still significantly below its earlier 35% market share. Id.

253 Audi’s automobile sales dropped by 69% after reports in the mid-1980s of problems of sudden acceleration of its vehicles. See Bradley A. Stertz, U.S. Study Blames Drivers for Sudden Acceleration, WALL ST. J., Feb. 2, 1989, at B1 (“Within the past three years, fears that Audis were prone to sudden acceleration cut U.S. sales of the models from an all-time high of 74,000 units in 1985 to just 22,943 last year.”). While this article suggests that there might not have been a mechanical problem causing sudden acceleration of Audi automobiles, the pronounced reduction in the sales of Audis shows that consumer beliefs about the safety of a product can strongly influence demand for it.
and Shavell’s paper, a problem with locally-manufactured and limited-volume-sold space heaters would be less likely to get more than a brief mention by the media or to be noticed by regulators. Polinsky and Shavell also noted that the observations about products that are and are not widely sold only describe central tendencies.\footnote{It could be that consumers do not have good information about the risks of a widely sold product, especially when the harm the product causes is small or infrequent, is difficult to attribute to its source, or occurs many years after the product’s use. Thus, market forces might not induce the manufacturer of a widely sold product to improve its safety. It could also be the case that consumers do have good information about a product that is not widely sold. The customers of a neighborhood restaurant, for instance, might be expected to learn about a frequent problem of food poisoning there by word of mouth. Thus, market forces could lead a seller of a product that is sold to a limited number of individuals to take care to reduce the risk of harm.}

In addition to market forces, government regulation affects the safety of a broad range of products, like automobiles, aircrafts, pharmaceuticals, or other consumer products such as toys, cigarette lighters, baby cribs, and household chemicals. Polinsky and Shavell stated that safety regulations are more likely to be more effective for widely sold products, such as automobiles, pharmaceuticals and aircrafts, than for limited distributed products. This is because regulators are more concerned about the risks of products sold in high volume and thus will tend to invest significant resources to regulate its safety. Also, regulators will obtain more information about a product’s hazards when more members of the public are using the product and are reporting problems and defects.

Product liability not only affects safety measure, it can impact the price of products. Particularly, product liability causes prices to rise to reflect the product’s risks, which can discourage consumers from buying risky products. Polinsky and Shavell’s paper refer to this effect as the price-signaling benefit of product liability.

The influence of product liability on compensation is incremental, only beyond that already furnished by private and public insurance and the compensation provided for non-monetary losses is generally detrimental to consumers. However, as illustrated in the study in Polinsky and Shavell’s paper, product liability still has a potentially important role to play in providing compensation for product-related accident losses.

Other scholars highlight additional problems with product liability specifically the “economic and sociological costs of adjudications.”\footnote{See, Page Keeton, Products Liability-The Nature and Extent of Strict Liability, 1964 U. ILL. L.F. 693 (1964).} Apart from insurance and regulations, the costs of product liability system outweigh its safety and compensation
benefits. Essentially, the safety regulation tends to already improve safety, the compensation rationale for liability is weak, and the costs of the liability system are high. These costs of product liability are legal expenses associated with tort liability, which is the direct cost and the price distortion or the reduction in consumption of products, which is the indirect cost.

Regarding, the knowledge of consumers about product risks, one might agree that consumers do not learn about product risks from a direct inspection of a product. But this does not bar consumers from learning about product risks from the print media, television, the Internet, and government agencies. These sources provide extensive information about product safety. According to Polinsky and Shavell’s study, in 2009, for example, the top ten newspapers in the United States, with a total paid circulation of more than eight million people, published an estimated 2,800 articles related to product safety. Daily television news programs report on major product defects and accidents, and feature news programs, such as 60 Minutes and 20/20, often include segments on product problems. The Internet also allows consumers to easily locate evaluations of the safety of most widely sold products, and many government agencies provide


257 See, e.g., 20/20: After the Crash (ABC television broadcast July 16, 1999) (reporting on automobile gas tanks exploding due to design defects); 20/20: Toys in Trouble? (ABC television broadcast Nov. 13, 1998) (Addressing the presence of the possibly harmful chemical phthalate in soft plastic toys); 60 Minutes: Is Your Car Safe? (CBS television broadcast June 11, 1978) (Discussing problems with the Ford Pinto’s gas tank), cited in W. PAGE KEETON ET AL., PRODUCTS LIABILITY AND SAFETY 841 (2d ed. 1989); 60 Minutes: Testing, Testing, Testing; Weapons Are the Only Manufactured Consumer Products Not Subject to Safety Inspections (CBS television broadcast Mar. 20, 1994) (covering handgun safety); CBS Evening News (CBS television broadcast Nov. 20, 2007) (addressing lead levels in popular toys, including Dora the Explorer and Sponge bob Square pants items).

258 One way to find information about the safety of a particular product is to search for it using Google. For instance, a consumer can obtain data on the safety of the Toyota Tundra truck by entering the search terms, “safety Toyota tundra 2008” into Google. The results include the Insurance Institute for Highway Safety’s test results for the Tundra. See Ins. Inst. for Highway Safety, Toyota Tundra, http://www.iihs.org/ratings/ratingsbyseries.aspx?id=444 (last visited Feb. 27, 2010). A Google search for “bike helmet safety” leads to, among other sites, the Bicycle Safety Helmet Institute, which provides ratings of bicycle helmets. See Bicycle Helmet Safety Inst., http://www.helmets.org (last visited Feb. 27, 2010). Another way to find product safety information is to examine the web sites of
evaluations of product risks.\textsuperscript{259}

Many scholars assert the detrimental side of product liability implementation. To illustrate, some argue that it is haphazard in its application, raises prices, inhibits innovation, causes desirable products to be withdrawn from the marketplace, and drives companies out of business.\textsuperscript{260} The usual recommendation is that product liability be
reformed in ways that reduce its scope. However, in case where market forces and safety regulations as well as insurance system are weak, the application of strict product liability may facilitate the litigation process with fairness and ease as well as ensure compensation to the injured party and eventually makes the benefits of strict product liability outweighs its costs.

As to the application of strict product liability in the United States, it stems from the Greenman case to the Restatement of Torts, the Second, Section 402A and the

application and raises product prices).

See, e.g., COUPLOS, supra note 260 at 1 (proposing a list of reforms, including a statute of repose, a limitation on contingent fees, and restrictions on awards for noneconomic losses); TED FRANK, AM. ENTER. INST. FOR PUB. POL’Y RES., ROLLOVER ECONOMICS: ARBITRARY AND CAPRICIOUS PRODUCT LIABILITY REGIMES 6 (2007), available at http://www.aei.org/docLib/20070104_LiabilityOutlookPosted_g.pdf. (Advocating a cap on noneconomic damages and more objective safety standards); Opinion, Review & Outlook: Guns and Poses, WALL ST. J., Apr. 17, 2003, at A12 (arguing that Congress should pass legislation that would limit lawsuits against the firearms industry); Editorial, Review & Outlook: The Trials of Merck, WALL ST. J., Nov. 18, 2004, at A18 (arguing that FDA approval of a drug should insulate its manufacturer from product liability); Robert J. Samuelson, Op-Ed., Lawyer Heaven, WASH. POST, June 22, 1994, at A21 (suggesting that making the losing side pay legal fees would be a “genuine remedy” for many of the problems associated with product liability litigation); Editorial, Trial Lawyers’ Triumph, WASH. POST, Mar. 19, 1996, at A16 (endorsing legislation that would impose caps on punitive damages in product liability lawsuits); Presser, supra note 260 at 3 (recommending such changes as the abolition of contingent fees and punitive damages, and the adoption of the loser-pays rule regarding legal fees).


Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The year after Greenman, the Supreme Court of California proceeded to extend strict liability to all parties involved in the manufacturing, distribution, and sale of defective products including retailers such as in case of Vandermark v. Ford Motor Co., 61 Cal.
Restatement of Torts, the Third264. After the Greenman case, the adoption of strict product liability became widely known and accepted in the U.S. legal system.

The application of strict liability to product liability seems to be efficient for the market economy, according to Pablo Salvador-Coderch, Nuno Garoupa and Carlos Go´mez-Ligu´erre,

[A]rchetypical examples are products liability and enterprise liability. In manufacturing, strict liability is perhaps the only viable alternative, the only feasible way, of deterring excessive level of activity without crushing the market economy: deferring to legislators, or to courts and juries, the determination of the optimal level of activity would be tantamount of economic implosion.265

Also in other jurisdictions, for example, in Spanish law, strict liability has prevailed in public law and negligence in private law, but actual differences between similar cases are low or inexistent: so iatrogenic injuries in medical malpractice cases are decided the same whether the patient was hurt in a public hospital or in a private clinic; similarly, school accidents cases are similarly adjudicated independently of whether they took place in a public or in a private school.266 In German strict liability, the scope of strict liability is always and only statutorily defined.267

As to the application of strict liability in Thailand regarding product liability and

2d 256 (1964) and in 1969 enlarged the scope of protection not only to direct customers and users, but also to any innocent bystanders randomly injured by defective products as in Elmore v. American Motors Corp., 70 Cal. 2d 578 (1969).] See, http://en.wikipedia.org/wiki/Product_liability#cite_note-4.

264 Section 402A of the Restatement of Torts, Second regarding strict product liability, is by far claimed to be the most widely cited section of any Restatement according to the Wikipedia website (http://en.wikipedia.org/wiki/Restatement_of_Torts,_Second). However, the new Restatement of Torts, Third: Products Liability published in 1997 had eventually superseded Section 402A and related sections in Restatement of Torts, Second.

265 See, The American Law Institute’s Restatement of the Law Third, Torts: Products Liability, available at http://www.ali.org/ali_old/promo6081.htm. (“Restatement Third, Torts: Products Liability represents a thorough reformulation and expansion of Section 402A and related sections of Restatement Second, which will enable practitioners in the field to analyze the issues confronting them with greater sophistication than afforded by the previous version of Restatement. Especially notable are the careful separation of product defect into distinct categories and the development of separate rules for special products and product markets. Another issue covered in detail is liability of product sellers not based upon defects at the time of sale, including liability for post-sale failure to warn, and successor liability.”)


consumer cases, the new product liability law in 2008, has stated clearly to allow the strict product liability to be available. As stated in its Remarks, the drafter of the laws hope that the strict product liability would make it easier to initiate product liability litigation by reducing the burden of proof for plaintiffs, given the assumption of the law in favor of the injured party affected from unsafe products. However, it takes time to see whether this reform has become effective in inducing more injured parties to go to the court than other methods, such as, behaving in an aggressive behavior to attract the media’s attention. Also, even if the amount of product liability cases is increased, it does not necessarily mean that the strict product liability is its only explanation. There could be other elements such as punitive damages that contributed to the result of having more product liability lawsuits in court system. More information and time are therefore needed for a complete analysis on this issue.

5.2 CLASS ACTION PROCEEDINGS

An introduction of class action proceedings is one of the means I propose to achieve the goal of encouraging consumers to file more lawsuits. First, I will describe

268 The strict liability here has some defenses under this product liability law. For examples, an entrepreneur shall not be liable for damages caused by the unsafe products if he can prove that such products are not unsafe products; or the injured person has already been aware that the products are unsafe, or the damages were caused by an incorrect usage or preservation when an entrepreneur has put the correct and clear usage, preservation, warning message or relevant information on the product. (Section 7, The PRODUCT LIABILITY ACT B.E. 2551 (2008)); or a manufacturer by the order of a hirer shall not be liable if he can prove that the product unsafety is caused by the hirer’s design or by the instructions given by the hirer, which he does not and should not foresee of such unsafety; as well as a manufacturer of the component parts shall not be liable if he can prove that the product unsafety is caused by to the design, assembly, instruction, preservation, warning message or information provided by a manufacturer of such products. (Section 8, The Product Liability Act B.E. 2551 (2008))


[A]s the products nowadays both manufactured within the country or by importation increasingly undergo scientific and hi-technical manufacturing process, detecting non-safety of the product is difficult for consumers. Such unsafe products, when being used, may be harmful to consumers’ or other people’s life, body, health, hygiene, mind or property. Filing a court case for compensation is currently complicated because the burden of proof according to the general principle of law is on the injured person to prove the willfulness or negligence of the manufacturer or importer due to the lack of the law protecting the consumers by implementing the provision of liability of the manufacturer or relevant persons. It is therefore appropriate to promulgate the Product Liability Law applying the strict liability. The result is that the injured persons have no burden to prove about the product unsafe condition and also are able to receive fair compensation. (Bold and italic added.)

270 There is however, an interesting view that apart from being a complement to punitive damages as to make an effective product
the elements of class action proceedings, the benefits and the problems of class action proceedings, an example of its application in the U.S., as well as whether its application in Thailand is possible.

In class action proceedings, a significant number of injured parties form a class in which parties seeking to become a class member must have suffered injuries from the same conduct and shared common facts and law. A representative must be appointed to act as plaintiff in the class action to guard his/her individual interests as well as the interests of the entire class.\textsuperscript{271} Economically, a class action is a procedure that best suits the protection of a large number of parties injured from a single act by same defendant. According to an example in an article entitled “A Primer On The Thai Draft Law On Class Action,” relating to consumer cases, the cost of filing a case individually may not worth the expected damages. However, if all injured parties were able to collectively initiate a class action aided by a team of lawyers that document the facts of the case to file a single lawsuit in court, the protection of interests for minor victims would be greatly strengthened along with the costs and timesaving.\textsuperscript{272} Class action proceedings also reduce the burden of court by limiting the amount of proceedings brought before the court due to the same causes of action requirement. Therefore, Class Actions should be applied in cases involving large group of victims suffering the same cause of action, such as a plane crash, product liability claims or toxic waste disposal from industrial factories.\textsuperscript{273}

There are basically four essential principles in a class action proceeding.\textsuperscript{274} First, there must be commonality between the plaintiff and other class members in the issues of fact and issues of law. Second, a judgment is binding on all class members whether they directly or indirectly participate in the proceedings as long as sufficient notice is given to

\textsuperscript{271}Chukiert Ratanachaichan, \textit{A Primer On The Thai Draft Law On Class Action}, http://www.aseanlawassociation.org/9GAdocs/Thailand.pdf (last visited Apr. 4, 2012). (Mr. Chukiert Ratanachaichan is a permanent law counselor member of the Civil Procedure Code Revision Committee, Office of the Council of State. This article also came with the assistance of the Secretariat of the Civil Procedure Code Revision Committee and Mr. Yordchatr Tasarika for the English translation.)

\textsuperscript{272}Id.


\textsuperscript{274}See Ratanachaichan, \textit{supra} note 271.
them about the developments of the cases and their entitlements. Third, each class member has the right to express an intention to opt-out of the class and exclude himself/herself from being bound by the result of the class action claim without prejudicing his/her right to bring an individual lawsuit. Lastly, to protect the collective interest of the class members, the court must strictly comply with the requisite qualifications in order to exercise his/her diligence in selecting the plaintiff and plaintiff’s lawyers.

According to noted scholar Richard Epstein, class actions are advantageous in terms of economies of scale and appropriate in cases, that a. the number of individuals similarly situated with respect to a common defendant becomes very large, b. the loss sustained by each party is relatively small,275 and c. the administrative costs of each individual suit turn out to be quite high.276 This is because individuals will not pursue claims unless their expected recovery from suing is more than their cost of pursuing the suit. Usually the latter cost is expensive, as the lawyers’ fees are usually high, therefore, a class action device makes it possible to deter large but dispersed wrongdoings. Class action therefore can assist these claimants by making it possible for them to form a class. In terms of economics, there are two strong reasons supporting class actions claims. First, consolidation of the individual claims against the same defendant for the same wrongs, saves litigation costs through economies of scale and has other associated efficiencies, and second, consolidation attenuates external costs associated with a series of individual litigations on the same matters.277 For example, the “limited fund” problem which is the situation that the first few plaintiffs are likely to exhaust all the available resources of the defendant, leaving the rest with nothing to satisfy their judgments.278 A class action can avoid this situation by allowing the class to agree to apportion the expected value of the claims among the members of the class according to some formula. It is to be noted that in this situation, the possibility of certifying a class can prevent the problems that would

275 This is the so-called “frivolous claim” and the cases that have high administrative costs of bringing the claim is referred to “small claim” in Thomas S. Ulen paper. See Thomas S. Ulen, An introduction to the law and economics of class action litigation, 32 EUR. J. LAW ECON. 185 (2011) at 6.


