

PUNITIVE DAMAGES REFORM IN THAI LAW:

A COMPARATIVE STUDY OF TORTS AND PRODUCT LIABILITY LAW

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The concept of punitive damages 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. Nevertheless, 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

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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.¹

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.

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

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

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.

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 administrating 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 B.E. 2551 (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. Therefore, the problems regarding punitive damages in Thailand currently lies on the topics regarding the criteria of cases which the plaintiff shall have the right to claim for punitive damages, the standard of proof, burden of proof and the assessment of punitive damages in each case.

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.² Therefore, if such wrongful act and injuries caused did not occur, due to unsafe product, the injured party will have to claim against the

² 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).

tortfeasor under the Civil and Commercial Code which only allows actual damages as compensation.³ 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 concluded 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 whose intentionally manufactured, imported or sold the unsafe product. Additionally, this section

³ Paijit Punyapun, Principle of Civil and Commercial Code: Principle of Torts (Bangkok: Winyuchon Publication House) 27 (1984).

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 effect the industrial as a whole, therefore the wrong doers under this Act shall be punish by subjecting to punitive damages.⁴ Another question still remains, what is the rationale that allows the injured party under Unsafe Product Liability Act to be award with punitive damages while the injured party under general torts law will only be award 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

⁴ Section 11 of Unsafe Products Liability Act B.E. 2551

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.

Secondly, regarding burden of proof in punitive damages cases, 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.

Thirdly, 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.

Lastly, the assessment of punitive damages in Thai law currently may create another problem in Thai judicial system. 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.

In 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.⁵

⁵ American Tort Reform Association, Punitive Damages Reform, available at <http://www.atra.org/show/7343>. (last visited 25 September 2008).

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.

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.