



PUNITIVE DAMAGES REFORM IN THAI LAW:
A COMPARATIVE STUDY OF TORTS AND
PRODUCT LIABILITY LAW

BY
MS. SIRIYA SIRITHIENTHONG

AN INDEPENDENT STUDY SUBMITTED IN PARTIAL
FULFILLMENT OF THE REQUIREMENT FOR
THE DEGREE OF MASTER OF LAWS
(BUSINESS LAWS)

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ASSUMPTION UNIVERSITY

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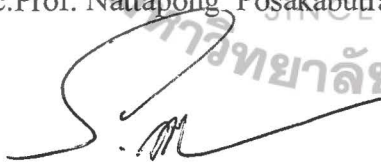
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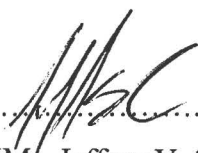
Faculty of Law, Assumption University approves this Independent Study as the partial fulfillment of the requirement for the Degree of Master of Laws.


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ABSTRACT

Punitive damages had recently been adopted into Thai legal system as one of the type of compensation offers to injured party in Unsafe Product Liability Act B.E. 2551 (2008) with the aim of punishing the defendant while deterring similar behavior in society in civil cases. However, in adopting punitive damages into the Unsafe Product Liability Act B.E. 2551 (2008), Thai legislation seems to have jumped the gun by ignoring general tort law in introducing punitive damages.

The aim of this independent research study is to study the concept of punitive damages and its application in comparison between general Tort Law and Product Liability Law which shows that even though, the concept of punitive damages may be a type of damages which have been practicing in the countries of common law system for over 100 of years, it is still a new concept to Thailand.

By accepting punitive damages to be a type of compensation in the Unsafe Product Liability Act B.E. 2551 (2008), it can be said that Thailand had impliedly accepted this form of damages which is often used in common law countries to be a type of damages within Thai legal system. However, instead of following the steps of countries which have been practicing punitive damages, Thailand had ignored the general law and only approved of punitive damages in specific acts of law. By doing this, Thailand may soon run into problems with the standard of punitive damages. By only inserting punitive damages in specific laws, legislators have created a small number of cases in which parties may claim and have done so in a manner which may leave many judges ill equipped to make determinations on the damages which will lead to an under developed understanding of the law.

However, this could be averted by introducing punitive damages into general tort law. Doing this will expose more of the judiciary to this legal concept and provide broader understanding and more effective judiciary system.



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Siriya Sirithienthong

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Chapter 1

Introduction

A. Background and General Statement of the Problems

The concept of punitive damage had long been introduced into Thai society as one of many suggestions given by scholars in the attempts to increase the effectiveness of laws relating to product liability in Thailand. However not until recently did Thailand finally accept such concept and incorporated into “The Unsafe Goods Liability Act B.E. 2551 (2008)”, empowering the court to grant punitive damages to injured parties. In addition to “The Unsafe Goods Liability Act B.E. 2551 (2008)”, the Thai legislative body had also incorporated punitive damages as one type of compensation in “The Consumer Protection Case Procedural Act B.E. 2551 (2008)” and Intellectual property laws. Never- the-less, one question still remains, what are punitive damages and how can an appropriate amount of punitive damages are determined? What good will punitive damages do to product liability law in Thailand? Most importantly, is it enough to restricted punitive damages to only “The Unsafe Goods Liability Act” and “The Consumer Protection Case procedural Act”?

Prior to the enactment of The Unsafe Goods Liability Act B.E. 2551, the law which shall be use to govern the case of product liability and enable injured parties to compensation was Thai Civil and Commercial Code section 420 or the Consumer Protection Act B.E. 2522 (1979). Under section 420 of Thai Civil and Commercial Code requires a person to compensate for the “wrongful act” which imposes on the injured party. The basic claim under this section of Thai CCC is similar to common law tort with the difference in the way that in these claims burden of proof lies upon injured parties which need to prove the defendant’s willful, negligent or unlawful act. Additionally, the damages for claims under this section are also limited to actual damages which often times do not covers the extend damages.

Despite the fact that the Unsafe Goods Liability Act B.E. 2551 and the Consumer Protection Procedural Act B.E. 2551 addressed the issue regarding burden

of proof, which shipped the burden from plaintiffs' to defendants', these Acts still does not solve the fact that Thailand's compensation in general cases of tort, which doesn't falls within the scope of Unsafe Goods Liability Act or Consumer Protection Act are still too low and doesn't minimize the lost or damage that occurred to the injured parties.

B. Hypothesis of the Study

Although, Thailand recognizes the importance of punitive damages and its benefit toward the effectiveness of "product liability" and "consumer protection" law by adapting the punitive damages as a form of remedies into the new draft of product liability act and consumer protection act, which will help to deter or prevent crime under these two Acts. However, there is still a loophole of law regarding tort cases which may not be govern by these two acts. To set a standard level of punitive damages which may be award to plaintiff or the damage party, Thailand should also reform its tort law by allowing punitive damages to be a form of remedies under tort cases in addition to the actual damages. In addition to adopting punitive damages into tort law, Thailand should also provide the procedural in which the party to the tort case may use in applying for punitive damages, regarding the assessment, standard of proof and criteria of the case. By only offering compensation in the form of actual damages, it could be considered as under-compensation to the injured party. Additionally, the current compensation which available under Thai law also doesn't has the ability to reform, deter or prevent other person or the defendant from pursuing the course of action such as that which damage the injured party or the plaintiff. Moreover, not only do the punitive damages serve as compensation to the injured party, it is also a sanction or punishment to the defendant at the same time.

To increase the level of responsibility and liability of people in society, in addition to setting a standard and effectively enforce punitive damages in Product liability Act and Consumer Protection Act, the Thai legal system should adopt punitive damages to be one of the ways to compensate for the loss or damage which occurs to a plaintiff or an injured party under general tort cases by amending sections in Torts law under Thai Civil and Commercial Act regarding compensation and

damages. Additionally, those sections shall also include the criteria of cases, standard of proof and the assessment of punitive damages.

C. Objectives of the Study

1. To study current problems of compensations offer under law of torts in Thai law
2. To do a comparative study of the principles of product liability laws
3. To study the development and rationale behind punitive damages; and
4. To study and analyze the effect of punitive damages toward law of torts

D. Study Methodology

This research paper will be a research and analysis of the topic of punitive damages by the method of Documentary Research, from information and related data which are collected from Thailand and foreign countries laws, textbooks, articles, journals, theses and case laws.

E. Scope of the Study

This research will be focusing mostly on the topic of punitive damages and its' development, in addition to the benefit of punitive damage toward Thai law. Additionally, this research will also be a comparative study of tort law, product liability law and compensations.

F. Expectation of the Study

1. Knowing general principles of law of tort;
2. Knowing the general principle of punitive damages; its purpose and enforcement;
3. Knowing the benefit and disadvantages of punitive damages; and
4. Be able to decide whether incorporating punitive damages into the law of tort will help to set a standard and improve product liability law in Thailand.

Chapter 2

General Principles of Tort and Product Liability Law

The evolution of tort law started from the period as early as the Roman Empire. The first idea of tort law was based on ethics with the belief that a person shall be responsible for their actions that is against good moral or wrongful. It adopted the idea of “Lex Talionis” or the Justinian Code’s “an eye for an eye”. The Romans believed that the injured party shall have the right to request for compensation from the wrong doer at the rate regulated by the government as according to the law of “Twelve Tables”. Additionally, in case of other types of crime such as theft, the injured party shall have the right to request for capital punishment in addition to compensation. In the case where the injured party was able to catch the thief the injured party or the property’s owner shall have the right to punish the thief himself. The injured party shall received damages from the wrong doer and the assurance that they will not have to live in fear of revenge.

However, as society became more developed and civilized the rule “an eye for an eye” becomes too vicious. The government felt that this rule encouraged people to take the law in their own hands by taking revenge on each other for the wrong committed to them. To avoid disturbance of public order, the government decided to set the amount of compensation which the injured party was entitled from the wrong doer in the case of torts and take punishment in the case of criminal crime into their own hands. Since then law regarding tort and criminal law had been separated under the law, where under civil case (tort), the injured party can only request for compensation from the wrong doer without a way of punishing the wrong doer and under criminal law the wrong doer is subject to a fine or imprisonment.