278 Id. at 263-64.
arise, if the class members realized that there might be little or no satisfaction available to late arrivals and start to rush to be the first to litigate.\textsuperscript{279}

Unfortunately, class actions often suffer from inherent difficulties. First, it is often not the case that claimants are, in actuality, "similarly situated." In fact, there are many various factual differences that might lead to disparate outcomes in individually litigated claims. Second, the costs of class action are inconsiderable although they are less in a class action than in the individual cases of the litigants. Simply managing communication among class members such as giving all potential members a chance to opt out of the class is a considerable expense and administrative burden.\textsuperscript{280} Moreover, there is a considerably agency problem in class action litigation. As generally individual claims are small for class litigation, no individual plaintiff typically has sufficient interest to monitor or control the class attorneys. At the simple level, this problem is apparent: with a large, disparate class of plaintiffs when one member will negotiate with the attorneys over fees and most of the time, there are agency costs in that the desires of the principals (the members of the class) are not perfectly consonant with those of the agent (the class counsel).\textsuperscript{281} In many other typical class actions, however, the problem of monitoring the class attorneys remains endemic and there is no ideal solution to compensate class action lawyers\textsuperscript{282} as well as the way to monitor their conducts.\textsuperscript{283} Another cons of class action is that sometimes one of the class members in the class action will want to gain more than others and not a pro rata share. Also, the problem of free riders as some class members

\textsuperscript{279}In this regard, the class certification procedures avoid the same problems that might arise in a bankruptcy proceeding in which the total claims of the creditors exceeded the assets of the debtor. See, Ulen, \textit{supra} note 275, at 6.
\textsuperscript{280}Id. at 7.
\textsuperscript{281}Id. at 8.
\textsuperscript{282}There are basically two methods of calculating the class action lawyers’ fee; the lodestar method and the percentage of the recovery method. The lodestar method will pay the lawyers from the hours the lawyers have worked on the cases multiplying by a reasonable hourly fee and adjustable by the judge depending on the lawyers’ assessment of the case particularities, such as the number of parties involved, the complexity of the legal issues involved and the like. Under the percentage of the recovery method, the judge will give the fee to the lawyers in percentage of the recovery based on their assessment of the same kinds of factors in the lodestar method. Different incentives are on these two methods. Under the lodestar method, class lawyer has an incentive to prolong the litigation as many hours as possible. Under the percentage of recovery method, the lawyer has an incentive to settle early and for as large amount as possible.
\textsuperscript{283}For a more critical perspective, see Lorenzo Sacconi, \textit{The Case Against Lawyers’ Contingent Fees and the Misapplication of Principal-Agent Models}, 32 \textit{EUR. J. LAW ECON.}, 263 (2011).
\textsuperscript{284}It is well known that in some cases the ordinary contingent fee lawyer will settle a case sooner than might be in the best interest of his client to reduce the costs of additional litigation which fall largely or entirely on him. See, Epstein, \textit{supra} note 276.
might choose to free ride on others’ efforts and bear none of the costs of running the suit and the consequent risk of failure and a problem of choosing the class representative if two or more individuals or groups try to run the single lawsuit.\textsuperscript{284} Furthermore, class action litigation creates problems involving multiple jurisdictions because plaintiffs’ attorneys can "shop" class action suits in search of the most favorable forum, making the preference of state to initiate the litigation. Also, because of the sheer size of many class action claims, it is possible for many large companies to become insolvent or bankrupt which will eventually impact the entire economy.\textsuperscript{285} Other scholars argue that class actions will lead to excessive enforcement and deterrence, which may generate double recoveries regarding additional actions on behalf of unharmed consumers when added to existing legal protections and recovery for injured consumers.\textsuperscript{286}

Regarding the practice in the United States, class action proceedings are principally governed by Federal Rules of Civil Procedure Rule 23 and 28 U.S.C.A. Section 1332 (d). Under § 1332 (d) (2) the federal district courts have original jurisdiction over any civil action where the amount in controversy exceeds $5,000,000 and either 1. any member of a class of plaintiffs is a citizen of a State different from any defendant; 2. any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or 3. any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.\textsuperscript{287} Certain lawsuits with common issues across the states are allowed to create nationwide class actions, although this could cause problems if the various states’ laws lack significant commonalities. Class action lawsuits can also be brought under state law, and in some cases the court may extend its jurisdiction to all class members, including those out of state (or even internationally) as the key element is the jurisdiction that the court has over the defendant. Typically, federal courts are thought to be more

\textsuperscript{284} Id.


\textsuperscript{286} See, Michael S. Greve, Harm-Less Lawsuits? What’s Wrong with Consumer Class Actions, AEI Press (Apr. 4, 2005), available at http://www.aei.org/book/814. (It is suggested that a viable reform agenda must focus not only on courts and common law tort but the statutory laws that give rise to those actions and the private enforcement of consumer protection laws should be closely tied to traditional common law requirements of detrimental reliance and loss causation.)

favorable for defendants, and state courts more favorable for plaintiffs. Many class action cases are filed initially in state court. The defendant will frequently try to move the case to federal court. The Class Action Fairness Act of 2005\(^{288}\) addresses defendants’ ability to shift state cases to federal court by giving federal courts original jurisdiction for all class actions with damages exceeding $5,000,000, exclusive of interest and costs.\(^{289}\) However, the Class Action Fairness Act contains carve-outs for, 'inter alia', shareholder class action lawsuits covered by the Private Securities Litigation Reform Act of 1995 and those concerning internal corporate governance issues.\(^{290}\)

Under Rule 23 of the Federal Rules of Civil Procedure, the class action must qualify certain prerequisites: (1) the class must be so numerous to make joinder of all members’ suits impractical, (2) there must be questions of law or fact common to the class (3) the claims or defenses must be typical of the representative parties, and (4) the representative parties must adequately protect the interests of the class.\(^{291}\) These four requirements are often summarized as CANT: commonality, adequacy, numerosity, and typicality. However, in most cases the CANT requirements will not stay satisfied unless one can show that: (1) prosecuting separate actions would create a risk of inconsistent or varying adjudications to individual class members that would establish incompatible standards of conduct for the party opposing the class or adjudications that practically would be dispositive of the other members’ interests or substantially impair or impede their ability to protect their interests, (2) the party opposing the class acts or refuses to act on grounds that apply generally to the class, so that final injunctive relief is appropriate as to the entire class, or (3) the court finds common legal or factual issues between the class members predominate in the proceedings, as opposed to individual ones and that the class action is a superior vehicle for resolution of the disputes at hand than other available methods for fairly and efficiently adjudicating the controversy.\(^{292}\)


\(^{289}\) 28 U.S.C.A. § 1332(d) (West 2010).


\(^{291}\) FED. R. CIV. P. 23 (a). (U.S.).

\(^{292}\) See FED. R. CIV. P. 23 (b). (U.S.). (The matters regarding these findings include: (A) the interests of the class members in
To initiate a class action, the procedure begins with filing a suit with one or several named plaintiffs on behalf of a proposed class. The proposed class must consist of a group of individuals or business entities that have suffered a common injury. Typically these cases result from an action on the part of a business or a particular product defect or a policy that applied to all proposed class members in a typical manner. After the complaint is filed, the plaintiff must file a motion to have the court certify the action as a class action. In some cases, class certification may require discovery to determine its size and to see if the proposed class meets the standard for class certification. After such motion, the defendant may object to whether the issues are appropriately handled as a class action, whether the named plaintiffs are sufficiently representative of the class, and whether there are any issues regarding relationship with the law firm handling the case. Moreover, the court will examine the ability of the law firm to prosecute the claim for the plaintiffs, and their resources for dealing with class actions.\textsuperscript{293} Due process requirements must be satisfied in most cases, a notice describing class action must be sent, published, or broadcast to class members. The class members have a right to opt out of the class if the person wants to proceed with his/her own litigation if the person notifies the class counsel or the court in time stating that the person wants to opt out. According to Rule 23 (e), the claims of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval by directing notice in a reasonable manner to all class members who would be bound by the proposal. If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. The parties also need to file a statement identifying any agreement made in connection with the proposal and if the class action was previously certified under Rule 23 (b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so. Any class members’ objections or withdrawals of the objection will require the court's approval.\textsuperscript{294} The subclasses are

\textsuperscript{293}See, http://en.wikipedia.org/wiki/Class_action#cite_ref-.\textsuperscript{3} Also, see Fed. R. Civ. P. 23 (c). (U.S.).

possible when appropriate if each class is treated as a class under this Rule 23.  

After the court certifies a class, the court must appoint a class counsel, by considering the work counsel has done in identifying or investigating the potential claims in the action, the counsel’s experiences in handling class actions, the counsel’s knowledge of the applicable law, and the resources the counsel will commit to representing the class as well as any other matter pertinent to the counsel’s ability to best fairly and adequately represent the class’ interests. The court may order potential class counsel to provide more details regarding the attorney’s fees and nontaxable costs.

Rule 23 (h) allows the court to award reasonable attorney’s fees and nontaxable costs authorized by law or by the parties’ agreement in a certified class action if there is a timely motion asking for an award and the notice of such motion must be directed to class members in a reasonable manner. An objection is available for a class member or parties from whom payment is sought. The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a) and the court may refer issues related to the amount of award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

At the state level, many states have adopted rules similar to the Federal Rules of Civil Procedure. However, some states such as California have civil procedure systems in which deviate significantly from the federal rules providing four separate types of class actions. As a result, there are two separate treatises devoted solely to the complex topic of California’s class actions.

Comparing federal and state class actions, there are advantages and disadvantages to both venues. The federal class actions are well known of its authority to deliver a remedy to litigants located in any state. If two or more cases involving a common defendant or common liability questions are pending in different districts, the party may ask to have them transferred under the Multidistrict Litigation Panel in federal law. (28 U.S.C.A. § 1407.) This jurisdictional benefit can greatly streamline consolidation of

---

similar cases. The federal class actions are also beneficial because of the federal court system has one judge in charge of the entire proceeding. This will allow the same jurist to rule on class certification after handling with extensive pretrial motions and other activity that has educated him or her to the benefit or merits of the case. However, federal class actions are subject to jurisdictional restrictions as the United States Supreme Court held, for instance, that each of the members in a diversity case under federal Rule 23 must have a monetary claim of more than $10,000 and or be dismissed from the case or suspended by statute. It is to be noted that this issue does not apply in most securities class actions, which are usually brought under the jurisdictional provisions or federal securities law. Another disadvantage of federal class action is that it is believed that federal rules require stricter adherence to notice provisions than state practice does.

The state class actions, on the other hand, are claimed to be more direct and expeditious than the federal venue. Although the recent United States Supreme Court rulings enhance respect for state class action settlements and make them more attractive in *Matsushita Electric Industrial Co., Ltd v. Epstein*, 516 U.S 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996), the primary shortcoming of state class actions is still the inability to venue larger national claims without raising serious due process issues. Moreover, class actions require more attention than average civil cases, which makes them suitable for judges who have serious concerns and are willing to take care of the extra workload. This then could be quite problematic for judges in small courts who are busy and already overburdened to handle not only the extensive factual investigation but also the constant monitoring of the class counsel for potential harm to absent class members.

The empirical examples of the class action cases are vary in contents. However, the top ten largest class action lawsuits are often concerned with large and well-known companies, like, Exxon Mobil Valdez, World Com, Enron, Wal-Mart, Target, Citibank, Exxon Mobil class action lawsuit related to the Exxon Valdez oil spill, which affected thousands of people and more than 1,300 miles of coastline. A federal judge ordered ExxonMobil to pay punitive damages and interest to thousands of commercial fishermen, cannery

---

299 Id.
302 See *Cohelan*, supra note 298.
303 Id.
304 Id.
305 Exxon Mobil class action lawsuit related to the Exxon Valdez oil spill, which affected thousands of people and more than 1,300 miles of coastline. A federal judge ordered ExxonMobil to pay punitive damages and interest to thousands of commercial fishermen, cannery
Nortel Networks, AOL Time Warner, AT&T, etc. Most cases, for example, World Com, Enron, Nortel Networks, AOL Time Warner are involving fraud under the federal security law or false advertising, unfair business practices, breach of contracts, deceit, and/or misrepresentations.\textsuperscript{306} Other cases are related to race discrimination and gender discrimination either in employment,\textsuperscript{307} school admissions,\textsuperscript{308} loan allocations and

workers, landowners, Alaska natives and others who were harmed by the spill.

\textsuperscript{306} See, \textit{Vroegh v. Eastman Kodak Company, et al. case number CGC-04-428953} (the complaint accuses the defendants of false advertising, unfair business practices, breach of contract, fraud, deceit and/or misrepresentation, and violation of the California Consumers Legal Remedy Act); \textit{Smiley v. Citibank}, 517 U.S. 735 (1996) (the class action case by bank and credit card issuers filed regarding limiting credit card late fees and other penalties); the \textit{Nortel Networks} case (\textit{IN RE NORTEL NETWORKS, INC. In re: NORTEL NETWORKS, INC., et al. Chapter 11 Debtors. In re: NORTEL NETWORKS LTD., et al. Chapter 15 Debtors. NORTEL NETWORKS, INC. and NORTEL NETWORKS LIMITED, et al., Plaintiffs, v. COMMUNICATIONS TEST DESIGN, INC. Defendant. Case Nos. 09-10138 (KG) Jointly Administered, 09-10164 (KG) Jointly Administered, Adv. Pro. No. 10-53065 (KG) Consolidated, Re. D.I. 22, Re. D.I. 96 Adv. Pro. No. 10-53065, Re. D.I. 27 Adv. Pro. No. 10-53066.} (the class action lawsuits filed under federal securities laws for fraud against the leading fiber-optic equipment to emerging Internet companies); \textit{Mitchell v. AOL Time Warner, Inc. et al.} (AOL Time Warner stock investors sued the company for fraud under federal security law alleging the company having improperly accounted for advertising transactions between 1998 and 2002); \textit{In re WorldCom, Inc. Sec. Litig.}, 294 F.Supp. 2d 392 (S.D.N.Y. 2003) (this class action represented WorldCom stock investors who held WorldCom stock from April 29, 1999 through June 25, 2002, initially against World Com, and individual employees Bernard Ebbers (CEO), Scott Sullivan (CFO) David Myers (Controller) and Buford Yates (Accounting Director) for fraud); \textit{Enron} case (Enron corporate stock investors filed lawsuits under both federal and state securities laws against Enron Corporation, individual Enron officers and directors, Enron’s accountant Arthur Anderson, individual Arthur Anderson partners and employees, and Enron’s former law firm Vinson & Elkins for engaging in fraud by concealing investors losses by Enron-controlled special purpose entities (the Raptors). The company eventually paid $7.2 billion in settlements reached by Enron to compensate shareholders whose stock became worthless during the company collapse and this is the largest payout to date in a shareholder securities class action, see http://www.cnbc.com/id/35988343/Top_10_Class_Action_Lawsuits?slide=9.)

\textsuperscript{307} See, \textit{Dukes v. Wal-Mart Stores, Inc.}, 603 F.3d 571 and \textit{Wal-Mart Stores, Inc. v. Dukes et al. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT No. 10–277. Argued March 29, 2011—Decided June 20, 2011} (See, http://www.lawmemo.com/supreme/case/Walmart/, “Current and former Wal-Mart employees sought judgment against the company for injunctive and declaratory relief, punitive damages, and backpay, on behalf of themselves and a nationwide class of some 1.5 million female employees, because of Wal-Mart's alleged discrimination against women in violation of Title VII. They claim that local managers exercise their discretion over pay and promotions disproportionately in favor of men, which has an unlawful disparate impact on female employees; and that Wal-Mart's refusal to cabin its managers' authority amounts to disparate treatment. The District Court certified the class, finding that respondents satisfied Federal Rule of Civil Procedure 23(a), and Rule 23(b)(2)'s requirement of showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Ninth Circuit substantially affirmed. The US Supreme Court reversed, finding that (1) certification of the class was not consistent with Rule 23(a), and (2) the backpay claims were improperly certified under Rule 23(b)(2).”) \textit{Or Luévano v. Campbell}, [93 F.R.D. 68 (D.D.C. 1981)] (the class action regarding racial bias in written test for employment).

\textsuperscript{308} See, \textit{Robbins v. Lower Merion School District No. 10-0665-JD}. (A federal class action lawsuit brought in February 2010 on behalf of students of two high schools in the Philadelphia, Pennsylvania suburbs, charging schools for secretly spied on students through surreptitiously and remotely activated webcams embedded in school-issued laptops that the students were using at home and for
assistance,\(^{309}\) or other consumer or human rights protections from dangerous or defective products.\(^{310}\)

---

violation of privacy rights;\(^{308}\) Gratz v. Bollinger, 539 U.S. 244 (2003). (A United States Supreme Court case regarding the University of Michigan undergraduate affirmative action admissions policy, claiming that it is too mechanistic in its use of race as a factor in admissions, and was therefore unconstitutional.)

\(^{308}\) Pigford v. Glickman 416 F.3d 12 (2005). (The class action lawsuit against the United States Department of Agriculture (USDA), alleging racial discrimination in its allocation of farm loans and assistance.)

\(^{310}\) For example, the breast implant class action litigations by women suffered autoimmune disease from their silicone breast implants against the major breast implant manufacturers such as Corning, Baxter, Bristol-Meyers Squibb/MEC, 3M, which later settled for $3.4 billion. According to LawInfo.com and cnbc.com, it was the largest class action lawsuit in history at time; the litigations against each of the top six tobacco companies in state court such as Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Commonwealth Tobacco, and Liggett & Myers brought by those who are injured by tobacco products, and medical cost reimbursement suits brought by states and insurance companies based on proven medical theories. The examples of such cases are, Broin v. Philip Morris, 641 So. 2d 888 [Fla. App. 3d Dist. 1994], review denied, Castano v. American Tobacco, 84 F.3d 734 [5th Cir. 1996]). (See http://law.jrank.org/pages/10805/Tobacco Litigation.html, “The class members in Broin were nonsmoking flight attendants who claimed to suffer from various illnesses caused by their exposure to ETS from air travelers' cigarettes while the Castano case was based on plaintiffs' claims that tobacco companies intentionally manipulated nicotine levels, even though the companies knew that nicotine was a hazardous and addictive substance. The Castano class consisted of all nicotine-dependent persons or their estates, heirs, family members, or "significant others" in the United States and its territories and possessions, who have bought and smoked cigarettes manufactured by the defendants. However, because of the breadth of the class, the U.S. Court of Appeals for the Fifth Circuit ruled that the plaintiffs in Castano should not have been certified as a class. Lawsuits since Castano have sought to eliminate the problem of certifying a large class. For example, Engle v. R. J. Reynolds, 672 So. 2d 39 [Ct. App. Fla. 3d Dist. 1996], review denied, 682 So. 2d 1100 (Fla. 1996), involved essentially the same claims as in Castano, but the class was much smaller. In Engle the certified class consisted of Florida citizens and residents, and their survivors, who had suffered, presently suffer, or have died from diseases and other medical conditions caused by their addiction to cigarettes. The Engle case was allowed to proceed, which made it the first class action lawsuit against tobacco companies to go to trial. In 2000, a six-person jury awarded the class members a record $15 billion in punitive damages. A trend of state reimbursement suits began in 1994, started with Mississippi State filed a lawsuit on behalf of the state's taxpayers against the tobacco industry to recoup the state’s share of Medicaid costs incurred as a result of tobacco-related illnesses (Moore v. American Tobacco, No. 94-1429 [Miss. Chan. Ct. 1994]), proceeded on legal theories of unjust enrichment and restitution, based on the fact that the state's taxpayers had been directly injured by the tobacco industry’s actions as they were forced to pay Medicaid costs associated with tobacco-related illnesses. Other states followed the trend, such as Minnesota, West Virginia, Florida, Texas, and Washington. Eventually, the tobacco companies were forced to seek a national settlement of all state tobacco claims with each of 50 state attorneys general.) Other cases involving the violation of consumer’s rights are such as, the case between Hepting and AT&T [Hepting v. AT&T Corp., F Supp.2d (N.D. Cal. July 20, 2006)], which was the class action brought by the Electronic Frontier Foundation against AT&T, the telecommunications company for permitted and assisted the National Security Agency in unlawfully monitoring the communications in the United States, including AT&T customers, businesses and third parties whose communications were routed through AT&Ts network, as well as Voice over IP telephone calls routed via the Internet; or the case between National Federation of the Blind and Target Corporation [National Federation of the Blind, et al. v. Target Corporation, 452 F. Supp.2d 946 (2006)], which is the case that the National Federal of the Blind (NFB), sued Target Corporation, a national retail chain, claiming that the blinds were unable to access much of the information on the company’s website, nor make purchase of anything from its website independently and thus infringed their rights; or the case of GM Instrument Cluster Settlement, which is a class action settlement under U.S. District Court in Seattle in 2008, awarded to owners of certain General Motors vehicles with allegedly defective speedometers by allowing the owner or lessee to get their instrument cluster replaced under the terms of a special coverage adjustment to their factory standard warranty.\(^{95}\)
Anyway, there is some mixed evidence on the various attempts to reform private class action litigation both legislative and judicial, particularly in the area of securities fraud. Some scholars suggest that “the class action securities fraud litigation business [ ] is shrinking faster than a polar ice cap.”\(^{311}\) Professor Grundfest argues that this decline in the absolute number of private securities fraud class actions is significant but that even more significant is the decline in the dollar amounts at issue.\(^{312}\) According to Professor Grundfest’s proposal, several points have been made to explain the reasons for this trend. First, there may be less fraud, especially, after the failures of Enron and WorldCom and the lengthy prison sentences for several of their officers. This may have highlighted the success of the previous decades’ litigations. Second, the criminal prosecution of the Milberg Weiss law firm, the leader in securities fraud class action litigation, may have discouraged other firms from entering this field of litigation. Third, the very strong performance of the equity markets in 2005 may have accounted for very few instances of share price falls that would have been candidates for securities fraud actions. Lastly, the new method of dealing with securities fraud under the SEC and the Department of Justice rules as well as under the Sarbanes-Oxley Act, may be found to be superior to private class actions for investors.\(^{313}\) However, it is also possible that the recent legislation, judicial holdings, and facts identified by Professor Grundfest may not have dissuaded complaints that settle short of a full trial as the figures on class action settlements have increased continuously since 1999 as shown in AEI-Brookings Conference on the Interim Report of the Committee on Capital Market, held in Washington, DC, on April 20, 2007, suggested by Robert E. Litan.\(^{314}\) Furthermore, other investigators such as, Thomas Willging and Emery G. Lee III have found “a substantial increase in class action activity


\(^{312}\) See, Ulen, supra note 275, at 15.

\(^{313}\) Id. (“The SEC and the Department of Justice insists that any corporation suspected of a sufficiently serious fraud conduct an internal investigation that will finger the executives responsible. The corporation must also cooperate in prosecuting these executives.” Additionally, under the Sarbanes–Oxley Act, the Securities Exchange Commission has the power to “collect funds that can be distributed to shareholders who have been harmed by fraud.” (See also, Grundfest, supra note 311.) The net amount that the average defrauded investor might collect in this fashion may be greater than if she were to participate in a class action in which the class attorneys take one-third of the judgment in the form of a contingency fee.)

during the months following the Class Action Fairness Act of 2005’s effective date.”

I agree with Professor Ulen that although this empirical evidence on private class action litigation and on the effects of recent legislation does not tell a clear story, it does suggest a decline trend, particularly for private class actions for securities fraud and that more time and work are needed to make better predictions.

Moreover, to some records, the imposition of class actions in the United States has imposed a substantial cost on American business, forcing them to allocate their budgets to legal fees and litigation costs and impedes research and development projects in many important product areas, such as medical technology and pharmaceuticals.

Another drawback of class action litigation in the United States is a certain chilling effect that it poses on and deters foreign direct investment. According to a recent paper issued by the U.S. Department of Commerce, examining the specific areas of concern cited by foreign investors, class action lawsuits are listed as one of four categories (in addition to punitive damages, forum shopping and litigation culture) meriting further examination for their impact on investment. A number of other recent studies provide confirmation of the Commerce Department’s findings. However, the most problematic issues in my opinion is the facts that most American class actions are largely lawyer-driven exercises in which the idea of bringing a lawsuit comes from an entrepreneurial lawyer who see a potential profit, not from an injured consumer or investor. This is obviously not the original envision of the American class action that was intended to enhance judicial efficiency in adjudicating claims involving large numbers of people and to grant access to compensation for individuals whose claims, when taken individually, would not be

316 See, supra note 275, at 16.
318 Id. (A survey of Chief Executive Officers of non-American based companies conducted by the Organization for International Investment found class action lawsuits to be the top concern with the U.S. legal system among foreign investors. In the same vein, the McKinsey and Company Global Capital Markets Survey found securities class actions to be a major concern affecting the health of the U.S. capital markets.)
sufficiently profitable to persuade a lawyer to take their case.\textsuperscript{319}

Taking into account of the nature of the class action proceeding, all of its benefits and downsides, and the practices in the U.S., Thailand’s Cabinet has recently approved in principle draft legislation on class action proceedings although it is not yet officially recognized under Thai laws.\textsuperscript{320} Thai government aimed to have its content cover the securities and stock exchange law, as well as other legislations, including labor laws, trade competition laws, consumer protection laws and environmental laws. According to “A Primer on The Thai Draft Law on Class Action,”

[T]he initial draft law on Class Action is for Securities Proceedings B.E. …. by the Securities and Exchange Commission largely adopted the principles found in Rule 23 of the United States Federal Rules of Civil Procedure, a concept which aimed to give injured parties a greater role in seeking redress for wrongdoings. The essential provisions of this law comprised 3 parts, namely:

(1) The appropriate prerequisites for initiating a class action. Principles from the United States of America have been adopted whereby the court plays a central role in determining whether leave should be granted for a class action. (2) Most trial procedures would still be subject to the law on civil procedures. However, there will be certain procedures specifically enacted for class actions. For example, in an ordinary case, the Civil Procedure Code provides that the withdrawal of a lawsuit may be achieved simply by giving notice to the court if a defense plea has not yet been filed by the defendant. If a defense plea has already been filed, then the court must first hear the defendant’s objections. On the other hand, in a class action, the court has the discretion in every case in determining whether leave should be granted to the plaintiff to withdraw the lawsuit. When making a determination, the interests of the class member would be the primary consideration. The reason for stipulating such a condition is that if the plaintiff is allowed to withdraw a class action lawsuit in the same manner as an ordinary case, the plaintiff may employ class actions as a means of coercing the defendant to pay compensation in return for withdrawing the lawsuit at the expense of the interests of a very large number of class members.

(3) Motivation for class actions. The person who plays one of the most significant roles in a class action is the attorney who encouraged the filing of a lawsuit. The attorney would have to advance all costs of proceedings with the ultimate attorney’s fees being the motivating factor for carrying out the lawsuit. \textsuperscript{321}

\textsuperscript{318}Id.

\textsuperscript{320}The Thai Cabinet Resolution approved on this issue on November 9, 2010.

\textsuperscript{321}The Securities and Exchange Commission completed its draft of the Bill on Class Action for Securities Proceedings B.E. towards the
It is proposed that this new class action legislation will not be enacted as a new act but shall be added as Section 4 of the existing Thai Civil Procedure Code, entitled "Class Action." This new section will outline the criteria and procedure for class action lawsuits. This is a great step in developing the class action process in Thailand.

The draft legislation provides that "class" means a class of persons enjoying the same right owing to the same set of facts and law and possessing the same distinctive characteristics although suffering a different loss or damage. According to this draft legislation, “Class Action” means proceedings under which the court allows the plaintiff to submit a claim in order for the court to set forth the right of the plaintiff as well as the rights of other members of the group or class who do not join the case. Therefore, under a class action, the victims will not be individually required to initiate a complaint in order for the court to be able to grant justice. Only one victim is needed to commence a lawsuit and participate in the proceedings on behalf of other victims who are members of the group. Regarding the procedure for class action, the draft legislation asserts that the plaintiff may file an application together with the complaint for the class action

end of 2001 at which time the Bill was forwarded to the Office of the Council of State in advance of it being submitted to the Council of Ministers for consideration. The Secretary-General of the Council of State at that time (Professor Chaiwat Wongwattanasan) considered it appropriate to submit the Bill to the Civil Procedure Code Revision Committee, chaired by Mr. Jamras Khemajaru (Privy Councilor and former President of the Supreme Court), to determine whether the principles of class action should be extended to incorporate cases of mass losses resulting from torts, breach of contracts or other forms of losses arising from specific laws which were designed to protect a wide span of the population. The Secretary-General believed that the application of this legal principle to other legal proceedings would greatly enhance the facilitation of justice to the people as class actions save costs and time as well as provide an efficient means of reducing the number of cases that reach the courts. The Committee subsequently appointed a “Subcommittee for the Revision of the Civil Procedure Code on Aspects Relating to Class Actions,” chaired by former Vice-President of the Supreme Court Mr. Somboon Boonphinont, to take charge of drafting a law on class action. The Subcommittee determined that provisions on class action proceedings should be incorporated in the Civil Procedure Code and commenced drafting at the end of 2001. During the drafting process, laws relating to class actions in other countries were studied. Moreover, in order to ensure that the Bill was drafted meticulously and most effectively, the Office of the Council of State formulated a project entitled “Developing a Thai Class Action Law” with the sponsorship of and informational support on class actions from the U.S. Agency for International Development (USAID) under the “Accelerating Economic Recovery in Asia (AERA)” program. Under this project, two videoconferences between Thai and American lawyers were held at the Embassy of the United States of America through Kenan Institute Asia and the American Bar Association (ABA). These dialogues were further supplemented by study visits participated by certain members of the Subcommittee and researchers to observe class action proceedings in Washington D. C., the United States of America, a seminar for Thai lawyers to express their opinions on the draft law on class action and an International Class Action Workshop in which Thai lawyers from all legal professions were invited to engage in discussions with legal experts from the U.S., comprising of a professor of law, a judge, an attorney and other experts. At present, the Committee has already completed its consideration of the draft law on class action, which now awaits introduction to the National Legislative Assembly as a Bill of Law. (See Ratanachaichan, supra note 271.)
proceedings. The complaint shall be in writing and clearly state the nature of the claim, the relief sought and the basis that the members of the class share the same characteristics with the plaintiff. However, where the relief sought by the plaintiff is for a specific monetary amount, the relief sought by the class must apply the same principle and calculation for the monetary amount as the plaintiff, although it is not necessary to identify the specific amount to be received by each member of the class. The plaintiff who initiates the case shall only pay the court fees levied on his own amount of claim. Upon approval of the class action by the court, the plaintiff is not allowed to withdraw the complaint, unless by the court’s permission. In addition, the parties cannot come to an agreement or compromise the issues of the case or agree to submit the case to arbitration without the court's consent. The plaintiff's lawyer also has a significant role. This new legislation provides that the lawyer is entitled to apply and proceed with execution on behalf of the plaintiff and the members of the group. Also, where the judgment requires the defendant to perform or restrain from performing or delivering property, the court shall also specify the sum of the money that the defendant shall pay to the plaintiff's lawyer who shall be deemed as the judgment creditor. Thus, the ultimate reward from the result of the case is a great incentive that makes the lawyer represents a case for the class although the lawyer may have to face a risk of losing the case.