A. History of Thailand Law of Torts

The development of tort law in Thailand dates back to before the Sukothai period (1238-1350 A.D). The Thai legal system had been highly influenced by the ancient Hindu jurisprudence which is the “Code of Manu”. During that period, it is believed that the state shall have the power to punish those convicted of a wrongful

act and not the victims themselves. The victims shall have only the right to receive compensation for their injuries or loss. The “Code of Manu” continued to develop and was used in the Thai legal system through Ayudha period, 16th century. However, during this period wrongful acts had been classified into crimes which affect the State and crimes which only affect the victims. If the crime committed affects the stability of the State, the person who committed such crime shall be subjected to fine and physical punishment lay upon by the state. However, if the crime doesn’t affect the State but only affects the victim, the wrong doer shall be subject to compensation and such compensation shall be divided between the victim and the State equally as the reimbursement to the State. Nevertheless, the law of tort did not fully develop in the Thai legal system until the reign of King Rama V who reigned between 1851-1868. Western jurisprudence was introduced and adopted into the Thai legal system during his period and the wrongful act was classified into criminal crime and civil crime which is a tort¹.

B. The General principle of tort

Civil and Commercial Code

The general principle of tort is governed under section 420 of the Civil and Commercial Civil Code (CCC). In this section, the elements of torts are provided to help clarify what kind of act shall be considered a tort. If a case of an unlawful act shall occur and such act does not fall within the scope of any specific provision of law or Act, section 420 shall be used to apply to such case.

Section 420 of CCC provides that “a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.”

1. The elements of tort

There are four elements to a tort case

¹ Vicha Mahakut, Principles of Torts: Study from Court Decision, (Bangkok: Saweangsutikanpim) 3-8 (1980).

a. Unlawful act

The meaning of “unlawful act” is not restricted to an action that is expressly prohibited by law, but also includes any kind of action which injures or interferes with others’ life, body, health, liberty, body or property.² An act shall also include any omission to do any kind of action which should be done in preventing such consequence.

b. Willful or negligently

“Willful” means to purposely or voluntarily commit an act with intention [citation], while “negligently” refers to an unintentional act of committing the offense and causing the damage but the damage occurs due to the lack of care which can be expected from a person under such condition and circumstances.³ In another word, “negligence” is harm caused by the failure to use reasonable care.

c. Causing injury or damage to other

The injury or damage may be the injury or damage that occurred at the time of tort or is expected to occur in the future. However, such injury or damage has to be definite. There must not be any doubt that such injury or damage occurred or will occur. Example: Child support money in case of death of the legal guardian. This type of damage is considered to be future damages. It is the expected loss. Since the child guardian is the one supporting the child therefore if the child shall lose its guardian, it’s also lost the legal support.⁴

Such injury or damage must occur as the result of the act

In addition to section 420, the general principle of torts, section 421-425 in the CCC also provides the additional and specific acts that shall be considered as torts. For example section 421 provides “the exercise of a right which can only have the purpose of causing injury to another person is unlawful”. [citation] The act which is rightfully committed by the doer and is not illegal, however, if in exercising such right only have the purpose of causing injury to others, such as shall also be considered as tort.

² Pajit Punyapun, Principle of Civil and Commercial Code: Principle of Torts (Bangkok: Winyuchon Publication House) 27 (1984).

³ Vicha Mahakun, Principles of Torts: Study from Court Decision, p.9.

⁴ Ibid.

2. Strict Liability

While section 420 of Thai Civil and Commercial Code provides the general rule of tort, which requires the plaintiff to prove the action of the defendant to be an unlawful act. Some sections under Thai Civil and Commercial Code also enforce the strict liability theory toward the defendant, such as; section 425, 426, 429 and 430. In strict liability, a person shall be responsible for the damage and loss caused by his or her acts or omissions regardless of culpability. For example under section 425 of Thai Civil and Commercial Code, the employer must be jointly liable for the damage which his or her employee has caused in the scope of his employment. From this section, it can be seen that regardless of the employer's action, if the employee had caused damage while working for the employer, the employer shall be required to be jointly liable with the employee. It is a strict liability in the sense that, even though the employer may not have caused the damage, but he shall be responsible anyway.

C. Tort law in Foreign Countries

Since Unsafe Product Liability Law was only recently been passed into law in Thailand and the punitive damages was only recently been introduced by this new law, the suggestion to incorporate punitive damages into tort law in Thailand to help set standard of punitive damages would be best supported by the study of tort and product liability law in different countries which have long been enforcing punitive damages as one type of compensations in tort and product liability law. The main legal systems in foreign countries can be divided in two categories:

1. Common Law

Common law legal system is often also known as "Judge Made law" due to the reason that under common law system, the precedent serves as law. Prior to the equity and code of precedent, there is no written code book under the common law system. The origin of this type of law is in England and expand into the countries which were once colonies of England; for examples the United States, Australia and Canada etc. Since these common law countries, the study of their punitive damages will be based on precedent or the judgment made by the courts.

Additionally, common law countries do not base their judgment on codifications of law. Their judgment in awarding punitive damages will be more flexible depending on circumstances.

2. Civil Law

Civil law system is also known as Romano-Germanic Law or codification law, has its root from Roman law. Most of the civil law countries based their law on several codes of law. The most commonly known country that is a Civil law system country is France, which can also be considered as the country of birth of the modern civil law system, because most of the law codes in most of the civil law countries are based on the Napoleonic Code. Even though, most civil law countries based their judgment on codes of law, which may provide the standard of judgment, but the amendment of law codes are hard to do, requires a lot of process and time consuming.⁵

D. United States Torts Law

Torts are wrongful acts which result in an injury or harm to the injured party. It is also known as civil wrongs and it can be use as grounds for a lawsuit. While all crimes are torts which allow the tortfeasor to be punished by the states and compensate for the loss to the injured party, not all torts are crimes. That means in some cases of tort, the tortfeasor will only be required to compensate the loss to the injured party but will not be punish by the State. Therefore, the aim of tort law in the United State is to provide relief for the damage of the injured party, punish the tortfeasor and to deter others from committing the same wrongful act. However, since United States divides its jurisdiction into Federal and State level with each state having its jurisdiction and law, tort law may vary from state to state. Additionally, the United States is a common law country which bases their law on the judgment of the Courts; therefore the law of torts in the United States is continually evolving and

⁵ Henry John Stephen, A Treatise on Principles of Pleading in Civil Action Comprising a Summary View of the Whole Proceedings in a Suit at Law, available at <http://www.svpvrl.com/ comcivlaw.html>. (last visited 10 August 2008).

constantly increasing its complexity to meet the needs of the society. Never-the-less, in general United States' law can be divided into three categories: intentional torts, negligence's, and strict liability.⁶

1. Intentional Torts

Intentional torts occur when one voluntary act with intent to cause injury to other. Intentional torts include: assault, false imprisonment, intentional infliction of emotional distress, invasion of privacy, fraud, defamation of character, malicious prosecution, abuse of process, the real property tort of trespass to land, and the personal property tort of conversion and trespass to chattels.⁷

a. Elements of intentional torts

- (1) An intention
- (2) An injury
- (3) Tort was the proximate cause of injury
- (4) Injury caused damages⁸

2. Tort of Negligence

Tort of Negligence is one of the most common forms of torts. It occurs when a party with extra-contractual liability failed to comply with the duty of care which can be expected of a reasonable person under circumstance and such failure is the actual cause and proximate cause of damages. Without the tortfeasor's act or omission, the damages to the plaintiff would not have been incurred, and the damages were a reasonably foreseeable consequence of the tortuous conduct.

Other non-intentional torts include malpractice (professional negligence), and product liability (liability of manufacturers, wholesalers and retailers for unreasonably dangerous products).

⁶ Dan B. Dobbs, Torts and Compensation: Personal Accountability and Social Responsibility for Injury (United States: West Publishing Co.,) 4 (1985).

⁷ American Tort Reform Association, Punitive Damages Reform, available at [http:// www.atra.org/show/7343](http://www.atra.org/show/7343). (last visited 25 September 2008).

⁸ Settlement Central.Com, An Overview of the Law of Torts, available at <http://www.settlementcentral.com/page3000.htm>. (last visited 25 September 2008).

a. Element of Negligence

- (1) Duty of care- a reasonable responsibility to act or not to act
- (2) Breach of duty
- (3) Proximate Cause- without the breach of duty, the result would not have occurred
- (4) Actual harm
- (5) Measurable damages- may include both financial loss and non-pecuniary loss⁹

3. Strict liability

The term “Strict liability” concerns not on the tortfeasors’ liability and their culpable state of mind but instead, strictly on the conduct itself or its result. Strict liability torts refer to injuries resulting from ultra-hazardous activities, for which the defendant will be held liable even if there was no negligence on his/her part. Strict liability also applies to some types of product liability claims and to copyright infringement and some trademark cases. Some statutory torts are also strict liability, including many environmental torts.¹⁰

E. European Group on Tort Law

The European Group on Tort law is a group of scholars in the area of tort law. It was established in 1992 and formerly called “Tilburg Group”. This group serves the purpose of discussing the fundamental issues of tort liability, its development and its future directions. The Group has drafted a collection of Principles of European Tort Law which available in 16 languages including; English, Catalan, Chinese, Czech, French, German, Greek, Italian, Japanese, Korean, Polish, Portuguese, Russian, Slovenian, Spanish and Turkish.¹¹

⁹ Palsgraf v. Long Island R.R. 248 N.Y. 339, 162 N.E. 99 (1928).