At this point, it is noteworthy to remind that there is inevitably a difference between class action litigation in Thailand and in the United States. As for one obvious reason, the United States has a long history with class action litigation, at least 15 years, so much so that Congress has passed important legislation on these matters, and the United States Supreme Court has handed down noteworthy opinions in cases involving class actions. This is a big difference from the class action experience in Thailand, which is still in the drafting process and thus, a very new issue. Another difference is in the two legal systems, common law and civil law. Most class action litigation in the United States involves a jury which is unavailable in Thailand. Also the specific nature of both the substantive and procedural law of the two countries, namely the absence of contingent fees, the American cost rule, an entrepreneurial bar, the existence of the fee-

---

322 See Summacarava, supra note 273.
323 See, Ulen, supra note 275, at 13.
shifting rules (losers pay legal costs regime) in the Thai legal system, raise doubts about the compatibility of class action proceedings in Thailand. The above issues will be considered by the Thai legislative body; thus, more empirical work and time to investigate is necessary for a more thorough understanding of each problem.

Nevertheless, even a class action proceeding is still a new issue, there are already many proponents and critics on this issue. Supporters of class action proceedings, believe this new legislation will likely improve the Thai legal system as in many countries where class action has been well-recognized such as the United States,\textsuperscript{324} class action makes it possible for a few people to change corporate practices and to bring wrongs to the attention of the court on more than a trivial basis. From this perspective, the claims may result in a settlement; however, they usually force the defendant-corporation to change its policies and eliminate the practices that led to the class action. Thus, the society benefits in ways that are hard to quantify beyond the members of the class who receive compensation as class action helps lower costs of initiating lawsuits and other administrative costs; facilitating justice to a larger section of the society, especially the less privileged ones and parties suffering from minor damages; ensuring consistency in defendant’s treatment on identical issues as well as, persuading attorneys to do a good job for their clients since there are contingent fees available.

On the other hand, critics of class action proceedings point out some limitations on its applications in Thailand. One concern is the fear that companies will be sued for a meritless suit and this will bring too many cases to the court and eventually cause over-deterrence. Critics also believe that class action litigation will make businesses insolvent or bankrupted and ultimately impact the entire economy. Some other critics fear of the moral hazard problem between the class representative and other class members concerning protection of the interest of the entire class, for example, the threats of class action lawsuits as leverage in bargaining with the opposite party for compensation without genuine regard for interests of other class members. Others concern of the specific nature of each country and jurisdiction such as in Thailand, the awareness

\textsuperscript{324} See the earlier paragraphs regarding the United States class actions practice. Also see, Ratanachaichan, supra note 271. (These rules were amended once in 1966 and has spread out to other common law jurisdictions such as Canada, Australia and even some civil law jurisdictions such as Brazil, Quebec (Canada) and other countries in Asia, i.e. China and Indonesia. France has also attempted to introduce draft legislation in this regard but not available yet.)
regarding loss of Thai traditional values in respecting forgiveness and compromise upon the introduction of class action proceedings, which promotes bringing the dispute to the court in which is viewed by many Thais as encouraging the disputes.\textsuperscript{325}

One complication of class action proceedings in a civil law jurisdiction is clearly shown in another civil law country’s experience, which also adopted class action proceedings, like, Portugal. Namely, it is dubious that class actions will be unlikely or very problematic to function without contingency fees rules and under the fee-shifting rules, which the losing party is responsible for the expenses and attorney’s fees of the winner.\textsuperscript{326} This situation will deliver a different system of economic incentives than in the United States and eventually are claimed to provide fewer opportunities for the development of a strong and entrepreneurial plaintiff bar.\textsuperscript{327}

However, as the literature evidence shown, the results in a certain country depend largely on the uniqueness of each nation’s system of substantive law and individual civil procedure, as well as ideological, cultural, political and philosophical attitudes towards law.\textsuperscript{328} Thus, even though there is a different setting of class action proceedings between the common law and civil law jurisdictions, it does not always mean that class action proceedings will be incompatible with civil law systems. According to some literature reviews, some civil law system countries, like Brazil and Canada (Quebec), have been able to develop a sophisticated class action suits systematically.\textsuperscript{329}

\begin{flushright}
325 Id. \\
326 Please note that there is although usually a statutory one-way exception in public interest litigation. \\
328 See Antonio Gidi, \textit{Class Actions in Brazil: A Model for Civil Law Countries}, 51 AM. J. COMP. L. 311 (Spring 2003). \\
\end{flushright}
To some extent, class action proceedings can be successful even in the absence of discovery, contingent fees, the American cost rule, an entrepreneurial bar, and powerful and active judges, at least as effectively as can traditional individual litigation. One literature review’s evidence reveals that the American Rule 23 does not even refer to discovery, attorney’s fees, the right to jury trial, an entrepreneurial bar, or treble or punitive damages. For example, if there is no discovery and attorneys’ fees are limited, the costs of proceedings are generally lower, and the need and incentives for an entrepreneurial bar is considerably reduced. Moreover, the unavailability of contingent fees and the existence of the shifting-fee rules may be beneficial in that they dissuade the problematic concern of over-deterrence or other problems such as having meritless cases on file driven by the exercises of the entrepreneurial lawyers who seek the opportunity for profit themselves. Nevertheless, in order to give more incentive to balance the unavailability of the contingent fee and the American cost rules, the legislators should give standing to associations or governmental agencies, instead of class members. Then there is no compelling need for contingent fees because in a system with low attorney’s fees and low costs, the American cost rule loses its importance as a tool for access to justice. In addition, in a system of detailed and compulsory procedural rules, with little room for discretion, there is no need for a powerful and active judge. If there is discovery or the proceeding is otherwise expensive, the legislature may create a special fund to


331 See Gidi, supra note 328.
finance meritorious class litigation.\footnote{See, e.g., Quebec’s Fonds d’aide au recours collectif (CODE OF CIVIL PROCEDURE, art. 1050.1); Ontario’s “Class proceedings fund” (S.O. 1992, c. 7); South Africa’s proposed “Public Interest Action and Class Action Fund,” arts. 8, 9, and 10. See SOUTH AFRICAN LAW COMMISSION, THE RECOGNITION OF A CLASS ACTION IN SOUTH AFRICAN LAW 45-52 (1995); WOUTER DE VOS, REFLECTIONS ON THE INTRODUCTION OF A CLASS ACTION IN SOUTH AFRICA, Tydskrif Vir Die Suid-Afrikaanse Reg 639, 650-52 (1996). See also LORD WOOLF, ACCESS TO JUSTICE. Final Report 239-42 (1996) (noting that “[other common law jurisdictions with a cost-shifting rule have not changed it when introducing special rules for [class action,]” and approving the creation in England of a “Contingency legal aid fund.”) The British Columbia Class Proceedings Act, however, followed a recommendation from the Ontario Law Reform Commission and adopted the “American rule” on attorney fees; neither party is liable for costs in the event of loss, with some exceptions (R.S.B.C. 1996 C.50, S.37). See III Report on Class Action 704-09 (1982). See Watson, Class Actions: The Canadian Experience, 11 DUKE J. COMP. & INT’L L. 269 (2001) (discussing the perplexities of a class action in a fee-shifting system). But see Goldstein, The Utility of the Comparative Perspective in Understanding, Analyzing and Reforming Procedural Law, 33 COMP. L. REV. 87, 142-46 (1999) (noting that in Israel, against the expectation of all, an entrepreneurial legal profession is using class actions at an increasing pace.) This does not minimize the importance of money in litigation. Funding and adequate economic incentives, however, are essential for the success of any legal claim in any legal system; class and public interest litigation are specially sensitive to these factors. See generally Rowe, supra note 327; CHARLES SILVER, CLASS ACTIONS: REPRESENTATIVE PROCEEDINGS, in V Encyclopedia of Law and Economics 194 (Bouckaert and Geest eds., 2000); Schaefer, The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions Taken by Associations, 9 EUR. J. LAW & ECON. 183 (2000) (presenting and economic analysis of class actions); ONTARIO LAW REFORM COMMISSION, III REPORT ON CLASS ACTIONS 647-752 (1982).}

Due to such limitations, there is an expectation that the effectiveness of class action litigation in Thailand is limited with potentially small number of cases filed and most class action suits are to be formed by basically public bodies or NGOs like in Brazil, and not the private parties as occurred in the United States. However, this may be argued to the contrary as there is now punitive damages award available in Thailand and this may create balance in the system as well as an adequate incentive for private parties to initiate a class action suit.

All in all, one shall keep in mind that the adoption of class action proceedings in Thailand and in many civil law countries shall not be necessarily viewed as an Americanization of civil law jurisdictions. Rather, it should be viewed as a legal transplant that encourages one step ahead towards more judicial protection for group rights in the civil law countries, which in return benefits society. The legislators must consider an appropriate adaption of the law and make it become compatible with the new legal and social context of their country so that the law will be responsibly transplanted.
5.3 ANTI-INSURANCE: THE IDEA OF PAYING PUNITIVE DAMAGES TO A third-party

Paying the punitive damage awards to a third-party instead of the plaintiff can be viewed as a form of anti-insurance. It is a contractual device aimed to indirectly fix the incentive problem\textsuperscript{333} between the parties, mostly, the promisor and the promisee in contracts, by creating a surplus by facilitating cooperation, making several actors internalize the social cost of a risk affected by each of them.

Since in standard models of contracts, efficient incentives require the promisor to pay damages for nonperformance and the promisee to receive no damages. Anti-insurance makes the promisor pay the damages to a third-party, not to the promisee. This allows efficient incentives to both parties by magnifying risk based on the general principle that when several parties jointly create or affect a risk, efficient incentives typically require each party to bear the full risk. Specifically, when the promisor and promisee affect the probability of nonperformance or the magnitude of the resulting loss, efficient incentives require each party to bear 100 percent of the resulting harm. The standard devices of contract law do not produce this result and cannot provide efficient incentives to both parties. To solve this problem, Cooter and Porat propose a novel contract requiring the promisor to pay damages to a third-party, instead of the promisee, in the event of nonperformance.\textsuperscript{334} Liability to the third-party gives the promisor efficient incentives to perform. Receiving no damages gives the promisee efficient incentives to restrain reliance and assist performance.\textsuperscript{335} In exchange for the right to damages, the third-party pays the others in advance before performance or nonperformance occurs. By improving incentives, anti-insurance increases the value of the underlying transaction. By imposing the full cost of risk on all party who affect it, anti-insurance causes all party to

\textsuperscript{333} In the anti-insurance contract, the promisee assigns her right to receive damages in the case of nonperformance to an anti-insurer (worth 10). In order to induce the promisee to assign her valuable liability right, the anti-insurer pays the promisee (5), and the promisor, who stands to gain (20) from the promisee’s assistance, also pays the promisee (15).

\textsuperscript{334} For a suggestion that under certain circumstances large liquidated damages would be paid to a third party instead of the aggrieved party, see Charles R. Knoeber, \textit{An Alternative Mechanism to Assure Contractual Reliability}, 12 J. LEGAL STUD. 333 (1983).

internalize the risk, and this generates efficient incentives.\textsuperscript{336} Anti-insurance indirectly controls the acts that affect a risk by internalizing its cost. In general, internalizing a joint risk often has lower transaction costs than contracting to control all the acts that significantly affect it.\textsuperscript{337}

After all, paying-punitive damage-awards-to-third party mechanism causes the potential plaintiff to restrain reliance and assist performance without having an incentive to accrue the default to get the punitive damage awards. At the same time, the potential defendant’s duty to pay punitive damage to the third-party assures that the potential defendant’s incentive in nonperformance would less likely occur.

In addition, anti-insurance theory would solve an insurance problem found in many consumer product injuries. People need insurance against medical costs and lost wages resulting from bodily injuries but not against pain and suffering. By awarding damages for pain and suffering, the tort system over-insures potential victims.\textsuperscript{338} Anti-insurance would therefore eliminate overinsurance in such cases. This could be applied to punitive damage awards cases too.

Also adding the third-party into the picture assures reliability. As to the extent the injured party is fully compensated, the implicit contract obligation will make parties reliable. However damage awards for breach of contract actually available through the legal system will not always be fully compensatory.\textsuperscript{339} Such incomplete compensation may occur where damages are difficult for courts to estimate (uncertainty) such as in cases of punitive damages, excuses are available to defaulting parties (impossibility or mistake), or default is difficult to show. As a result, the legal remedy of compensatory damages will not, in many instances, assure reliability. A third-party default bond can assure reliability. The third-party bond provides incentive to each contracting party to be reliable without simultaneously providing incentive for the other party to induce breach. In some circumstances, particularly where efficient breach or renegotiation is unlikely,

\textsuperscript{336} See, Robert Cooter & Ariel Porat, Anti-Insurance, 31 J. LEGAL STUD. 203, 205 (2002).
\textsuperscript{338} See compare Samuel A. Rea, Jr., Nonpecuniary Loss and Breach of Contract, 11 J. LEGAL STUD. 35 (1982), an exception, which can be explained, is uninsured-motorist insurance, which typically gives the insured the right to recover damages, including pain and suffering, caused by an uninsured motorist.
\textsuperscript{339} See Knoeber, supra note 334.
this mechanism may be the least costly way to assure reliability.

There are two possible legal obstacles for anti-insurance markets. First, anti-insurance might be regarded as a penalty clause in a contract, which is a misconception since the nature of anti-insurance is not a penalty. The promisor pays exactly for the harm caused by nonperformance, no more and no less, whereas the aggrieved party is not compensated because he assigned his compensation rights to a third-party, which contract law allows. Second, anti-insurance might be regarded as a gambling contract that is unenforceable on the grounds of public policy. In fact, the anti-insurer is not a gambler but rather someone who increases the value of contracts by improving incentives.

Three general nonlegal barriers also reduce the scope for anti-insurance. First, when several actors affect a risk, but one actor affects it far more than others, making one actor bear all of the risk approximates efficient incentives. Second, some nonmarket mechanisms reduce the need for anti-insurance by magnifying risk in business and law. Business examples include such simple devices as company prizes for employees and the replacement of equity financing with debt financing. Legal examples of risk magnification include processes where a losing defendant pays damages to a third-party instead of paying the plaintiff. Some organizations assess fines that must be paid to a charity. Article VI of the National Basketball Association’s Collective Bargaining Agreement contains such provisions. Roger Noll, who provided Cooter and Porat the relevant text of the agreement, says that such arrangements are common with professional sports teams in America. Class action settlements also sometimes involve payments to charities. Third, as with insurance markets, various forms of adverse selection and moral hazard impede anti-insurance markets. While these three factors reduce the scope for anti-insurance, they do not explain its total absence. Like insurance, anti-insurance is fragile and susceptible to abuse.

Therefore, the payment of punitive damages to the third-party assures that the injured party will not receive a windfall or attempt to make a false case to receive punitive damages awards. In addition, it ensures that the defendant will still have to pay for what he or she had done wrong. By magnifying risk by imposing the full cost of risk

on all party who affect it, anti-insurance causes all parties to internalize the risk, and this generates efficient incentives.  

The success in applying this pay-punitive damage awards-to-third-party concept depends on various factors in a different societies, different norms, and different cultures. As in Thailand, this concept could be difficult to apply and unlikely to be successful since the problems of high levels of corruption and the inefficiency of law enforcement. These problems will affect the trust and reliability among the parties and the third-party and this eventually could result in the failure of the entire mechanism of the anti-insurance concept. There are also many questions left to answer. For example, the question of who the suitable third-party to receive the punitive damage awards instead of the plaintiff should be; the question whether the third-party should be a non-profit organization or a religious or educational or societal organization or a non-governmental organization, or the governmental organization or other one else; or the question regarding the proper percentage of the punitive damage awards to be paid to the third-party, and so on. However, an important point is that we might need less anti-insurance in civil law jurisdictions because we have punitive clauses in contract law and public prosecution of certain torts, both absent in common law jurisdictions. Therefore, to some extent, our anti-insurer should be the state since it is very common in our jurisdiction to aggregate a civil claim to a criminal claim tried at the same time whereas the percentage of the punitive damage awards given to the state should be limited in order to eliminate the incentives of having redundant and too much punitive damages.

Some empirical examples have illustrated the actual use of the anti-insurance concept in some jurisdictions. For example, in the United States, some states including, Alaska, California, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah currently have some forms of a split-recovery statute, which provides some percentage of every

---

342 Anti-insurance usually asks for an impartial and honest third-party or governmental agency. However, as Thailand has faced with a high rate of corruption problem, it is therefore very hard to apply anti-insurance in Thai jurisdiction. In order to eliminate this limitation, one suggestion maybe that we do not need any particular third-party or agency but just applying the idea of anti-insurance in a form of private contracts. However, such suggested alternative has the flaw on that it is less realistic in the current Thai jurisdiction since it could lead to an increase of unnecessary litigations.
punitive damage awards to be paid to the states rather than the plaintiff.\textsuperscript{343} Further empirical study also showed that the seemingly innocuous idea of diverting some or all of punitive damage awards to the state not only fails to prevent a windfall to the plaintiff, but also fails to reduce the size and frequency of punitive damage awards.\textsuperscript{344} Although punitive damages are not intended to be compensatory in theory, as a practical matter, an award of punitive damages sometimes may be the only way for plaintiffs to actually recover the full cost of their injuries. Therefore, split-recovery statutes with the anti-insurance concept provide another means to deprive plaintiffs’ recovery of all of their damages and to balance the hardships plaintiffs endure in the litigation process.\textsuperscript{345} Moreover, allowing punitive damages awards to become additional revenue to the state may push lawmakers and judges toward loosening laws on recovery of punitive damages.\textsuperscript{346} Commentators also assert that split-recovery statutes present a whole host of additional problems. For example, they have the potential to create a conflict of interest between lawyer and client\textsuperscript{347} and may present additional constitutional challenges to punitive damages awards by both plaintiffs and defendants.\textsuperscript{348}

Moreover, one of the main objections to the idea of paying punitive damages to a third-party is the incentive for the third-party itself. Cooter and Porat assumed the third-party is sweet and nice. But they also recognized that if the third-party is strategic, the whole thing is quite unclear. Take the example of split-recovery statutes mentioned above. One criticism made is that states have passed laws to facilitate or induce punitive


\textsuperscript{344}See Goldstein, supra note 343, at 106.

\textsuperscript{345}See White, The Practical Effects of Split Recovery Statutes and Their Validity as a Tool of Modern Day ‘Tort Reform,’ 50 DRAKE L. REV. 593, 603-04 (2002) (arguing that compensatory damages do not, and are not designed to, compensate the plaintiff for the pain and suffering of the long, arduous trial process; and that the plaintiff who endures the hardship of litigation is more deserving of punitive damages than the government that does nothing).

\textsuperscript{346}Schwartz et al., I’ll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to be Shared With the State, 68 Mo. L. REV. 525, 540 (Summer 2003).

\textsuperscript{347}Id. at 544-45 and see Garrity, Whose Award is it Anyway? Implications of Awarding the Entire Sum of Punitive Damages to the State, 45 WASHBURN L.J. 395, 412-13 (Winter 2006).

\textsuperscript{348}See, Bethany Rabe, The constitutionality of split-recovery punitive damages statutes: Good Policy but Bad Law, 2008 UTAH L. REV. 333 (2008) (detailing the various constitutional challenges to split-recovery laws); Schwartz, supra note 346, at 548-57.
damages as a mechanism to finance their needs. So if the third-party can strategically condition punitive damages, the case might end with too much of punitive damages. It is like a tax. In other words, what has not been emphasized is that when the state institutes a policy of taking from liable defendants more than it gives to victorious plaintiffs, it effectively taxes parties (probabilistically and jointly) for participating in transactions that may lead to litigation. This tax drives a wedge between the expected social and private benefits of entering such transactions. The result is that socially beneficial transactions may fail to take place.349

Thus, one must balance the efficient-incentive-providing advantages and the potential practical shortcomings and decide whether one far more outweighs another in deciding to use the anti-insurance concept by paying punitive damages to the third-party rather than the plaintiff.

5.4 INSURANCE PREMIUM: THE EFFECT OF THE IMPLICATION OF PUNITIVE DAMAGES TO INSURANCE PREMIUM

Product liability insurance is the insurance that pays for any bodily injury or property damages within the limits of the cover provided, resulting from the use of the insured’s goods or services. Generally, there are two kinds of product liability. One is the Insurance Service Office, Inc. (ISO), which has the standardized language and form. Another is the Broad form, which does not have the standardized language and form. There are generally two kinds of protection for product liability insurance. The first type is the “Occurrence Coverage Trigger.” This kind of product liability insurance protects any bodily injury or property damages that occurred within the period of insurance coverage even though the claim was made after the insurance has expired. The second kind of product liability insurance is “Claim-made Trigger.” This will protect any bodily injury or property damages that the first claim was made within the period of insurance coverage.

349 See, Nuno Garoupa & Chris William Sanchirico, Decoupling as Transactions Tax, 39 J. Legal Stud. 469, 470 (June 2010). (The article analyzed that in Cooter & Porat (2002) the up-front payment by the third-party to the promisee insures that the effective decoupling that occurs in litigation does not affect the parties’ joint incentive to enter into the contract in the first place: the decoupling tax is offset with an up-front payment (Cooter & Porat [2002] do not present this ex ante payment as a way to maintain the parties’ incentive to enter into the contract. Rather, they take the existence of the contract as given and present the ex ante payment as a way to induce the promisee to sell her right to damages.) However, in Garoupa & Sanchirico’ model, up-front payments cannot be made. They think that up-front payments are an unlikely palliative for the transaction-discouraging effect of the decoupling tax.)
coverage even though the bodily injury or property damages that cause the claim occurred before the insurance coverage period. Generally, the burden of proof falls on the injured party to prove that the injury has resulted from the defective of the product of the insured party.\textsuperscript{350}

There are, however, some exclusions of the product liability insurance. For example, the insurance company (or the insurer) is not responsible for the physical damage to the product, which includes the defect that derives from the manufacturing or designing process (which is the fault of the insured.) So the insurer is not liable to pay for the repairing or replacing of the products in such condition. Also, the insurer has no responsibility for the recall expenses, which usually occurs by the government officer’s order or by the manufacturer (insured) itself to repair the defective products in case that the products already launched have some defects that could cause danger to the users/consumers. Another general exception is the insurance for the defects that the insured already knew about before entering into the insurance contract with the insurer.

The product liability insurance also has the limit of insurance. Generally, there are two methods of the limit of insurance. The first one is the limitation in “Per Occurrence Limit” and the second one is the limitation in “Aggregate Limit,” which cumulates the occurrences in one period of coverage time. The second method is usually for the product type that could have many claims for the same defect of the product. Therefore, the insurer has to limit the liability on insurance for one period of time of the total coverage insurance period.

That was the general guide of the product liability insurance. Now, I will look through other countries, in particular the United States’ experiences of the product liability insurance as it is usually a great way to make ones understand the costs and benefits as well as the effects of applying product liability rules as to the insurance terms and most of all, help us predict the potential trends of the product liability insurance premium in Thailand.

In 1977, there was a recent sharp rise in product liability insurance rates in the United States and was explained by three main causes: insurer rate-making procedures, 

unsafe products, and uncertainties about the conduct of personal injury litigation.\textsuperscript{351} The report also suggested some recommendations:

First, it suggested that data should be collected more systematically, so that insurance rates can be better related to statistical assessment of risk and insurer profit and loss can be defined more clearly. Second, the federal government should work with business to coordinate product risk information. Third, insured firms, which use effective product liability loss prevention techniques, should enjoy premium discounts. Also according to the report, some manufacturers don’t use available technology to make products as safe as possible. About 60,000 to 70,000 product liability claims were filed in 1976, as the report estimated, but almost no earlier data exist to indicate a trend. Another major finding of the task force was that the cost of product liability insurance might reinforce trends against new product development so that some socially beneficial products may never be developed or may be discontinued.

Insurance acts as a signal when consumer expectations are biased. The correct information about product safety held by the producer-insurer is conveyed by the insurance premium. The greater the degree of insurance coverage, the closer the consumer’s objective function is to the true one. The presence of biased expectations apparently provides a justification for mandatory insurance coverage. It is admitted to proponents of government intervention, albeit reluctantly, that there may be market responses to the presence of asymmetric biased information such as voluntary certification and standardization and guarantees, but these are usually dismissed as inadequate.\textsuperscript{352} When biased expectations and moral hazard are combined, there is a trade-off occasioned by increased insurance coverage. Increased coverage signals the correct accident parameter, but it encourages shrinking. However, the optimal degree of coverage is not generally full coverage under the analysis of risk aversion.\textsuperscript{353}

In terms of American literature reviews, W. Kip Viscusi’s article is a valuable step


\textsuperscript{353}\footnote{See, Richard S. Higgins, \textit{Products Liability Insurance, Moral Hazard, and Contributory Negligence}, 10 J. \textbf{LEGAL STUD.} 111, 125 (1981).}
in the effort to understand how differences in product liability law influence the performance of products liability insurance and here we will mainly follow his article. He found that differences in products liability laws across states influence the loss ratios of products liability insurance and that these statutes have a negative effect on premium levels as well. States that have enacted product liability statutes of various sorts-defining key concepts in products liability, articulating a state-of-the-art defense, imposing a specific product liability statute of limitations, or modifying the collateral source rule, have lower product liability insurance loss ratios and (other things being equal) lower premiums than states that have not enacted these statutes. However, Viscusi found that loss ratios are not lower in states that have enacted a statute that imposes a ceiling on the damages recoverable in product liability actions. Kenneth S. Abraham followed Viscusi’s article, explaining that the findings regarding the effect of the statutes on premiums is more difficult, and that the data do not tell us directly the magnitude of the contribution of the investment effect, the effect of the statutes on loss rates, or the amount of insurer miscalculation or overcharging during the period studied. Abraham underscored the finding from Viscusi’s study that loss ratios in states with statutes are lower than those without them, but the loss ratios of the two sets of states tended to converge during the period Viscusi studied (1980-84), when interest rates were declining. Viscusi, however, reasons that, over time, premiums should adjust upward or downward where there are higher or lower losses, thus yielding fairly constant loss ratios. Viscusi therefore concludes that, where markets are competitive, loss ratios should not vary between states and that the progressive convergence of loss ratios in states with and without statutes between 1980 and 1984 as evidence of the effect of competition.

Abraham also argued that loss ratios in states with the statutes are generally lower despite the negative effect of the statutes on premiums because the statutes reduce losses as well. If this is true then one answer may be found in the investment effect. The product liability statutes may reduce product liability insurance payouts, and the market may react accordingly by charging lower premiums for the same amount of coverage. However, if

---

356 Id. at 841.
these statutes also truncate the average length of the tail on claims, their negative effect on premiums is not as strong as it otherwise would be. The result is then a higher loss ratio. On the other hand, it could be that although the statutes have a negative effect on both losses and premiums, their influence on losses is greater than their influence on premiums. Therefore, losses in relation to premiums (loss ratios) are lower in states with statutes than in states without them because insurers in states with statutes are overcharging for product liability insurance. Abraham then pointed out that the statutes alone are likely to influence insurer attitudes and behavior in ways not yet noted. For example, the enactment of one or more product liability statutes may decrease the degree of uncertainty associated with marketing product liability insurance. The greater the uncertainty insurers face in a given jurisdiction, the higher the premiums they will demand as payment for bearing the risk of liability transferred to them by product liability insurance contracts. As a consequence, other things being equal, premiums in states without statutes should be higher in order to compensate insurers for bearing this additional risk. This assumption is consistent with Viscusi’s finding that product liability statutes have a negative effect on premiums. Unfortunately, it is not consistent with his finding that loss ratios are lower in states with statutes. Abraham reasoned that lower premiums charged in states with statutes should translate into higher loss ratios, not the lower loss ratios that Viscusi observed and the most obvious explanation is that the statutes reduce loss rates and despite the reduction in premiums that results from the decreased uncertainty insurers face in states with statutes, their loss ratios are lower still because of the statutes’ greater effect on losses than on premiums. In a competitive setting, insurers should be unable to maintain premiums at this excessive level. Alternatively, in the aggregate, product liability insurers underestimated the influence the statutes would have on their loss rates and then charged premiums for coverage that have turned out to be excessive. For instance, insurers may only calculate the direct effect the statutes would have on loss payouts but failed to predict the indirect effect of the statutes. The actual effect of the enactment of a product liability statute on claim frequency and severity may be the direct result of the statute’s provisions or a more indirect product of generally increased judicial and public restraint in product liability cases as a result of the

357 Id. at 842.
legislation message the enactment sent. This phenomenon may also help to account for the convergence of loss ratios in states with and without statutes toward the close of the period Viscusi studied. As insurers began to recognize the effect that the statutes had on loss rates, they would have adjusted their premiums accordingly, and the loss ratios that resulted would have more closely resembled those in states without statutes.358

However, in a big picture, only the United States has witnessed the judicial creation of a regime of strict product liability. Unlike so many American ideas, this one has not inspired imitation. In Canada, for instance, the courts’ tailoring of liability rules to the operation of insurance would be regarded as bizarre, and there is no judicial pronouncement similar in impact to Justice Traynor’s statement in *Escola v. Coca-Cola Bottling Co.*359


Over the last few decades, the dominant feature of the insurance market in the United States has been the intermittent periods of rapidly rising premiums and cutbacks on the availability of coverage. The “insurance cycle” appears to be increasing in amplitude and, since the 1960s, has been concentrated increasingly in liability lines. An episode of rising premiums in the late 1960s was followed by a six-year period of declining and eventually negative growth rates in total liability insurance premiums. Over the 1975-1977 period, the annual growth rate jumped to 30 percent. Then followed another period of declining real premiums, until premiums nearly tripled in 1984-1986, accompanied by cancellations of policies and massive withdrawal of insurers from some lines. This crisis had an economic impact beyond the insurance market, leading to the withdrawal of many goods and services from U.S. market. In mid-1987 the market began to turn again, with premiums falling by as much as 40 percent for some commercial policies. Since then, aggregate revenue from premiums has been relatively stable.

The dynamic behavior of the insurance market can be fully explained in a model that emphasizes uncertainty and informational asymmetries. There will be a cost advantage to internal capital or retained earnings over external equity, attributable to informational asymmetries between insurers and the capital market. This cost advantage means that when equity is drawn down by a series of negative shocks such as bad

358 Id. at 842-843.
realizations of aggregate uncertainty, it will not be replaced immediately by outside equity. Episodes of limited supply will persist until equity is built up through retained earnings. Periods of excess supply of insurance will persist because of the reluctance of insurance firms to distribute internal funds that might become valuable in near future. Other information-driven effects, such as adverse selection in the market, will magnify the amplitude of fluctuations in premiums and availability. …Insurance is usually thought of as a way of reducing exposure to liability, but where the liability of individuals or corporations is limited by finite wealth, the causation is reversed. Prior purchase of insurance may attract liability—both through jury decisions and through the decision by accident victims to sue—because the insurance guarantees the ability to pay damages. The dependence of liability on insurance is particularly strong when the doctrine of joint and several liability applies, the doctrine that any party who is partially responsible has to pay up to 100 percent of the damages if other parties are financially unable to pay their share. In many cases, the doctrine has been used to single out deep-pocket or well-insured defendants who have only a small role in a tort. This suggests a version of the paradox first described by Priest (1987): the expansion of tort awards can reduce the total insurance provided to potential accident victims, in this case because larger awards may actually reduce demand for insurance. To be sure, higher awards may make insurance more attractive, but there is a countervailing effect of becoming a magnet for liability claims, raising the risk of having to pay such claims. The optimal liability insurance purchase may fall in response to expanded liability, to the detriment of potential victims.