¹⁰ Settlement Central.Com, An Overview of the Law of Torts, available at <http://www.settlementcentral.com/page3000.htm>. (last visited 25 September 2008).

¹¹ European Group on Tort Law, Principle of European Tort Law, available at <http://www.egtl.org/Principles/pdf/PETL.Pdf>. (last visited 25 September 2008).

1. Principles of European tort law

Title I, chapter 1 Article 1:101 of the principles of European tort law provides the Basic Norm of tort to be:

(1) A person to whom damage to another is legally attributed is liable to compensate that damage.

(2) Damage may be attributed in particular to the person

- a) Whose conduct constituting fault has caused it; or
- b) Whose abnormally dangerous activity has caused it; or
- c) Whose auxiliary¹² has caused it within the scope of his functions.

2. Elements of tort under the European Tort Law

a. Proof of damage

Damage must be proved according to normal procedural standards. The court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly.

b. Causation

Causation of damage is provided within article 3:101- 3:105 of the principle which provides that the damage must occur directly as a result of the activity. This means that if such activity is absent, the damage would not have occurred. In case of concurrent causes (multiple activities) and each activity alone would have caused the damage, each activity is assumed to have caused such damage to the injured party.

c. Alternative causes

(1) In case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage.

(2) If, in case of multiple victims, it remains uncertain whether a particular victim's damage has been caused by an activity, while it is likely that it did not cause the damage of all victims, the activity is regarded as a cause of the damage

¹² Definition: Conferring aid or help; helping; aiding; assisting; subsidiary; as auxiliary troops.

suffered by all victims in proportion to the likelihood that it may have caused the damage of a particular victim.¹³

d. Potential causes

(1) If an activity has definitely and irreversibly led the victim to suffer damage, a subsequent activity which alone would have caused the same damage is to be disregarded.

(2) A subsequent activity is nevertheless taken into consideration if it has led to additional or aggravated damage.

(3) If the first activity has caused continuing damage and the subsequent activity later on also would have caused it, both activities are regarded as a cause of that continuing damage from that time on.¹⁴

e. Uncertain partial causation

In the case of multiple activities, when it is certain that none of them has caused the entire damage or any determinable part thereof, those that are likely to have [minimally] contributed to the damage are presumed to have caused equal shares thereof.¹⁵

3. Damage

Principles of European Tort Law divided damage into two types of damages which are recoverable damage and legitimacy of damage. Recoverable damage is refers to be “damage which requires material or immaterial harm to a legally protected interest”. Protected interests are defines under Art. 2:102 to be:

1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection.

2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.

3) Extensive protection is granted to property rights, including those in intangible property.

¹³ Chapter 3 Section 1 Article 3:103 of Principle of European Tort Law.

¹⁴ Chapter 3 Section 1 Article 3:104 of Principle of European Tort Law.

¹⁵ Chapter 3 Section 1 Article 3:105 of Principle of European Tort Law.

4) Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim.

5) The scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases.

6) In determining the scope of protection, the interests of the actor, especially in liberty of action and in exercising his rights, as well as public interests also have to be taken into consideration.

4. Scope of Liability

Where an activity is a cause within the meaning of the Directive, whether and to what extent damage may be attributed to a person depends on factors such as;

a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity;

b) The nature and the value of the protected interest;

c) The basis of liability;

d) The extent of the ordinary risks of life; and

e) The protective purpose of the rule that has been violated.¹⁶

5. Conditions of liability based on fault

A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct. Required standard of conduct

(1) The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship

¹⁶ Chapter 3 Section 2 Article 3:201 of Principle of European Tort Law

of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.

(2) The above standard may be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it.

(3) Rules which prescribe or forbid certain conduct have to be considered when establishing the required standard of conduct.¹⁷

6. Duty to protect others from damage

A duty to act positively to protect others from damage may exist if law so provides, or if the actor creates or controls a dangerous situation, or when there is a special relationship between parties or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side point towards such a duty.¹⁸

7. Strict liability

Abnormally dangerous activities

(1) A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it.

(2) An activity is abnormally dangerous if:

a) It creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and

b) It is not a matter of common usage.

(3) A risk of damage may be significant having regard to the seriousness or the likelihood of the damage.

(4) However it does not apply to an activity which is specifically subjected to strict liability by any other provision of these Principles or any other national law or international convention.¹⁹

¹⁷ Chapter 4 Section 1 Article 4:101 of Principle of European Tort Law.

¹⁸ Chapter 4 Section 1 Article 4:104 of Principle of European Tort Law.

¹⁹ Chapter 5 Article 5:101 of Principle of European Tort Law.

F. Product Liability Law in Thailand

1. Unsafe Product Liability Act B.E. 2551 (2008)

After many years of debates, the Unsafe Product Goods Act B.E. 2551 was passed by the Thai legislature on 13 February 2008 and will take effect on 21 February 2009. The rationale behind the enactment of this Unsafe Product Goods Act B.E. 2551 (2008) is to respond to concerns regarding the burden of proof. Prior to the enactment this Act, claim regarding unsafe or defective product shall be file under the 'unlawful act' or tort provision of Thai Civil and Commercial Code B.E. 2551 which makes the burden of proof to be rested upon the consumers to prove the manufacturer's willful or negligent act. This is difficult to do in practice due to the fact that often times technical questions which are beyond the ability of consumers are involves. In addition to solving the problem regarding burden of proof, the Unsafe Product Goods Act B.E 2551(2008) also introduced and incorporated concept of damages into Thai law which are compensation for mental injury and punitive damages with the purpose of compensating extensive damage that occur to the injured party which cannot be cover by the actual damage and to punish the business operators for the wrong doing.

a. Definition of "Unsafe Product"

Under the new Unsafe Goods Act B.E. 2551 (2008) (Unsafe Goods Act) does provide goods which are considered to be unsafe and may include a wide range of goods. The Unsafe Goods Act defines "unsafe product", as any product manufactured or imported for sale which can cause or may cause injury as a result of defects in manufacture or design or failure to provide adequate instructions and warning also expressly including items such as buildings, certain services, and electricity and electromagnetic waves.²⁰

²⁰ Section 4 Unsafe Products Liability Act B.E. 2551.

G. US product liability law

United States product liability law concerns mostly with the liability of manufacturers, or other entities in the chain of distribution for personal injury, property damage or economic loss caused by the sale or use of a product. Product liability lawsuits in the United States can be brought based on negligence, strict liability, or breach of warranty. Similar to law of torts, product liability law in the United States may vary from state to state. There is no federal products liability law.

The development of the US product liability law mainly started with the doctrine of privity, which states that an injured person can sue the negligent person only if he or she was a party to the transaction with the injured person.²¹ These means that the only party that the injured party can claim negligent from is the product retailer in the case of defective of product, however, most of the time the manufacturer of the product are the one who shall be responsible for the defectiveness. As a result, the plaintiff or the injured party are left with no remedy due to the reason that the manufacturer does not have the duty of reasonable care under the contract with the injured party, therefore the injured party may not claim against the manufacturer.

Even though the doctrine of privity dominated the nineteenth-century law, the court had found ways to create exceptions of this doctrine in order to award a remedy to an injured party. Soon in cases where the seller fraudulently concealed the defect of the product or the product is considered to be inherently or imminently dangerous to human life or health, the privity of contract is no longer required.²² The court then expanded these exceptions and soon dropped the “fraud” requirement. A concealed defect coupled with some sort of “invitation” by the defendant to use the product was enough to constitute a claim of negligence against seller for remedy. In some later

²¹ David G Owen & Jerry J. Phillips, Product Liability in a Nutshell (St. Paul, MN: Thomson/West) 10 (7th ed. 2005).

²² American Justice Partnership, Speaker's Resource: Punitive Damages, available at In http://www.legalreforminthenews.com/speakers/punitives/punitives_1.html. (last visited 17 September 2008).

cases, the term imminently dangerous was construed to mean especially dangerous by reason of the defect itself and not necessarily dangerous per se. This means that the product itself may not be dangerous but with some kind of defect it may be considered to be dangerous example of coffee urn that exploded.