That is quite a proof of the American experience on the insurance premium effect of the product liability law. Now we are going to discuss more the consequences in Thailand on the same issue.

As seen in many recent news reports, many insurance companies have increased their interest in including the product liability insurance as one of their products once the enactment of the product liability law became official in 2008 as a response to the increasing interest of the insured customers.\(^\text{361}\) The insurance premium for product liability is different from one company to another, usually depends on the type of the products, the market share of the product, the credibility of the insured company, the jurisdictions, etc. The total product liability insurance market has the insurance premium around 50 million Baht. For example, one insurance company has gained 10 million Baht (approximately US$ 333,333.33) annually for the product liability insurance premium in

last two years (2009 and 2010) and planned to expand the market to 15 million Baht in this year (2011). Most insured companies are the large local and exported industrial manufacturers of foods or equipments. However, the limit of liability depends upon the risk of the products as well as the amount of insurance coverage. Now, the loss ratio in Thailand is still low compared to other countries, for example the United States has a high loss ratio. However, from the experience of the United States, one expectation may likely be that the insurance premium for the product liability insurance in Thailand will be higher in next couple of years then become lower and stable later when the insurer, the insured and the market more efficiently adapts to the product liability law.
CHAPTER 6: IS A JURY SYSTEM NECESSARY IN ORDER TO ADOPT PUNITIVE DAMAGES?^{362}

Thailand does not have a jury system but now permits punitive damages. This is different from many common law jurisdictions, which apply the punitive damages in their jurisdictions with a jury responsible for determining the amount of punitive damages and not the judge. Thus, this part of the dissertation will consider whether there should be concerns for the effectiveness of punitive damages theory in the jurisdictions without a jury and where only judges will be responsible for determining the amount of punitive damages according to the code law. In order to do that, I will use the case of Quebec, which is a civil law jurisdiction but also has a jury trial system to compare with Thailand, a civil law jurisdiction without a jury system. This is to see if the jury system is required or significantly affects the effectiveness of punitive damages.

Quebec is the only jurisdiction in Canada with civil law and civil code (adopted from France) in force and also has adopted punitive damages so extensively in such areas as fundamental rights, consumer protection rights, and environmental protection rights.

In general in consumer protection cases, the consumer may claim punitive damages if the merchant or the manufacturer fails to perform the obligations that the Act imposes^{363} or fails to comply with a voluntary undertaking made under section 314 or made applicable by the Act under section 315.1.^{364}

The remedy of punitive damages is recognized by Article 1621 of the Civil Code. Article 1621 of the Civil Code of Quebec provides the assessment parameters to

---

^{362}I thank to Professor Daniel Gardner from Laval University in Quebec, Canada for help with information and bibliography regarding the Canadian laws and other related legal resources.


^{364}See, Lacoursière Droit de la consommation.
guide the judges. The English version of Article 1621, is as followed;

Where the awarding of punitive damages is provided for, by law, the amount of such damages may not exceed what is sufficient to fulfill their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his/her patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

The introduction of this sanction in consumer law, as a measure of protection of consumer interest, is inspired by the common law system, and is designed to restore justice between the parties. Punitive damages may be construed as a sum of money, granted separately from compensatory damages, when the conduct of the offender manifests an antisocial attitude or is particularly reprehensible. The consumer law introduced this remedy in civil matters only in the event of a breach of statutory duty, to express the disapproval of society of the conduct as unacceptable and to prevent a similar conduct in the future by the offender and those who might be tempted to imitate him, as well as acts that compensatory damages cannot impose effective penalties.

Many criticisms had been made, including but not limited to the view that punitive damage is a form of penalty which has no place in civil law. The civil law should only compensate plaintiffs for actual damages; punitive damages provide consumers a way to recover more than the amount of actual damages, thus unfairly making a profit at the expense of the defendant; or the merchant may be punished more than once for the same offense, the offense making him/her liable to criminal sanctions.

These objections reflect a narrow conception in views of those who support punitive damages. While it is the role of the criminal law to punish, it is by no means a monopoly. Even in compensatory damages, there is a punitive aspect. Civil law serves to enforce certain standards of conduct and, in particular cases, punitive damages are the

only way to get there. Note the example of defamation\textsuperscript{366} or a copy of a trademark.\textsuperscript{367} As to the possibility of multiple punishments for the same offense, the proponents argue that it is however not a compelling argument. The civil and criminal penalties have different objectives. The civil penalty is designed to ensure the execution of a legal duty, while the criminal sanction is interested in unlawful conduct.

In terms of the objectives, in consumer law, three goals motivate the introduction of an action for punitive damages. First, the action seeks to restore the balance of forces and increase the appeal of negotiating the weaker party. The consumer who suffers damage and inconvenience following the delay or denial of the merchant or the manufacturer to perform a duty imposed by the Act to protect the consumer, such as repairing the vehicle that is the subject of a legal guarantee, has a weak bargaining position and pressure. The merchant or manufacturer, who intentionally or not, extend the limits of consumer complaints is not afraid of lawsuits, especially if the amounts involved are minimal, and thus makes the legal protection measures ineffective. The fear of a conviction for a significant amount in punitive damages could change their behavior and force him/her to comply with the Act. Second, the measure aims to facilitate the process of the consumer court. Since there is much disadvantage in court action: waste of time, stress, legal costs, attorney fees, uncertainty of outcome, time-consuming, inter alia, the consumer is often made to suffer their loss without requiring compliance with rights that the Act grants him/her. If the amounts involved are small, the consumer will not continue, despite the troubles he suffered as a result of the failure of the merchant or manufacturer. The Legislature created an incentive that motivates him/her to demand the enforcement of the Act, giving the assurance that the prosecution does not further impoverish and that the merchant who does not comply with the Act will not continue to defy the law. Based on the idea that injured plaintiffs should be the first


\textsuperscript{367} Punitive damages of $500 were granted in the case of a copy of a brand, \textit{DPM Thibault Inc. v. Products Blanchet Inc.}, CSM, No. 05-006341-73, July 2, 1974; \textit{Association of composers, Authors and Publishers of Canada Ltd. v. Keet Estates Inc.}, [1972] CS 315 (violation of copyright). (Des dommages punitifs de 500$ ont été accordés dans le cas de copie d'une marque de commerce: \textit{D.P.M. Thibault Inc. c. Produits Blanchet Inc.}, C.S.M., n° 05-006341-73, 2 juillet 1974; \textit{Association des compositeurs, auteurs et éditeurs du Canada ltée c. Keet Estates Inc.}, [1972] C.S. 315 (violation du droit d'auteur).)
to contribute to the implementation of the Act, it became clear that punitive damages method was a good way to promote such involvement. Finally, the most important aspect of punitive damages is to prevent similar behaviors. This is not primarily to punish the dealer or manufacturer who violate the Act by refusing or neglecting to perform an obligation that the Act imposes, but rather to dissuade them from continuing to contravene the Act and the Volunteer Strength encourage them to perform their obligations. The merchants or manufacturers who are motivated in their conduct by the profit will be forced to think and consider the consequences of their actions if they cost more than the amount of actual damages suffered by the consumer. The chance to deter them from continuing their misconduct has increased by condemning them to pay punitive damages.

To give rise to punitive damages, the merchants must have failed to fulfill their legal obligations and thus make it ineffective protective measures enacted by the Act. The court must assess the conduct of the merchant to determine whether it shows a disregard of consumer rights in a manner serious enough to warrant an additional sanction and to prevent recurrence. This is the criterion that retains in Article 1621 Civil Code of Quebec. The merchants need not fear the danger posed by the proliferation of these claims since the Act is explicit on the obligations imposed by the manufacturers or the dealers have no excuse not to comply.

It is also likely that the majority of case law has a negative view to the limitations of punitive damages in cases where the business is acting in bad faith\textsuperscript{368} because the aims

pursued by the legislature. The burden that would then support the consumer to prove bad faith would have the effect of making its use virtually unenforceable. It would also add to the Act and the Quebec Civil Code that do not have such limitation.

Considering this aspect all the cases reported where the consumer had requested punitive damages, it must be noted that in cases where the judges retain the requirement of bad faith, they refuse to sanction. To fulfill the purpose of the Act, the court should award punitive damages against a dealer or manufacturer that exceeds the boundaries of normality in his conduct. For example, this would apply to a trader who, after acknowledging that the product is defective and is required to guarantee, would do nothing to remedy the situation because it is cheaper to

---

further exasperate the consumer as to change its practices and perform its obligations voluntarily within a reasonable time. Similarly, this will also deter one who would use its financial strength to delay unfair performance of its obligations in an attempt to get a better settlement with consumers benefiting from the state of necessity.

Regarding the assessment of punitive damage awards, the Act leaves to the discretion of the judge to determine the amount of punitive damages and so it allows great flexibility to the court to assess each case on its merits. The judge may determine the amount likely to be large enough to force the trader to act and prevent its recurrence. Article 1621, para. 2 C.C.Q. provides that the court must consider the severity of the debtor's fault, his/her assets and liabilities or the extent of the compensation to which he/she is already liable to the creditor and, where applicable, the fact that taking payment of the damages is wholly or partly assumed by a third-party. These criteria should facilitate the implementation of the action has so far been made with great timidity. The absence of compensatory damages does not preclude the award of punitive damages. The amount awarded by way of punitive damages should not be excessive and constitute an unjust enrichment to the consumer.

Thus, the judges are authorized to award punitive damages and they do really impose punitive damages awards practically. Nevertheless, such practice is not so frequent in the area of product liability even though Quebec Consumer Protection Act does not require the proof of recklessness or bad faith from the manufacturer or the seller.

A recent decision in *Fortin v. Icon* has provided a simple illustration of how

---


judges in Quebec award punitive damages. In this case, David Fortin (“Fortin”) alleged that Icon of Canada Inc. (“Icon”) as a manufacturer was responsible for a defective equipment—weight machine—sold by them. The judge in this case reasoned that it was appropriate to impose punitive damages in addition to compensatory damages because Icon asked a technician to change his report to make it less damaging to Fortin. This last gesture, according to the court decision, demonstrates the obvious bad faith of Icon. This is necessary to signal disapproval of the Court in blatant disregard on the part of Icon warranty rights enjoyed by the purchaser under the Civil Code of Quebec and the Act on Consumer Protection. The Court further stated that the amount of punitive damages claimed, $1,050, is not disproportionate in the light of the contract value and especially the size of Icon, which is a major company that distributes its product across the country. Thus, in terms of punitive damages concern, the Court then ordered Icon, the defendant to pay Fortin, the plaintiff punitive damages in the amount of $1,050 with interest at the legal rate of 5% per annum from the trial. Another decision, which clearly presented the situation in Quebec, is the Genex case in 2009.\(^{374}\) The Court in this case finally awarded $50,000 in punitive damages to the plaintiffs, given the reasons that it is proportionally awarded, and stating that it would be an example for others that they cannot make accusations against anyone without basis and without any justification to do so, as well as, to show disapproval of unacceptable behavior. That is, the Court aimed to reach the objectives of Article 1621 of Civil Code of Quebec in awarding punitive damages to avoid recurrence to reach the preventive purpose of punitive damages.

Concerning the jury and non-jury system comparison, although there are plenty of advantages to a jury system. One of which is that it keeps the law in touch with evolving realities, including financial realities.\(^{375}\) However, the civil jury was abolished from Quebec’s judicial system since 1976, and a jury trial now only exists in criminal matters. The initial availability of punitive damages in certain cases (e.g. intentional interference

\(^{374}\) See, Genex Communications inc. v. Quebec Association of the music industry, entertainment and video, Case Number 500-09-071, 2009 QCCA 2201.

\(^{375}\) See, Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, 2002 SCC 18 at para 136. (The respondent objects that, prior to this judgment, the highest previous award in an insurer bad faith case was $50,000. However, prior to the $800,000 award of punitive damages upheld in Hill, the highest award in punitive damages in a libel case in Canada was $50,000: Westbank Band of Indians v. Tomat, [1989] B.C.J. No. 1638 (QL) (S.C.). One of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities.)
to the human rights and freedom, Revised Statutes of Quebec, chapter C-12) was in force since 1975. Therefore, judges always had the sole power to award them (same thing with the Consumer Protection Act, in force since 1980).

Therefore, in terms of the focus here, Quebec is quite a clear example that punitive damages can function in a civil system without jury as well. It should also be noted that in the rest of Canada (where common law jurisdiction applies), jury trials are less frequent today in civil matters. More than 90% (probably more) of the cases are decided by a judge alone. Those cases have no direct application in Quebec, apart from the fact that the amounts awarded could help Quebec’s judges when they have to make an order. Some examples of well-known cases of other jurisdictions’ court decisions are the Hill case in 1995 and the Whiten case in 2002. In the Hill case, contain the following guidelines that are quite helpful for the jury to consider for awarding the punitive damages:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. They should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence. Unlike compensatory damages, punitive damages are not at large, and consequently courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose, as they did in this case. Further, the circumstances presented in this exceptional case demonstrate that there was such insidious, pernicious and persistent malice that the award for punitive damages cannot be said to be excessive.

Or in the Whiten case, which set a great bright-line rule on assessing punitive damages for the jury in its jurisdiction:

The trial judge’s charge to the jury with respect to punitive damages should include words to convey an understanding of the following points: (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been highhanded, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behavior. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably

---

proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community’s collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) The jury should be told that while normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a “windfall” in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient. While the jury charge in this case was skeletal, it was upheld by the Court of Appeal (unanimous on this point) and, with hesitation, this Court should not allow the appeal on that ground. As to quantum, the award of $1 million in punitive damages was more than this Court would have awarded, but was still within the high end of the range where juries are free to make their assessment.

There are surely some reasons as to why Quebec prefers judges to jury. Yet, my supposition is that it is all back to the same reasons why Quebec chose to adopt civil law rather than common law system. It might as well be that it is more responsive to the sociological and cultural backgrounds that most Canadians in Quebec speak French, all judgments in Quebec are in French and the laws in Quebec are mostly adopted from France, the civil law country. In any case, it should be noted that the awards of punitive damages in Quebec remains quite rare. However, in summary, it should be clear at this point now that the unavailability of a jury will not be a reason to not impose punitive damage awards in a civil law jurisdiction where only judges are existing, such as one in Thailand.
CHAPTER 7: PUNITIVE DAMAGES EXTENSIONS

7.1 MEDICAL MALPRACTICE IN THAILAND

In recent years, a lot of attention has been paid to medical malpractice lawsuits as a response to an effort by Thai politicians to make Thailand a medical tourism destination and to the draft of Medical Malpractice Act. This political influence will likely increase accountability among hospitals, doctors, and other related medical practitioners in Thailand.

Medical malpractice occurs when a medical practitioner fails to meet the accepted medical standards of practice, and this failure results in injury or death of a patient. According to current Thai law, medical malpractice cases are considered, a “wrongful act,” as defined by Civil and Commercial Code, Section 420. To establish a cause of action, the plaintiff must show that the medical practitioner acted negligently or unlawfully. Most importantly, the injured party must show that the medical practitioner failed to meet the accepted medical standards of care for the area in which the injury occurred. The testimony of another doctor is important evidence in medical malpractice cases. The doctor must certify that the defendant acted in a negligent or unlawful fashion. Therefore, the first step in the civil action procedure is to obtain an opinion from a medical expert witness.

Another general concern for medical malpractice lawsuits is the statute of limitation. Typically, civil lawsuits in Thailand must be filed within one year of the injury. However, the statutory period may run longer than one year in criminal cases. If a circumstance has exceeded the civil law’s time limit, the party may try to join their civil action to a criminal case that is still ripe.

In views of many western lawyers, medical malpractice lawsuits in Thailand are often difficult experiences. First, an injured party must consider the process involved in pursuing legal action, which requires that the foreigner remain in Thailand for a duration of the trial. The travel and cost of living expenses may prove an insurmountable hardship.

379 Id.
Moreover, Thai tort liability is different from western tort liability in several ways. Thai courts typically award far lower amount of damages than western courts. Thai courts only award tangible damages. These include medical expenses, past and future missed work, and other determinable losses. Essentially, punitive damages are awarded in limited areas and no damages for disfigurement or damages for pain and suffering are available. Another difference is the trier of fact. Under the Thai legal system, medical malpractice cases are decided by a judge, not a jury, and usually a jury will award larger amount of damages than judges will. Therefore pursuing a medical malpractice lawsuit in Thailand may be financially unwise.380

Notwithstanding the evident difficulties of pursuing a medical malpractice lawsuit in Thailand, it is possible that the trend is going to change as in the case of a recent trial; where doctors were sentenced to three years imprisonment for the death of a patient.381 The well-known case occurred in 2002, the Court of First Instance level, or to be specific, “Toong-Song Court” in Nakornsritammaraj Province. The judge in this court sentenced an anesthetist to three years imprisonment for negligence, in an appendicitis operation, for injecting an overdose of a drug into a patient which caused the patient to go into shock and later die.382 Future criminal trials may bode well for injured patients; however, adding a civil case to a criminal case may mitigate the time and expense associated with trying a civil suit.

The draft of the Medical Malpractice Act, however, has made a big difference to the current framework because it aims to be the sole law that assures the victim of medical malpractices to receive damages. The draft will have a specific committee comprised of qualified individuals to consider whether to award the damages and the amount of the damages. Such damages would be paid from the fund established according to the draft paid by the medical practitioner at the rate and means indicated in

380 Id.
381 Id.
382 See, http://thaidocs scandal.com/2011/04/%E0%B8%84%E0%B8%94%E0%B8%B5%E0%B8%AB%E0%B8%A1%E0%B8%AD%E0%B8%AA%E0%B8%B8%E0%B8%97%E0%B8%98%E0%B8%B4%E0%B8%9E%E0%B8%A3%E0%B8%84%E0%B8%94%E0%B8%B5%E0%B8%9B%E0%B8%A3%E0%B8%B0%E0%B8%A7%E0%B8%B1%E0%B8%95/
There are also many concerns of the new draft. First of all, this draft is claimed to have strict liability rules with some limitations that prevent the victim from claiming their right against the medical practitioner. Such limitations include: if the harm normally occurs even if the standard medical practice has been met, or the harm is inevitable when applying the standard medical practice, or the harm is the kind that has no consequence to the victim’s way of living at the end of the medical practice. Secondly, the draft, nevertheless, specifically states that the statute of limitation runs differently. The victim must file a lawsuit within 3 years from the day that the victim discovers the harm and knows the medical practitioner whom causes such harm. However, the statute of limitation will not run over 10 years from the day that the victim discovers the harm. Moreover, the draft authorizes the specific committee to award the damages to the victim even after the victim has filed the case to the court even if the court has dismissed the case. Besides, the draft has included the criminal penalty in its content, which is imprisonment of no more than 6 months, against the medical practitioner who violates the order of the committees according to the draft.

This all has brought a lot of arguments among the Thai public, followed by many protests. Some people agree with the draft, stating that this kind of law is indeed necessary to guarantee the welfare of the public in terms of health. However, others especially many doctors, hospitals, and medical practitioners are against this law. They argue that this draft is unfair because it violates the constitutional policy using a double standard that only benefits the victim. They also fear the strict liability rule which

---

383 See, Section 20 and 21 of the DRAFT OF MEDICAL MALPRACTICE ACT B.E. …
385 See, Section 6 of the DRAFT OF MEDICAL MALPRACTICE ACT B.E. …
386 See, Section 25 of the DRAFT OF MEDICAL MALPRACTICE ACT B.E. …
387 See, Section 34 of the DRAFT OF MEDICAL MALPRACTICE ACT B.E. … and see Prachatai Online Journal, “The Draft of Medical Malpractice Act B.E. …,” Hurt Doctors or Patients?, supra note 384.
assumes liabilities without fault and they find unfair the requirement that medical practitioners have to pay into a fund in advance of the occurrence of the harm. Moreover, there is a concern about the criminal penalty (imprisonment) that is indicated in the draft.\textsuperscript{389} There is also a fear that the draft will not promote the public welfare but worsen it since the medical practitioners will not perform medical treatments if there is a risk of causing harm to the patient and the cost of the medical care will inevitably be increased as a result.

Amongst all the debates, one important concern is that medical malpractice also involves administrative law when it involves public hospitals. The doctors who work for public hospitals will be controlled under the Tort Liability of the Government Officers Act B.E. 2539 (1996), which is the administrative law. Basically, the public hospital that the liable doctor works for, will be liable for the tort damages in the case under the Tort Liability of the Government Officers Act B.E. 2539 (1996) if the act of the liable doctor worked for the public hospital. However, the public hospital could claim contribution for damages from the liable doctor later if the liable doctor has done so intentionally or with gross negligence.\textsuperscript{390}

Another important concern is that now there are some forms of medical third-party-liability insurance available in Thailand. This could imply that doctors and insurance companies might view the law as potentially effective. Doctors might be afraid of tort lawsuits and would buy insurance. This is because if they are not afraid of lawsuits, they are not going to buy more insurance. Although the possibility of enactment of the new law is low because of a strong opposition against it, the insurance companies presumably view that this law could give them good business or market opportunity due to the increasing amount of medical malpractice cases filed against the doctors and medical practitioners in the recent years as well as the draft of the Medical Malpractice Act.

The price of medical malpractice insurance is quite high\textsuperscript{391} and varies from one


\textsuperscript{390} See, Section 8, TORT LIABILITY OF THE GOVERNMENT OFFICERS ACT B.E. 2539 (1996).

\textsuperscript{391} See, http://w7.thaiwebwizard.com/member/suphaninsure/wizContent.asp?wizConID=6962&txtmMenu_ID=7 (The fee rate for
insurance company to another and depends on whether it is for general medical practitioners or specialists, or high-risk specialists. However, there could be some complications, such as, moral hazard problems that happened after the availability of medical malpractice insurance. To illustrate, the potential liable doctor or medical practitioner could disregard the law as they already have the insurance companies to pay for the damages in the event of liability. The supply of insurance could be weak in this case. Either we should see more doctors or other medical practitioners buying more medical malpractice insurance or the price of medical malpractice insurance will increase, unless it means doctors or other medical practitioners and insurance companies think that the law is ineffective.

However, medical malpractice in Thailand, unlike in the United States, is still quite a new proposal. Thailand is still in the beginning phase for medical malpractice claims so we likely have the same problem as found in the traditional analysis of malpractice liability in the United States. That is, the skeptical thought of its necessity or the need of a limited scope and magnitude-liability designed form with an attempt to curtail the damages or restrict the claims. As is shown in many public articles, many

insurance is varied but all are quite high. For example, from this insurance company (Best Affinity Insurance Brokers), the insurance will cover no more than 1 million Baht per each claim and no more than 2 million Baht for the entire insured period, general medical practitioner will pay 12,891.36 Baht, the Specialist will pay 15,577.06 Baht. Other high-risk specialists will pay higher fee, such as the Obstetrics and Gynecology will pay 19,337.04 Baht, the General Surgery, the Neurosurgery, the Plastic and Reconstructive Surgery will pay 17,188.48 Baht.)

392 More empirical analysis on the empirical studies of U.S. medical malpractice, see Jennifer Arlen, Reality Check: How Malpractice Facts Changed Malpractice Liability Theory, A Prepared Chapter for the Second International Conference on Empirical Studies of Judicial Systems (Yun-Chien Chang, ed., forthcoming 2011), available at www.iias.sinica.edu.tw/upload/conferences/.../p20110624-0c.pdf. (This is the same problem as in the traditional model of malpractice liability in the United States. Although, the later empirically-grounded evidence suggested that this is not a right solution. Many evidences support this modern view, for example, even in well-functioning tort system, most medical errors are caused by both incompetent and competent medical providers who err accidentally when providers cannot eliminate the risk of error by investing optimally in expertise (Arlen & MacLeod, 2003, 2005). Also, to the contrary of the reform proposals that the cost of malpractice liability exceed its benefit because of many settled cases are frivolous with liability falling randomly on negligent and non-negligent providers alike, empirical analysis reveals that patients face a substantial risk of being injured by genuine medical error. Moreover, the vast majority of malpractice settlements involve patients whose injuries were caused by actual, genuine, provider error (Studdert et al., 2006). Moreover, empirically-grounded analysis of malpractice liability reveals that contractual liability between patients and providers should be rejected. This is because even informed patients who value liability would be worse off under contractual liability than under well-designed malpractice liability as to the nature of malpractice liability that it provides a collective good and individual contracting over collective goods is plagued by coordination and free-rider problems and thus generally does not result in the efficient provision of collective goods (Arlen, 2010). (Other arguments are more purely theoretical. E.g., Arlen (2010); Arlen (2006); Arlen & MacLeod

131
scholars have opposed the introduction of medical malpractice in Thailand. Also, another noticeable difference between the two jurisdictions is the availability of a jury trial. Thai judicial system does not offer a jury system but strict adherence to the legislative law as it is a civil law system. This is the same difference as found in environmental liability, product liability, class action proceedings, and many if not most of other areas or procedures of law in Thailand and in the United States which I explored the matter regarding the availability of a jury in the legal system in the earlier part of the dissertation.

As to the future of a medical malpractice in Thailand, many doubts are still left as to whether the drafted Medical Malpractice Act will eventually become a law, and if so, whether it would be practical and suitable with the Thai legal system. Yet, at the moment, during the process of considering and balancing the benefits and limitations of the draft, one clear answer is that such draft is very unlikely to be enacted so soon because of many conflicts and pressures among Thai society and Thai political influences.

Finally, as to the purpose of this dissertation, a medical malpractice in Thailand seems to be quite far from the topic, as there are not any sections in the draft of Medical Malpractice Act which authorize the committee, the court or any other authorities to award “punitive damage” to the victim, which is a different practice from the United States. The victim from a medical malpractice in Thailand then will only receive compensatory damages when the Civil and Commercial Code regarding the “wrongful

(2003). See also Winkelgren (arguing that contractual products liability is inefficient); Geistfeld (same).) So, patients usually gain more benefit from any given liability rule when it is imposed by the state or government by fiat than they do when asked to contract into it individually. Contracting over liability thus encourages each patient to waive liability to reduce his health care expenses because he can do so without substantially reducing expected outcomes. Finally empirical study shows that malpractice liability reforms should be designed to expand liability to ensure that medical institutions and medical providers who provides suboptimal care bear the full cost of their neglects, while insulating high quality providers from the liability costs of their lower quality peers. For empirical analysis has revealed that medical institutions disproportionately affect the probability of medical error through their control over the systems, health care technology, and personnel in place when patients receive care (Abraham & Weiler, 1994), as well as the ability of some institutions, such as Managed Care Organizations (MCOs) to exert direct authority over treatment (Havighurst, 1986; Sage, 1999; Arlen & MacLeod, 2003). It also has revealed that medical institutions face too little incentive to implement optimal systems, technology and other practices (Mello et al., 2007; see Arlen & MacLeod, 2003; Havighurst, 1984; Epstein & Sykes, 2002). Thus, states genuinely interested in patient welfare should focus on how best to use liability to provide optimal incentives to hospitals and MCOs, instead of embracing empirically questionable efforts to reduce malpractice liability. From the combination of empirical evidence and theoretical analysis, the liability of medical institutions that directly influence the quality of care that patients receive should be expanded rather than restricted.)
act” applies. The reason may be because of the fear of too many critics cried for a reform claiming that punitive damage is “the most outrageous punitive damage” awarded to the victim in the United States as well as the concern that it could be difficult to put the new kind of damages into action in a different legal and societal system.

### 7.2 ENVIRONMENTAL LIABILITY IN THAILAND

Environmental liability is a vague term, which generally refers to the clean-up obligation for the polluted areas or to the potential for fines, penalties, and jail terms for violation of environmental laws.

Environmental liability torts are basically different from product liability tort. According to the United States Environmental Protection Agency (EPA), environmental torts are most often associated with emissions from a facility, waste disposal sites, and accidental releases. Despite, “product liability” torts are the danger posed by a “product,” such as pharmaceutical, pesticide, household, chemical, or industrial product (e.g., asbestos insulation), and whether there was adequate warning or disclosure of the risk.

In terms of punitive damages in an environmental liability case, although rarely assessed, punitive damages in environmental litigation usually exceed $1 million in the United States. However, punitive damages tend to be more common in product liability than environmental liability cases. This trend is the same in Thailand where there is no punitive damages for environmental liability. Only compensatory damages and penal fines or criminal penalties are available for environmental liability in Thailand.

The environmental right in Thailand is mainly protected under the Constitution law and the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992). The Act directly regulates and protects the environment and monitors, inspects and controls pollution by imposing promotional measures as well as civil and

---

393 See, Michael Rustad & Thomas Koenig, Reconceptualizing punitive damages in medical malpractice: Targeting amoral corporations, not “moral monsters,” 47 RUTGERS L. REV. 975 (Spring 1995).


395 Most “toxic tort” cases do not relate to environmental liability but fall under product liability. Id. at 11.

396 One of the most notable impositions of punitive damages in the environmental context arose from the Exxon Valdez spill. Id. at 11.
penal liabilities to the polluter. The Act also has a National Environment Board, a Pollution Control Committee and an Environmental Fund, however, all three deal with policy-making concerns. There is also a special Section in the Supreme Court with special trial procedures with the judges who possess more expertise within the environmental field to take care of environmental related cases.

In terms of compensatory damages for the victim before the Act’s enactment, the victim had a right to claim compensatory damages under Section 420 and Section 1337 of Civil and Commercial Code for any act that caused harm or nuisance to others. The victim had to comply with the general civil procedure and had the burden to prove the defendant’s intent and causation between the act of the defendant and the harm that occurred which could be very difficult for the victim.

However, to handle this problem, the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992), specifically Section 96 makes the owner or the possessor of the pollution-caused area strictly liable for compensatory damages to the victim if the victim can prove both ownership of the pollution-caused area and injury from the pollution. That is, the Act presumes that the owner or possessor of the pollution-caused area is the polluter and has responsibility to pay according to the “Polluter Pays Principle (PPP).” However, some exceptions apply to this strict liability if, the owner or the possessor of the area can prove that such pollution comes from; (1) a “force majeure” or war, or (2) the act in the order of the government or its agent, or (3) the act or omission of an act of those who are harmed or injured or others who have direct or indirect responsible for discharging such pollution.

Compensatory damages were not limited to the personal injury, property damage or the economic loss of the victim (such as bodily injury, medical monitoring, diminished

\footnote{The ownership here has a wide definition, and does not limit to the ownership of the private party but also includes the ownership of the government too.}

\footnote{See, Chaiyos Hemarachata, Law and Conservation and Development of Environment (ไชยยศเหมะรัชตะ,กฎหมายกับการอนุรักษ์และพัฒนาสิ่งแวดล้อม), 43 DULLAPAHA J. [พุลพาห] 59, 72 (Jan. – Mar. 1996) (Thai.). The “Polluter Pays Principle” was originally recommended by the Council of the Organization for Economic Cooperation and Development (OECD) in May 1972 by applying the economic rationale of cost allocation and the rule of externalities in environmental cases that those who benefit from investment should pay for its creation. The Polluter Pays Principle requires that the polluter should bear the expenses of carrying out pollution prevention measures or paying for damages caused by pollution. See, Brian J. Preston, The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific, 9 ASIA PAC. J. ENVIRON. L. 109, 194-195 (2005).}
value of real estate, buildings or automobiles, loss of crops, lost profits, or cost of renting substitute premises or equipment) but also included all expenses that the government has actually spent in eliminating the pollution. The law also protects the natural environment that belongs to the government or is public property under Section 97. One who unlawfully does or omits to do anything that harms or makes such natural environment lost or damaged must pay the damages to the government equal to the value of the harmed, lost or damaged natural environment.