The leading case that broadened the term “inherently” or “imminently” dangerous products so as to effectively abolish the privity requirement in negligence cases is *Macpherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916). This case brought products injuries into the modern tort law theory of a duty that all citizens owe each other by virtue of a defendant's relationship to the plaintiff. The fact of the case is that the plaintiff, Donald C. MacPherson, was injured when one of the wooden wheels of his automobile crumbled. The defendant Buick Motor Company had manufactured the vehicle, but not the wheel, which had been manufactured by another party and installed by defendant, therefore the defendant denied the liability because the plaintiff had purchased the automobile from a dealer, not from the defendant. The defendant does not have the contractual duty to the plaintiff. However, it was conceded that the defective wheel could have been discovered upon inspection. The court held that lack of privity is not a defense if it is foreseeable that the product, negligently made, is likely to cause injury to others. Additionally, following the MacPherson case which became the leading authority case of exception of doctrine of privity, similar privity limitation was also imposed on warranty. It is said that warranties were believed to be an integral part of the sales contract.

From 1930 to 1960, various legal writers and a few judges discussed the creation of strict liability in tort for defective products. The best-known judicial exposition of this view was California Supreme Court Justice Roger John Traynor's concurring opinion in *Escola V Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944).

“As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself

the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trademarks... Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark... Manufacturers have sought to justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds... The manufacturer's obligation to the consumer must keep pace with the changing relationship between them.....”²³

This opinion by Justice Roger John Traynor set a standard for the burden of prove. Additionally, a number of justifications have been advanced for strict liability: negligence is often too difficult to prove; strict liability can be accomplished through a series of actions for breach of warranty; strict liability provides needed safety incentives; the manufacturer is in the best position to either prevent the harm or insure or spread the cost of the risk; and the manufacturer of a product induces consumer reliance on the expectation of the product's safety and should be made to stand behind the product. However, the strict tort liability was not been adopted for defective products until 1936 by California Supreme Court in *Greenman v Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897. Since then, the standard of negligence had been shifted to strict liability.”²⁴

Lawsuits of product liability are typically a combination of many theories which may include: negligence in the design, manufacture or marketing of a product; strict liability in design, manufacture or marketing of a product; breach of an express or implied warranty about the product; negligent or fraudulent misrepresentations about the product; or violation of a state consumer protection statute.

²³ Bird on a Wire, Development of Product Liability Law, available at http://www.slu.edu/Documents/business/eec/hotstik_appendix.pdf. (last visited 25 September 2008).

²⁴ Bird on a Wire, Development of Product Liability Law, available at http://www.slu.edu/Documents/business/eec/hotstik_appendix.pdf. (last visited 25 September 2008).

1. Negligence theory

Elements of negligence theory under product liability laws are the same as in general torts cases. In other words, the plaintiff must be able to prove four elements of negligence which are duty, breach of duty, proximate cause and injury. However, the difference is that product liability law usually applies strict tort liability which means the burden of proof lays upon the defendant. The defendant shall bear the burden of proving that they have taken every appropriate measure to prevent such damages. Negligence of chain operator under product liability law includes negligent design, negligent manufacture and negligent in marketing. The manufacturers have the duty to design products that are reasonably safe for all intended and foreseeable uses and duty to exercise reasonable care in manufacturing their products. Lastly, manufacturers also have the duty to provide the user of the product with information of such product including instruction manuals, warning labels, advertising materials and post-sale information such as recall or retrofit notices. Failure to perform such duty, the manufacturers may be required to be liable for any damages resulting thereof.²⁵

2. Strict liability

Due to the doctrine of privity which prevents the injured party from claiming a remedy from the seller of the defective product. Strict tort liability is the exception of the doctrine of privity. To allow an injured party to claim a remedy from the retailer, most states allow recovery for injury from a defective product under the theory of strict liability, without any showing of fault or negligence on the part of the seller. The strict liability guidelines, as provided in Section 402A of the Restatement (Second) of Torts, apply to the case where a person sells any product in a defective condition unreasonably dangerous to the user or consumer is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if the seller is engaged in the business of selling such a product and the product is expected to and does reach the user or consumer without substantial

²⁵ The Globalaw Product Liability and Toxic Tort Initiative, A Summary of American Product Liability Law, available at http://www.globalaw.net/files/public/American_Product_Liability_Summary.pdf. (last visited 25 September 2008).

change in the condition in which it is sold. This rule applies even if the seller has exercised all possible care in the preparation and sale of his product; and the user or consumer has bought the product from or entered into any contractual relation with the seller. As with negligence, a plaintiff may assert a strict liability claim in three general areas which are design defect, manufacturing defect and marketing defect.²⁶

3. Breach of warranty

Breach of warranty is a form of strict liability. Making a claim under breach of warranty, the plaintiff does not need to demonstrate fault on the part of the defendant in order to recover. Additionally, the plaintiff may also recover for breach of “implied warranties”. These warranties include an implied warranty of merchantability, under which the product must be “fit for the ordinary purpose” of the product, and an implied warranty of fitness for the particular purpose to which the purchaser plans to put the product. To recover for breach of either express or implied warranty, the plaintiff must prove a combination of elements similar to those required for imposing tort liability, including the existence of the warranty, breach of the warranty damage and proximate cause between the breach and damage.²⁷

4. Fraud

Fraud and/or misrepresentation theories are one of the theories which the plaintiffs in product liability file a lawsuit under. These claims focus less on the product and more on the allegedly culpable behavior of its manufacturers and distributors.

²⁶ The Globalaw Product Liability and Toxic Tort Initiative, A Summary of American Product Liability Law, available at http://www.globalaw.net/files/public/American_Product_Liability_Summary.pdf. (last visited 25 September 2008).

²⁷ UK trade and Investment, Us Product Liability, available at [http://www.uktrade_invest.gov.uk/uktp/fileDownload/US_product_liabiliy.pdf\(ip=361220](http://www.uktrade_invest.gov.uk/uktp/fileDownload/US_product_liabiliy.pdf(ip=361220). (last visited 25 September 2008).

H. The European Community Directive on Product liability

1. Condition of Responsibility

The Directives assigns that responsibility arise from a defective product under Section 1 of the EU Directive “The producer shall be liable for damage caused by a defect in his product.” The foregoing paragraph is the basis upon which the entire directive is formulated.

1) Elements of responsibility which arises from defective product may be divide into the following conditions:

a) Product

The Directives have defined the term “Product” in Article 2 as physical property and goods, as opposed to land or rights in or to real property. A product could include a whole product, part of another product, or part of a fixture attached to real property. However, such definition was redefined in Directive 1999/34/EC amended 85/374/EEC to be all movables even if incorporated into another movable or into an immovable. In addition, Directive 1999/34/EC had also extend the scope of Directive 85/374/EEC to include agricultural products and game to also be considered as “product” under this directive.²⁸

b) Person of Responsibility

Section 1 provides that “producer shall be liable for damaged caused by a defect in his product”, therefore, the person whom shall be responsible under this directive is the producer of the product. However, the term “producer” does not only defines as manufacturer of a finish product but also refers to:

- The maker of any raw material or the manufacturer of a component part;
- Any person who, by putting his/her name, trademark or other distinguishing feature on the product, presents himself/ herself as the producer;

²⁸ Helen Delaney & Rene van de Zande, A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive), available at http://ts.list.gov/Standards/Global/upload/product_liability_guide_824.pdf. (last visited 25 September 2008).

- Any person supplying a product if the producer cannot be identified
- Importers placing products on the European Union market²⁹



²⁹ Helen Delaney & Rene van de Zande, A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive), available at http://ts.list.gov/Standards/Global/upload/product_liability_guide_824.pdf. (last visited 25 September 2008).

Chapter 3

Compensation and Damages

Compensation or damages are the legal terms referring to financial compensation for the victim or an injured party of an unlawful act. This chapter will explore and discuss similarity and differences of different types of compensation and damages which are available in torts law and product liability law in Thai law, United States law and European Countries Directives.

A. Compensation for torts under Thai Civil and Commercial Code

Under the law of torts, the injured party is entitled to receive compensation from the wrong doer upon the principle that the wrong doer must perform any type of redress toward the injured party until the injured party may return to its place before the unlawful act was committed. However, if it is impossible to return to its place, the wrong doer shall then compensate for the injuries or damage that occurred. The provisions regarding compensation for torts are provided within section 438 to section 448 of the CCC

1. General principle of compensation

Section 438 provides “the Court shall determine the manner and the extent of compensation according to the circumstances and the gravity of the wrongful act. Compensation may include restitution of the property of which the injured person had been wrongfully deprived or its value as well as damages to be granted for any injury caused.”