Moreover, the claimant does not have to be an immediate victim or particularized injurer or direct plaintiff. Anyone can file a complaint to the government officer if notices any action that violates or contravenes to the law regarding monitoring of pollution or conserving natural environment.

The Act also states the fundamental duty of Thai citizen to be strictly cooperative and assist the government officer at work relevant to enhancement and conservation of national environmental quality, as well as strict compliance with the Act or other related laws.399 However, there is no sanction for violating such duties. Thus, such clauses are more like the general good common rules or norms.

There are also criminal penalties such as fines and jail terms for the violation of the Enhancement and Conservation of National Environmental Quality Act, B.E. 2535 (1992) to make the environmental law enforcement more efficient. For example, Section 99 indicates the particular jail terms or the criminal fines for those who invade or occupy the land unlawfully or do anything to harm or damage or make the national environment or conservable art lost or pollute the environmentally protected areas.400

The civil liability available in the Environmental Act has some limitations in many perspectives.401 The first limitation is the ambiguous definition of many terms in the Enhancement and Conservation of National Environmental Quality Act B.E. 2535

400 See Hemarachata, supra note 398 at 63-64.
401 See, Panya Sudthibodi, A Research on the Claiming for Damages in Environmental Cases focusing on the case that Private Party is the Victim, Judicial Training Institute, Court of Justice Office Thailand (ปัญญา สุทธิบดี, การเรียกร้องค่าเสียหายในคดีอุกฉาดปกป้องสภาพแวดล้อมกรณีเอกชนเป็นผู้เสียหาย, วิทยาลัยการเรียนรู้ทางสิ่งแวดล้อม สำนักงานศาลยุติธรรม, available at http://www.library.coj.go.th/indexarticle2.php?idmain=12&&No=13&&Title=%A1%AE%CB%C1%D2%C2%CA%D4%E8%A7%E1%7B4%C5%E9%CD%C1&page=)
For example, it is not clear how to determine the value of the damages and the scope of the term, “all expenses that the government has actually spent in eliminating pollution.” More specifically, who will determine the value of the natural environment that has been harmed, damaged, or lost and under what standard? Or, whether the “all expenses” term includes the agent’s salary in monitoring the pollution or the expert’s fee. Secondly, in cases where parties are part of the government, the general attorney will represent the case for both parties and this raises questions about fairness. Thirdly, restoring the natural environment requires immediate action. However, the assessment of the value of the damaged natural environment generally takes a long time, and the Act must be in compliance with other related laws, therefore, delaying the necessary action. For example, if there is a procedure or an action under other laws that must be completed before imposing this Act, and such procedure or action is delayed for some reason, the imposition of this Act could be delayed too. This could cause a problem in enforcing the Act practically since the natural environment that has been damaged will be permanently ruined and cannot be restored to the same condition. Moreover, Thailand has no jury system, the court will make a decision about the amount of the compensatory damages and there is not much guidance for the judge regarding that and this could make it difficult in awarding the damages to the plaintiff. To date, most environmental liability damage payments in Thailand have been relatively small both for the claims settled in courts and out of courts. Clearer and more practical rules are indeed needed to assure the more efficient enforcement of the environmental law in Thailand.

Apart from the civil liability and criminal liability, there is also the administrative liability in the environmental cases. These three environmental liabilities are different in its nature. The civil liability is basically the compensatory damage or the court injunction that requires the party to do or to refrain from doing certain acts. The criminal liabilities include the imprisonment, fines, and confiscation of property. The government officers are authorized by many environmental laws to impose the fines if they observe or receive notice of the environmental crime. Thus, the implementation of criminal liabilities does not have to be in court if there is a law allows the government officers to do so. The aim of criminal liability in Thai environmental law is to deter people from committing a crime so the punishment is severe. For example, there are high fines in cases of severe
destruction of the natural environment or many years of imprisonment in cases of severely polluting the natural environment but there is still no capital punishment in environmental law. Therefore, due to the severe punishments, proof of intent is required, unless the law specifically indicates criminal liabilities in case of negligence. The administrative liability authorizes government officers to apply administrative measures or order to control, observe, protect or correct any acts that cause the harm to natural environment or any acts that cause pollution harmful to the public. Also, the government officers are authorized to legislate regulations or other declarations, as well as to make an administrative order in allowing or withdrawing the patent permit or demolishing any constructions that harm the natural environment and other administrative orders to protect or restore the natural environment in a cost of the polluters. For example, the government officers can compel the polluter to pay for the cost of demolition of prohibited constructions or the cost of removing and recovering the leaked crude oil or petroleum from the surface of the sea.402

402 See, Narong Jaiharn, Part 3, Law Enforcement and Claims in Environmental Cases, http://www.thailandforum2010.com/forum/index.php?page=articles&op=readArticle&id=67&title=b%E0%B8%AA%E0%B9%88%E0%B8%A7%E0%B8%99%E0%B8%97%E0%B8%B5%E0%B9%88-3--
%0E%B8%81%E0%B8%B2%E0%B8%A3%E0%B8%9A%E0%B8%B1%E0%B8%87%E0%B8%84%E0%B8%B1%E0%B8%9A%E0%B9%83%E0%B8%8A%E0%B9%89-
%0E%B8%B8%E0%B8%AB%E0%B8%A1%E0%B8%B2%E0%B8%A2%E0%B9%81%E0%B8%A5%E0%B8%80%E0%B8%B1%E0%B8%8D%E0%B8%A3%E0%B8%94%E0%B8%B3%E0%B8%90%E0%B8%89%E0%B8%B4%E0%B8%99%E0%B8%8B%90%E0%B8%84%E0%B8%A4%E0%B9%89%E0%B8%B4%E0%B8%A5%E0%B9%89%E0%B8%B7%E0%B8%83%E0%B8%A7%E0%B8%A4%E0%B8%B4%E0%B8%A2-%E0%B8%A3%E0%B8%88%E0%B8%A3%E0%B8%B1%E0%B8%87%E0%B8%84%E0%B8%B4-%E0%B8%83%E0%B8%8A%E0%B8%8D
Thus, environmental cases can involve civil, criminal, and administrative procedures. The injured party can go to each court to file a lawsuit and each type of cases will be deliberated separately. Therefore, it is possible that there will be many courts involved in the same environmental case and it is possible that the judgment or the trial will be different since each court has different procedures. However, practically among all three liabilities, the criminal liability is the last measure the government officers will apply. The government officers will generally apply the administrative and civil liabilities first so that the injured party can be compensated. If unsuccessful, then they will use the criminal sanctions to punish the offender who intentionally violated the law or any administrative orders. Therefore, environmental liability in Thailand is likely more...
administrative rather than criminal.

In terms of the environmentally friendly Non-Governmental Organizations (NGOs), currently, there are some green NGOs in Thailand taking cases on environmental liability. The roles of these NGOs in Thailand are significant to environmental protection. The government's acceptance thereof is evidenced by the enactment of Section 7 of the Enhancement and Conservation of National Environmental Quality Act, B.E. 2535 (1992) which provides that all NGOs engaging in environmental protection shall be juristic persons under Thai or foreign laws and shall have to be registered as NGOs engaging in the protection and conservation of natural resources and environment with the Ministry of Science, Technology and Environment. Such requirements are measures for the overseeing of the operation of the environmental NGOs. The law also provides incentives and promotion for NGO roles in environmental protection by rendering assistance when they run into problems. Financial support is also given to assist operation from Environmental Fund in accordance with Section 8. Many of the NGOs do not have enough requirement under the law to register as environmental NGOs; therefore, only a few are registered NGOs. Environmental protection activities of the environmental NGOs are carried out directly and indirectly. NGOs play their direct roles in management of the environment, dissemination of information, and exercise of environmental rights. Indirectly, their roles are also played through the National Environment Board in which 4 of their representatives are members among the total number of 23 members. However, NGOs are not entitled to nominate their representatives for submission to the Council of Ministers for approval for their appointment as members of the Board. Some NGOs do not know who their representatives are, and this hinders their indirect activities. In addition, NGOs also play another role in exercising their rights and performing their duty as provided by law. Their rights include the right to obtain information from government agencies, the right to
claim damages or compensation from the State, state enterprise, or any individual whose project causes damage, and the right to lodge complaints against environment violators. As for their duty, they are required by law to protect the environment and to cooperate with officials in carrying out their environmental protection duty.

Some studies suggest an amendment to the law regarding qualifications required for registration as an environmental NGO, and increase the ratio of the expert members from NGOs on the National Environment Board, and that a Ministerial Regulation be issued prescribing details and procedures for the nomination of the NGO representatives on the National Environment Board. It is also recommended that the NGOs improve their pattern of activities and create a network of environmental NGOs, as well as invite specialists from universities to join them more in order to step up their activities thus strengthening the NGOs' academic potential.405

Some examples of the cases in which NGOs handle with the environmental cases are with the “EnLaw” group, or the “Environmental Litigation and Advocacy for the Wants,” which gets involved in many environmental cases. For instance, it helps the injured victims in the Cobolt-60 case in filing a lawsuit to the High Administrative Court406 and to the Civil Court for torts compensation,407 the request to the Central Administrative Court in withdrawal of Kang Koi Two Electric factory permit’s certificate as it is affecting Pa-Sak River,408 or taking the criminal and administrative cases of the protesters against Thai-Malaysia natural gas pipeline project in Songkhla province to the Criminal and Administrative Court in Songkhla province to protect the rights of the environmentally injured party.409


406 See, High Administrative Court Case (Red) No. 415/2550.

407 See, Civil Court Case (Red) No. 1269/2547.

408 See, Central Administrative Court Case (Red) No. 642/2550.

409 See, Songkhla Province Court Cases (Red) No. 2321/2547 and 333/2550, and Songkhla Administrative Court (Red) No. 51/2549.
CHAPTER 8: CONCLUSION

From the salient cases where potential plaintiffs, with defective products, refused to go to the court and preferred to seek justice through the media, we can see that there were problems with Thailand’s product liability and consumer protection laws. The new Product Liability Act and the new Civil Procedure for Consumer Cases Act were enacted to resolve these issues. As the number of consumer cases submitted to the Supreme Court begins to increase, we can somewhat tell that the new laws can address these problems. The imposition of punitive damages in product liability cases in Thailand is an example of the Thai judiciary’s attempt to develop a more advanced system. Although achieving these goals will be challenging, considering what is at stake it is worth the try. The more efficient, effective, and equitable fashion of legal services is surely the key goals of both the Thai government and society. The increasing number of consumer cases submitted to courts and the decline of aggressive salient cases in the media, which creates public disorder, is a successful step of pushing the new laws into force. My suggestion is that in order to continue to reach such goal in solving the problems with product liability and consumer protection issues, the government, in addition to punitive damages, should implement other legal mechanisms, such as the doctrine of strict product liability and class action proceedings. Lastly, from the increase in the number of consumer cases submitted to courts we can see an emerging trend. As to the roles of judges in response to the imposition of the new laws, although judges are wary of the new common law-adopted rules, like punitive damages, I still expect an increasing trend of awarding punitive damages in the next couple of years. The current law contains the caps and limited multipliers of compensatory damages for calculating punitive damages; therefore, most judges, especially younger judges, will be more receptive to applying the new laws. Consequently, plaintiff-attorneys will seek punitive damages more often and this will pressure judges to be more aware of the punitive damages awards. In terms of manufacturers, the introduction of punitive damages may increase the price of products. However, this concern is premature because it depends on how effective the new laws are, and thus far we have not observed an abrupt increase in the price of products. So I think that we need more time to find out on these issues. I believe that there is no reason
to fear the imposition of punitive damages, strict product liability and class action proceedings in any country, including Thailand, if the laws are adopted with care and awareness of Thailand’s legal and cultural history.
BIBLIOGRAPHY

STATUTES AND OTHER LEGISLATIVE MATERIALS

- CIVIL AND COMMERCIAL CODE (Thai.)
- CIVIL PROCEDURE FOR CONSUMER CASES ACT, B.E. 2551 (2008) (Thai.)
- CONSUMER PROTECTION ACT, B.E. 2522 (1979) (Thai.)
- DRAFT OF MEDICAL MALPRACTICE ACT, B.E. … (Thai.)
- ENHANCEMENT AND CONSERVATION OF NATIONAL ENVIRONMENTAL QUALITY ACT, B.E. 2535 (1992) (Thai.)
- LIABILITY TO DAMAGES CAUSED BY UNSAFE PRODUCTS ACT (“THE PRODUCT LIABILITY ACT”), B.E. 2551 (2008) (Thai.)
- UNFAIR CONTRACT TERMS ACT, B.E. 2540 (1997) (Thai.)
- Unofficial Translation of the PRODUCT LIABILITY ACT, B.E. 2551 (2008) translated by officials of the Consumer Protection Plan and Development Bureau, OCPB (Thai.)
- Cabinet Resolution approval on November 9, 2010. (Thai.)
- UNIFORM COMMERCIAL CODE (U.C.C.) (U.S.)
- FEDERAL RULES OF CIVIL PROCEDURE (U.S.)
- Le Droit de la Consommation du Québec (Que., Can.)

BOOKS, REPORTS, AND OTHER NONPERIODIC MATERIALS

AARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS CASES AND MATERIALS 698 (2d ed. 2007).

BRYAN A. GARNER, BLACK’S LAW DICTIONARY 419 (8th ed. 2007).


GENERAL ATTORNEY OFFICE, A LEGAL PROSECUTING IN CONSUMER PROTECTION CASES, Supplementary for Thai General Attorney Academic Training Program 41st (2009) (Thai.).


JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW & PRACTICE 5-1,
6-1, 13-1 (2d ed. 2000).


**Sakda Thanitcul, Product Liability Law** 1 (Winyuchon Publication House, 2d ed. 2010) (Thai.).

**Steven L. Harris and Charles W. Mooney, Jr., Security Interests in Personal Property Cases, Problems and Materials** (Foundation Press. 4th ed. 2006).


**W. Page Keeton et al., Products Liability and Safety** 841 (2d ed. 1989).

**Periodical Materials**

**Journals**


David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors be Given to Determine the Amount of a Punitive-Damage Award?*, 57 MD. L. REV.


**NEWSPAPERS AND MAGAZINES**


**INTERNET AND OTHER ONLINE RESOURCES**

Channarong Praneejitt, *The Civil Procedure for Consumer Cases: the Review of General Characteristic*, a research supported by the Courts of Justice, Thailand, http://www.library.coj.go.th/rabieb/show.php?idmain=51&title=%A1%AE%C B%C1%D2%C2%A4%D8%E9%C1%A4%C3%CD%A7%BC%D9%E9%BA%C3%D4%E2%C0%A4&page=(last visited Apr. 4, 2012).


Panya Sudthibodi, *A Research on the Claiming for Damages in Environmental Cases focusing on the case that Private Party is the Victim*, Judicial Training Institute, Court of Justice Office Thailand, available at http://www.library.coj.go.th/indexarticle2.php?Idmain=12&&No=13&&Title=%A1%AE%CB%C1%D2%C2%CA%D4%E8%A7%E1%C7%B4%C5%E9%CD%C1&&page=)


Wana Visedsiri, *The Main Point Summary of the Liability for Damages Caused by*