Section 483 of the CCC is the general principle of compensation regarding tort. It provides the basic compensation that can be awarded to the injured party. The type of compensation under this section includes resituating the property back to the original owner who was deprived of its property or money equivalent to the value of

the property shall be awarded back to the injured party.³⁰ The way to determine and the extent of compensation shall be up to the discretion of the court after considering the circumstances and the gravity of the wrongful act. Example: Dika 126/2517 Defendant had, contrary to the truth, asserted as fact by publishing in the newspaper a statement which was injurious to the reputation of the plaintiff, a well known person in society. Therefore, the defendant shall be subject to take any proper measure to rehabilitate the plaintiff's reputation. The defendant shall bear all costs involved in rehabilitating the plaintiff's reputation as compensation. However, if there is a specific law which can be used to govern such case, such law shall apply e.g. product liability, consumer protection, etc.³¹

2. Compensation for destruction of property which had been deprived by the wrongful act

Section 439 provides "a person who is bound to return a thing of which he had deprived another by a wrongful act is also responsible for the accidental destruction of the thing, or for accidental impossibility of returning it arising from any other cause, or for its accidental detention, unless the destruction or the impossibility of returning it or the deterioration would have happened even if the wrongful act had not been committed."³²

In case the wrongful act is of the nature of depreciation of property, the compensation includes restitution of the property wrongfully deprived. However if such action become impossible to perform, because the thing is partially damaged or totally destroyed due to the fault of the wrong doer or not, the wrong doer must pay damages to the injured party for the destruction of the thing, making it impossible to be returned with exception, if such loss or damage ought to have occurs whether or not the thing was wrongfully deprived or not.³³

³⁰ Pajit Punyapun, Principle of Civil and Commercial Code: Principle of Torts, p.157.

³¹ Vicha Mahakun, Principles of Torts: Study from Court Decision, p. 10.

³² Pantarasuk Wonseang, Principle of Torts (Bangkok: Winyuchon Publication House) 180 (1997).

³³ Ibid., p. 195.

3. Compensation for wrongful act resulting in injury to body, health, liberty and life

Section 443 provides “in case of causing death, compensation shall include funeral and other necessary expenses. If death did not ensue immediately, compensation shall include particular expenses for medical treatment and damages for the loss of earning on account of disability to work. if on account of the death any person has been deprived of his legal support, he is entitled to compensation therefore.”

Compensation for a wrongful act resulting in injury to life of the injured person under section 443 of the CCC includes funeral expenses and other necessary expenses.³⁴ Example: Dika 574/ 2523 compensation for a wrongful act resulting in injury to life shall also include the expenses for publishing an obituary of the death person in the newspaper, in addition to funeral expenses. If the death of the injured person deprived any person from its legal support, compensation shall also include damages for the deprivation legal support. However, if the death of the injured party did not occur immediately, compensation includes medical expenses. Additionally, if the wrongful act results in inability to work, compensation shall also include damages for the loss of earning as provided under section 444 paragraph 1 of the CCC “in case of an injury to the body or heath, the injured person is entitled to receive reimbursement of his expenses and damages for total or partial disability to work, for the present as well as for future.”³⁵ In addition paragraph 2 of section 444 of the CCC also empowers the court to revise the judgment for awarding compensation within two years after giving the judgment, if at the time of giving judgment it is impossible to ascertain the actual consequences of the injury.

4. Compensation for third party affected by the wrongful act

The third person who is affected by the death, body or health injury or deprivation of the injured person can refer to section 445 of the CCC which provides such person shall also be entitled to compensation for the loss of service bound by law to be performed by the injured party.

³⁴ Ibid., p. 208.

³⁵ Ibid., p. 209.

5. Other compensation which is not a pecuniary loss

Section 446 provides “In case of injury to the body or health of another, or in the case of deprivation of liberty, the injured person may also claim compensation for the damage which is not a pecuniary loss. The claim is not transferable, and does not pass to the heirs, unless it has been acknowledged by contract, or on action on it has been commenced.

A like claim belongs to a woman against whom an immoral crime is committed”

Section 446 entitles the injured party to also claim compensation for the damage which is not a pecuniary means that is the injured party may claim for other types of compensation which is not money. Example: The decision of Supreme Court no. 5220/ 2539 The plaintiff have to suffers pain of being disable as a result of wrongful act committed by the defendant. Therefore, the plaintiff may demand the defendant to compensate for psychological and physical suffering which includes medical expenses and future expenses due to a wrongful act resulting in the injured party’s disability to work. The damages are for the disability to work and losses of future income and not for disco figuration of body image. However, there is no specific provision or definition under the law which provides the exact definition of pecuniary loss. In addition, Thai tort law still does not recognize punitive damage, which makes it impossible for the damaged party to claim for mental distress. Additionally, the right to claim for pecuniary loss is restricted to the injured party only and cannot be transferred to heirs of the injured party, unless it is acknowledged by contract or the trial has already commenced.³⁶

Additionally, section 446 paragraph 2 also provided that section 446 paragraph shall also be apply to the case of immoral crime. Immoral crime includes crimes such as; rape etc.

³⁶ Pantarasuk Wonseang, Principle of Torts, p. 180.

B. Compensation available under United State Torts Law

Compensation for injured party in torts is available in the form of damages which is a legal remedy in the form of monetary payments. Damages under the United States law generally can be divided into 3 categories: compensatory, nominal and punitive damages.

Compensatory damages are monetary payments awarded to compensate the plaintiff for his or her loss or the actual suffered. Compensatory damages cover two types of losses: economic and non-economic losses. Economic losses are losses which can be easily be calculate and replace by money, while non-economic losses refers to the type of losses that cannot be measure nor calculate into amount of money. Examples of economic losses are; present and future medical expenses, burial costs, loss of the use of property, present and future loss of earnings, loss of business or employment opportunities and cost of obtaining substitute domestic services. Examples of non-economic losses are; pain, mental distress, inconvenience, loss of companionship, humiliation and injury to reputation etc. The non-economic losses are subjective to the plaintiff.

Nominal damages are small monetary payment awarded to the injured party when tort resulted in a little or no harm. Nominal Damages are usually awarded in intentional tort and strict liability tort cases when there has been technical commission of tort but no actual harm had been done.

Punitive damages are damages awarded to injured party but not as compensatory damages instead punitive damages seek to punish the tortfeasor and to deter similar conduct by others. Punitive damages are usually award when the tortfeasor had acted maliciously, outrageously, recklessly, or in conscious disregard for the safety of others.

C. Determining damages under Principles of European Tort law

Principles of European Tort Law divided damage into two types of damages which are recoverable damage and legitimacy of damage. Recoverable damage is refers to be “damage which requires material or immaterial harm to a legally protected interest”. Protected interests are defines under Art. 2:102 to be:

(1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection.

(2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.

(3) Extensive protection is granted to property rights, including those in intangible property.

(4) Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim.

(5) The scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases.

(6) In determining the scope of protection, the interests of the actor, especially in liberty of action and in exercising his rights, as well as public interests also have to be taken into consideration.

1. Types of damages under Principle of European Tort Law

a. Nature and purpose of damages

Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.

b. Lump sum or periodical payments

Damages are awarded in a lump sum or as periodical payments as appropriate with particular regard to the interests of the victim.

c. Benefits gained through the damaging event

When determining the amount of damages benefits which the injured party gains through the damaging event are to be taken into account unless this cannot be reconciled with the purpose of the benefit.³⁷

d. Restoration in kind

Instead of damages, restoration in kind can be claimed by the injured party as far as it is possible and not too burdensome to the other party.³⁸

e. Personal injury and death

(1) In the case of personal injury, which includes injury to bodily health and to mental health amounting to a recognised illness, pecuniary damage includes loss of income, impairment of earning capacity (even if unaccompanied by any loss of income) and reasonable expenses, such as the cost of medical care.

(2) In the case of death, persons such as family members whom the deceased maintained or would have maintained if death had not occurred are treated as having suffered recoverable damage to the extent of loss of that support.³⁹

f. Loss, destruction and damage of things

(1) Where a thing is lost, destroyed or damaged, the basic measure of damages is the value of the thing or the diminution in its value and for this purpose it is irrelevant whether the victim intends to replace or repair the thing. However, if the victim has replaced or repaired it (or will do so), he may recover the higher expenditure thereby incurred if it is reasonable to do so.

(2) Damages may also be awarded for loss of use of the thing, including consequential losses such as loss of business.⁴⁰

g. Non-pecuniary damage

(1) The violation of an interest may justify compensation of non-pecuniary damage. This is the case in particular where the victim has suffered personal injury; or injury to human dignity, liberty, or other personality rights. Non-

³⁷ Chapter 6 Section 1 Article 10 of Principle of European Tort Law.

³⁸ Chapter 6 Section 1 Article 10:104 of Principle of European Tort Law.

³⁹ Chapter 10 Section 2 Article 10:201 of Principle of European Tort Law.

⁴⁰ Chapter 10 Section 2 Article 10:203 of Principle of European Tort Law.

pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal or very serious non-fatal injury.

(2) In general, in the assessment of such damages, all circumstances of the case, including the gravity, duration and consequences of the grievance, have to be taken into account. The degree of the tortfeasor's fault is to be taken into account only where it significantly contributes to the grievance of the victim.

(3) In cases of personal injury, non-pecuniary damage corresponds to the suffering of the victim and the impairment of his bodily or mental health. In assessing damages (including damages for persons having a close relationship to deceased or seriously injured victims) similar sums should be awarded for objectively similar losses.⁴¹

E. Compensation under Unsafe Product Liability Act B.E. 2551 (2008)

Section 11 of the Unsafe Goods Act provides:

As well as assessing damages in accordance with the CCC, the court may assess compensation taking into account the following matters:

(1) Regarding damages for mental loss caused by loss or damage to the body, health or hygiene of the injured person, where the injured person has died, his/her husband, wife, parents or heirs are entitled to receive the damages.

(2) If it appears that the business operator manufactured, imported, or sold the product, knowing that it was unsafe, or without knowledge due to his negligence, or knew that the product was unsafe after manufacture, import or sale but failed to act appropriately to prevent loss or damage occurring, the court may order the business operator to pay punitive damages up to twice the actual amount, taking into account matters such as: the degree of loss or damage suffered, knowledge of the unsafe product by the business operator, the length of time during which the business operator has concealed the unsafe aspects of the product, the reaction of the business operator when he knew of the unsafe aspects of the product, the benefits the business

⁴¹ Chapter 10 Section 3 Article 10:301 of Principle of European Tort Law.

operator has received, the financial status of the business operator, how the business operator has minimized the loss or damage, and whether the injured person did anything to cause the loss or damage to occur.”

In addition to the damages provided under the CCC, the court may award additional damages to the injured party as provided under section 11 of the Unsafe Goods Act which is compensation for mental distress and punitive damages. Section 11 of the Unsafe Goods Act has introduced a new concept of injury into Thai law which is mental injury. Mental injury or distress which occurred as a result of an unlawful act had long been recognized by other countries, especially the United States of America and other common law jurisdictions. However, the level of injury or damage which occurs is difficult to prove; therefore the amount of damages shall be up to the Court's discretion and to be determined on case by case basis. In the case of death, this section also entitles a husband, wife, parents or heirs of the injured party to receive damages. Additionally, section 11 of the Unsafe Goods Act also empowers the Court to award punitive damages in addition to the actual damages to the injured party as punishment to the business operator if circumstances proved to the Court show that the business operator knowingly manufactured, imported or sold an unsafe product. Moreover, the business operator shall also be liable under this section even without such knowledge of the unsafe aspect of the product if reason for not knowing is because of his negligence or the business operator learnt such unsafe aspects of the product but did not take any necessary or appropriate measure to prevent damage. The amount of punitive damages which shall be awarded to the injured party is up to the Court's discretion, however it may not exceed two times the amount of the actual damages.

The Unsafe Goods Act enables injured parties to claim extended damages, mental injuries or punitive damages, for the loss or damage which occurred and no longer is restricted to the actual damages. However, this Act only applies to the damage that occurs due to unsafe products whether because of the defectiveness in manufacturing or design or failure to provide adequate instructions and warning about the product. Additionally the only people who are liable under this Act are the business operators, manufacturers, importers and sellers of the unsafe product if they

cannot identify the manufacturer or importer, and persons who use a trade name, trademark or state and who hold themselves out as a manufacturer or importer.

F. Damages available under United States Product Liability Law

In addition to compensatory damages in order to punish a defendant for extremely egregious conduct, punitive damages or exemplary damages are also a type of damages which can be award to the injured party. The standard of awarding the punitive damages is based on 3 standards which are;

- 1) The degree of reprehensibility of the defendant's conduct
- 2) The ration between the plaintiff's compensatory damages and the amount of the punitive damages and
- 3) The difference between the amount of punitive damages and the civil or criminal sanctions that could be imposed for comparable misconduct⁴²

G. Available damages under European directive

1. Covered Damage

Damage caused by the product which is protected in the Directive is divided into two categories of damage:

- 1) Damage caused by death or by personal injuries;
- 2) Damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU.⁴³

⁴² David G. Owen & Jerry J. Phillips, Product Grobility in a Nutshell, p.30.

⁴³ Helen Delaney & Rene van de Zande, A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive), available at http://ts.list.gov/Standards/Global/upload/product_liability_guide_824.pdf. (last visited 25 September 2008).

H. Punitive Damages

Punitive damages are also known as exemplary damages are awarded to plaintiff as additional damages to compensatory damages. While compensatory damages are decide to compensate for the actual monetary losses of the plaintiff; pain and suffering, loss of consortium or loss of care and love, punitive damages are meant to punish the defendant and deter any future similar behavior. California's Civil codes section 3294 "...In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

1. Historical Development of Punitive Damages Law

a. The First 200 years

The case of *Huckle v. Money* 95 Eng. Rep. 768 C.P. 1763

"...they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour;..."

And *Wilkes v. Wood*. 98 Eng. Rep. 489, 498--99 C.P. 1763.,

"...Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself..." in 1763 were one of the first cases in the English common law that recognized punitive damages or exemplary damages. These two cases are later followed by cases approving punitive damages as compensation of injuries resulting from torts

involving conscious and intentional prosecution, false imprisonment, and trespass. Punitive damages during that time were used in cases as an auxiliary “helper” to the criminal law system. However, punitive damages in colonial America were available only in comparatively small class of torts.⁴⁴

b. Modern Era

Beginning in the late 1960’s, punitive damages became more popular in the U.S. The advent of mass tort litigation resulted in an increase of punitive damages claims against manufacturers, including the possibility of repeated imposition of punitive damages for an alleged risk in a single product line or a single decision.

“Reckless disregard” became a popular standard for punitive damages liability. A number of states utilize a triple “trigger” - punitive damages can be awarded if the defendant engaged in willful, wanton, or gross misconduct. The triple trigger approach gives plaintiffs three separate paths to obtain punitive damages. In some states, “gross negligence” can support a punitive damages award.

Changes in punitive damages law and practice also impacted both the frequency and size of punitive damages awards. For example, until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages award in each case was modest in proportion to the compensatory damages awarded. Then, in the late 1970’s and 1980’s, the size of punitive damages awards “increased dramatically” and “unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface.” “Today,” as one respected commentator in the field has noted, “hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case.”⁴⁵

⁴⁴ American Tort Reform Association, Punitive Damages Reform, available at <http://www.atra.org/show/7343>. (last visited 25 September 2008).

⁴⁵ American Tort Reform Association, Punitive Damages Reform, available at <http://www.atra.org/show/7343>. (last visited 25 September 2008).

2. Tortious Act

In order to claim for punitive damage, it is requires that the alleged offensive act have risen from a tort, not a contract. Punitive damages will only be awarded if the plaintiff can proves that the defendant is liable for compensatory damages and that the act of fraud, malice or willful, wanton or reckless conduct one was present and was related to the injury for which compensatory damages were awarded. (section 15-34-40 of SC Bill). Additionally, punitive damage will not be award against a person solely on the basis of vicarious liability for the acts or omissions of another. In another words, punitive damages will only be award against a person who participated in the conduct constituting the aggravating factors for punitive damages.⁴⁶

3. Standard of Proof

While the burden of proof in claims for punitive damages, the standard of proof for punitive damages is usually higher than other types of standard of proof. While constitutional standard of proof “probable cause” is the lowest level of proof, punitive damages standard of proof “clear and convincing” is considered to be second to highest level of proof. It lays between civil standard of proof “preponderance” and criminal standard of proof “beyond a reasonable doubt”. This means that the plaintiff must present clear and convincing evidence to the court in order to claim for punitive damages. Never-the-less, it is still up to the juries to award punitive damages or not. Often time punitive damages are only award in egregious cases which held serious circumstances.

4. Determining amount of punitive damages

In determining amount of punitive damages, the following trier of fact must be put into consideration:

- 1) Shall consider the purposes of punitive damages
- 2) May consider only that evidences that relates to the following:
 - a) The reprehensibility of the defendant’s motives and conduct;

⁴⁶ American Justice Partnership, Speaker’s Resource: Punitive Damages, available at http://www.legalreforminthenews.com/speakers/punitives/punitvies_1.html. (last visited 17 September 2008).

- b) The likelihood, at the relevant time, of serious harm;
- c) The degree of the defendant's awareness of the probable consequences of its conduct;
- d) The duration of the defendant's conduct;
- e) The actual damages suffered by the claimant;
- f) Any concealment by the defendant of the facts or consequences of its conduct;
- g) The existence and frequency of any similar past conduct by the defendant;
- h) Whether the defendant profited from the conduct;
- i) The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

However, despite all the factors in which the court uses to determine the amount of punitive damages, often time punitive damages awarded by the United States Courts are considered to be "grossly excessive". To avoid such problems the Supreme Court had applied three following factors in making decision regarding grossly excessive amount of punitive damages as provided in the case of *BMW of North America, Inc. V. Gore*:

"(a) ...Because such an award violates due process only when it can fairly be categorized as "grossly excessive" in relation to the State's legitimate interests in punishing unlawful conduct and deterring its repetition, cf. *TXO*, 509 U.S., at 456, the federal excessiveness inquiry appropriately begins with an identification of the state interests that such an award is designed to serve. Principles of state sovereignty and comity forbid a State to enact policies for the entire Nation, or to impose its own policy choice on neighboring States. e.g., *Healy v. Beer Institute*, 491 U.S. 324, 335-336. Accordingly, the economic penalties that a State inflicts on those who transgress its laws, whether the penalties are legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and economy, rather than those of other States or the entire Nation...

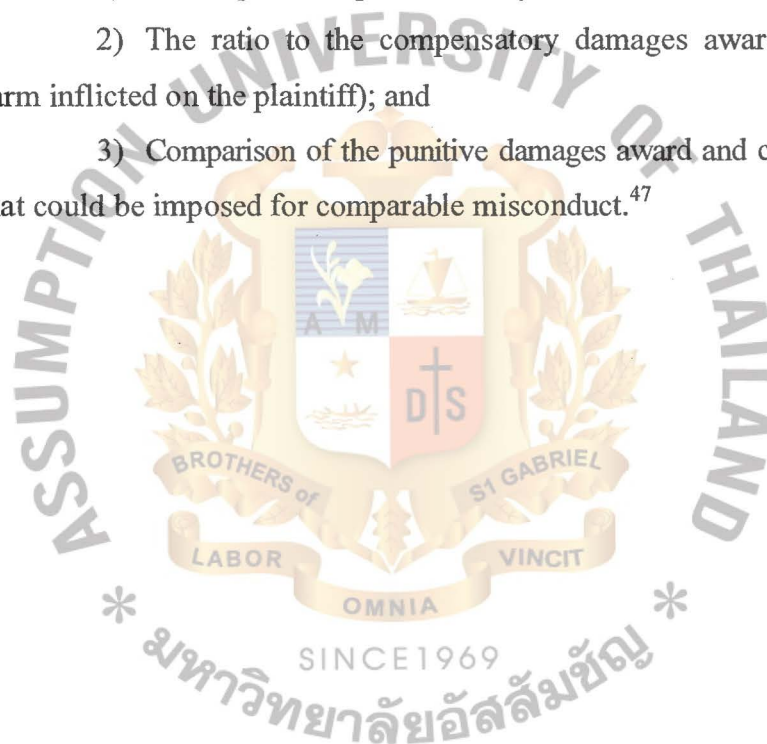
(b) Elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the

conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. ..

(c) None of the aggravating factors associated with the first (and perhaps most important) indicium of a punitive damages award's excessiveness—the degree of reprehensibility of the defendant's conduct, see e.g., *Day v. Woodworth*, 13 How. 363, 371...”

In summary the three factors which the Supreme Court applied in making this determination are:

- 1) The degree of reprehensibility of the defendant's conduct;
- 2) The ratio to the compensatory damages awarded (actual or potential harm inflicted on the plaintiff); and
- 3) Comparison of the punitive damages award and civil or criminal penalties that could be imposed for comparable misconduct.⁴⁷



⁴⁷ *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Chapter 4

Analysis of the Problem with Punitive Damages in Thai Law

In adopting punitive damages Thai legislation seems to have jumped the gun by ignoring general tort law in introducing punitive damages. Perhaps the Unsafe Product Liability Act B.E. 2551 is a “test run” for other jurisdiction administering these damages. It seems that the Thai legal system and its courts are sophisticated enough to tackle this issue.

Prior to the Unsafe Product Liability Act B.E. 2551 (2008), a case against manufacturers or sellers of unsafe products had to be brought under the Civil and Commercial Code section 420. Many argue that using only section 420 of Civil and Commercial Code to govern product liability is not sufficient enough due to the burden of proof which lay upon the plaintiff to prove the negligence or intention of the defendant which is very difficult to do and provides low compensation. One of many suggestions in attempting to increase the effectiveness of product liability law in Thailand was to incorporate the concept of punitive damages into the new product liability law. In addressing and as a response to these problems, Thailand enacted the Unsafe Product Liability Act 2551 B.E. (2008), which shifted the burden of proof from the plaintiff to the defendant and allows the court to award punitive damages as a punishment to the defendant. However, punitive damages is a type of damages which may have been practice for over 100 years in common law countries, it is still a new concept to Thailand.

By accepting punitive damages to be a type of compensation in the Unsafe Product Liability Act B.E. 2551 (2008), it can be said that Thailand had impliedly accepted this form of damages which is often used in common law countries. However, instead of following the steps of countries which have been practicing punitive damages. Thailand had ignored the general law and only approved of punitive damages in specific act of law. By doing this, Thailand may soon run into problems with the standard of punitive damages. By only inserting punitive damages into the Unsafe Product Liability Act legislators have created a small number of cases in which parties may claim and have done so in a manner which may leave many judges ill equipped to make determinations on the damages. They may only be

a handful of judges hearing cases under the act rather than widespread coverage throughout the judiciary; this will lead to an underdeveloped understanding of the law. This could be averted by introducing punitive damages into general tort law. Doing this will expose more of the judiciary to this legal concept and provide a broader understanding and more effective judicial system.

A. Criteria of cases for punitive damages

The Unsafe Product Liability Act developed and grew from the law of tort which it is a specific law of tort which emphasizes on only certain acts of misconduct. Therefore, if such wrongful act and injuries caused did not occur, due to unsafe product, the injured party will have to claim against the tortfeasor under the Civil and Commercial Code which only allows actual damages as compensation. This raises a problem regarding the rationale behind the punitive damages under Thai law. Section 11 of the Unsafe Product Liability Act B.E. 2551 (2008) provides

“As well as assessing damages in accordance with the Civil and Commercial code, the court may assess compensation taking into account the following matters:

(1) Regarding damages for mental loss caused by loss or damage to the body, health or hygiene of the injured person, where the injured person has died, his/her husband, wife parents or heirs are entitled to receive the damages.

(2) If it appears that the business operator manufactured, imported, or sold the product, knowing that it was unsafe, or without knowledge due to his negligence, or knew that the product was unsafe after manufacture, import or sale but failed to act appropriately to prevent loss or damage occurring, the court may order the business operator to pay punitive damages up to twice the actual amount, taking into account matters such as: the degree of loss or damage suffered, knowledge of the unsafe product by the business operator, the length of time during which the business operator has concealed the unsafe aspects of the product, the reaction of the business operator when he knew of the unsafe aspects of the product, the benefits the business operator has received, the financial status of the business operator, how the business operator has minimized the loss or damage, and whether the injured person did anything to cause the loss or damage to occur.”

From this section, one can conclude that, the reason for allowing punitive damages to be a type of damages to the injured party is because the law has the intention of punishing the business operator who intentionally manufactured, imported or sold the unsafe product. Additionally, this section also includes those business operators who may not have the knowledge of the unsafe aspect of the product but learned about it later on but did not do anything to prevent the harm from happening. However, if the rationale behind punitive damages of the Unsafe Product Liability Act is to punish the business operators as civil punishment and not criminal punishment and to deter others from committing the same kind of act, why the law won't allow this type of damages to be a type of damages in general tort cases. As of right now the torts law under Thai Civil and Commercial only concerns about damages which serves as compensatory and does not have the ability to deter or prevent the wrongful act, despite the fact that in a lot of cases the tortfeasor either intended to cause harm, acted with bad motives, malice or fraud. To which degrees or measure did the law use in deciding the level of severity of the action that deserves civil punishment. If the answer is because Unsafe Product Liability Act affects the industrial as a whole, therefore the wrongdoers under this Act shall be punished by subjecting to punitive damages. Another question still remains, what is the rationale that allows the injured party under Unsafe Product Liability Act to be awarded with punitive damages while the injured party under general torts law will only be awarded with actual damage as compensation.

Fact is in Thailand right now there are victims of accidents that occurred by either intentional acts or negligence which only falls within the scope of general torts and not product liability or consumer protection law which allows punitive damages, therefore the only type of damage that they are receiving are only the actual damages and non-pecuniary damages. However, non-pecuniary damages in Thailand only apply in the case where the victims have to live in pain and suffering. Non-pecuniary damages in Thailand do not apply to mental distress of the victim nor the suffering of the victims' family in the case of death. One example of a case where the terrorist group had set a car bomb in Narathiwat on February 17, 2005 killing 4 dead and 40 wounded. Another example is in the case where the students of Southern Thailand claimed Government for compensation in beating up and torturing

the victim. "...the case of detaining Mr. Aminudeen Kajik, religious teacher of Rungrid Witya A. Jana J. songkhla, in which he was tortured during custody by authorities. This incident also included seven persons that were arrested before this and this also included the case of army gang carrying people. Regarding to this matter, they hope that the government will responsible and compensate for the damage..." Although, this act of torturing the victim may falls under criminal law, looking from the civil law aspect, filing a claim under torts law using sections in Civil and Commercial Code will only obtain the victim the actual damage while there is no punishment to the authorities who commit such an act. There is a disconnect when a person can claim for the negligence of a business operator who manufactures or distributes an unsafe product but you cannot claim punitive damages if someone runs you over in their car. As stated before, the purpose of punitive damages is to punish. To create effective deterrents punitive damages should be applied throughout the civil law and not just product liability.

B. Burden of Proof

Referring to section 11 (2) of Unsafe Product Liability Act B.E 2551 (2008), empowers the court to award punitive damages to injured party if its appear to the court that the business operator knows of the unsafe aspect of the product at the time of manufacture, import or sell, or learned of such aspect after such process but did not do anything to prevent harm from occurring. However, it failed to provide the burden of proof to which party does the burden to prove of such facts lay upon. Therefore the question remains, does issue regarding punitive damages is consider to be a public order and good moral in which the court may consider on its own without claim from the plaintiff or is it a question of fact which the court will only have the right to award punitive damages upon the request made by the plaintiff. In this regard, it shall be refer back to the general rule of civil procedural which provides that the party which asserts the fact shall bares the burden of proof.

C. Standard of proof

In addition to the absent of burden of proof for punitive damages, the Unsafe Product Liability Act B.E 2551 (2008) also doesn't provide the standard of proof for punitive damage. To which extend does the plaintiff is require to proof that the injured occurred is severe to the point in which it is deserving of punitive damages; probable cause, preponderance, beyond a reasonable doubt or clear and convincing standard of proof.

D. Assessment

In preventing the amount of punitive damages awarded to be overly excessive, Thai legislative should also limit the maximum amount of punitive damages which the court shall be empowered to award to the injured party. The Product Liability Act B.E 2551 provides that the punitive damages awarded by the court shall not exceed 5 times of the actual damages. This amount of damages may be consider as an adequate punishment for private sectors which are small in size. However for bigger company, this amount may not serve the purpose of punitive damages.

Chapter 5

Conclusion and Recommendation

A. Conclusion

After study the comparative of torts law and product liability law of Thai with that of U.S and European Countries, it can be concluded there are still some aspects of the new Unsafe Product Liability Act B.E 2551 of Thailand regarding damages may need more development.

Torts law is meant to hold those who commit a wrongful act against another liable for their conduct. In some jurisdictions if the actions of the wrong doer are so outrageous the courts will grant damages that are meant to deter the wrong doer from engaging in similar activity alone.

In the United States punitive damages are commonly awarded when the plaintiff suffers mental anguish, severe pain and suffering among others. Punitive damages developed through tort law and were eventually adopted into product liability cases. This appears to be a natural progression.

Within the European group punitive damages to the plaintiff for the loss of human dignity or liberty or third party having close relationship with injured party. However, punitive damages are not as widely accepted in European Countries as in the United States.

As for Thailand, the main reason Thailand had enacted the new Unsafe Product Liability Act B.E 2551 was to address the problems and difficulties which most claimants of product liability face in filing cases for product liability under general torts law of Civil and Commercial Code. The main problem that most claimants face is the problem with burden of proof regarding product liability cases, due to the reason that proving negligence of business operator is hard to do for claimants. However, in addition to the burden of proof, most scholars also believes that the damages allow under Thai CCC is low, not only does it do not do the justices for the injured party but it do not have to ability to punish and deter the action of the wrong doers, therefore the suggestion is, in addition to shifting burden of proof to

defendants, punitive damages should also be added into the new product liability law.

The study shows that all of the product liability law developed from general tort law. However, specific law of product liability is needed in most country due to burden of proof and contractual relationship requirement under general torts law. In general torts law, the burden of proof lay upon the plaintiff to prove the intention or negligence of the defendant while in product liability cases, proving of such fact are difficult to do, due to the reason that in most cases regarding product liability requires specific and technical knowledge to prove of such intention or negligence, therefore, liability under product liability laws of most countries are strict liability and the burden of proof shall be upon the manufacturer or seller of the product. Additionally, study also shows that, prior to allowing punitive damages to be a type of compensation to injured party in the product liability cases; Courts in foreign countries have long been awarding punitive damages in general torts cases. In setting standard for punitive damages, courts in foreign countries had continuously developing statute regarding punitive damages separately from their product liability laws. Despite such fact, the United States Courts often time still run into problems regarding the amount of punitive damages being "grossly excessive."

Therefore, prior to the time where the new Unsafe Product Liability Act B.E 2551 takes effect on 21 February 2009, there are many issues that Thai legislation needs to take into consideration.

B. Suggestions

Firstly, Thailand should study the concept of punitive damages in foreign country more regarding its benefit and problems. Secondly, if Thailand still wants to continue allowing punitive damages to be a type of compensation under Thai law, Thailand should adopt punitive damages into general torts law by adding a new section into torts law under Thai Civil and Commercial Code to help set standard of punitive damages in Thai law prior to allowing punitive damages to be use in product liability law. Additionally, under this section regarding punitive damages, the law should provide the basic elements of the act that would subject the defendant to

punitive damages such as elements which are parts of any criminal punishment. A clear definition of the types of conduct that is punishable also needed to be provided under the law. Punitive damages should only be award if the defendant's conduct exhibited criminal actions whether willfully or negligently and for both foreseeable and non-foreseeable offends.

In addition to actions which will subject the tortfeasor to punitive damages, the law should also specify an appropriate burden of proof. In this case the court may refer to Thai Civil Procedural Code which provides that whichever party assert facts that party shall bears the burden of proof, therefore regarding punitive damages, the plaintiff should bear the burden of proof of the damage and injuries and its severity of deserving the punitive damages. Additionally, it should also provide the standard of proof: to which extend would the plaintiff be require to prove its injuries or damage, probable cause, beyond reasonable doubt, preponderance or clear and convincing clause. In this regard the suggestion would be that the standard of proof should be "clear and convincing", because "clear and convincing" standard of proof doesn't require the plaintiff to prove its damages and the severity of the defendant's behavior to the extreme as "beyond reasonable doubt", but will give the court the exact idea and detail regard the damage which the plaintiff suffers and the level of punishment which should be bestow upon the defendant for such wrongful act. Lastly, regarding the assessment of punitive damages, in order for punitive damages to serve its purpose, the amount of punitive damages should be set to a higher level to which the figure itself creates conscious to the prospect tortfeasors. The suggestion level would be the minimum of 5 times but no more than 10 times the actual damages. However in assessing the amount of punitive damages the court must determine the reprehensibility of the defendant's actions. Basing on such degree of reprehensibility, the court must then compare the amount of punitive damages to the potential harm caused to the plaintiff or future potential harm which may be further cause by the defendant. These means that as the defendant moves up the scale of reprehensibility, the defendant becomes eligible for a higher ratio of punitive damages to the actual damages. In addition to reprehensibility, the court should also take the influence which the defendant had over the society into consideration while determining the amount of punitive damages, since the greater

influence the defendant had over the society, the greater risk that the damages will be higher. The amount 5 times of the actual damages will be high enough to set standard for punitive damages while limited the maximum to 10 times of the actual damages will help to prevent the awarding of punitive damages from becoming “grossly excessive”.

By applying these concepts into punitive damages under Thai law by adding a section regarding punitive damages into torts law in Civil and Commercial Code, Thailand will be able to uphold the justice for both defendant and plaintiff as Thailand had hoped for not only in product liability cases but for most of the civil cases while fulfilling the main purpose of punitive damages which are to compensate for the loss of injured parties, punish wrong doers in civil cases and deter any similar behaviors or actions of the defendant or others in the future.



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