FOCUS: PUNITIVE DAMAGES IN CHINA
A STUDY ON PUNITIVE DAMAGES IN CHINA

ZHU Yan,* PAN Weilin**

From the early 1990s onwards, the institution of punitive damages in Chinese civil law has been introduced in translation, learned in discussion, and adopted over a 20 year period of development. Punitive damages were first provided for in Article 49 of the Consumer Protection Law (CPL) of 1993, and this institution has expanded into the field of tort liability with later laws (the Food Safety Law and the Tort Law), and judicial interpretation as supplement. Further, the latest amendment of the CPL has drawn attention to the following two points: (1) the calculation method has been amended leading to an increase in punitive damage amounts in most cases; (2) Article 55 specifies the corresponding provision in the CTL. It has coordinated and synchronized two institutions: punitive damages and mental injury compensation, in the way of entitling the consumer the “right to claim punitive compensation of not more than twice the amount of losses incurred” with the “the amount of losses” including the mental injury compensation.

In the second part, the very basis upon which the developing legislations above rests is rooted in intense academic discussions regarding various aspects of punitive damages. Some quintessential topics thereof selected in this article concern: the legitimacy of punitive damages, commentaries on buying-fake-while-knowing-it, the calculation method for punitive damages, and the relationship between punitive damages and mental injury compensation. In the summary, the authors reveal certain negative trends in the application of punitive damages.

I. THE DEFINITION AND CHARACTERISTICS OF PUNITIVE DAMAGES
IN CHINA .......................................................... 360
II. THE LEGISLATION ON PUNITIVE DAMAGES IN CHINA .................. 362
   A. Background ......................................................... 362
   B. The First Law — The Law of the People’s Republic of China on the Protection of Consumers’ Rights and Interests (CPL) ...................... 365
      1. The Legal Nature of Punitive Damages .............. 366

* (朱岩) Doctor of Law, Juristische Fakultät der Universität Bremen, Bremen, Germany; Professor, at Law School, Renmin University of China, Beijing, China. Contact: zhuyanlaw@gmail.com
** (潘玮麟) Ph.D Candidate, at Law School, Renmin University of China, Beijing, China. Contact: panweiliny@foxmail.com
2. The Purposes within a System of Chinese Characteristics .............................. 367

C. A Further Supplement — the “Interpretation concerning Contract for the Sale of Commodity Houses” .......................................................... 368

D. An Extension of the Scope — The Food Safety Law of the People’s Republic of China (FSL) ................................................................. 369

1. Deficiencies in the Understanding of Punitive Damages in Article 49 of the CPL .......................................................... 369

2. Comments on Article 96 of the Food Safety Law of the People’s Republic of China (FSL) ................................................................. 370

E. The Final Establishment — The Tort Law of the People’s Republic of China (CTL) .................................................................................. 372

F. The Further Improvement — The CPL Amendment of 2013 ......................... 374

III. MAIN DISCUSSIONS ON PUNITIVE DAMAGES IN CHINESE LEGAL ACADEMIA ................................................................. 375

A. The Legitimacy of Punitive Damages .......................................................... 375

B. The Commentaries on Buying-Fake-While-Knowing-It ................................ 377

1. The First Batch of Cases involving the Buying-Fake-While-Knowing-It: “Wang Hai Phenomenon” .......................................................... 377

2. Legal Validity of the Buying-Fake-While-Knowing-It Phenomenon ........... 378

3. What is “Knowing-Fake” or “Fraud” ........................................................ 380

C. The Calculation Method of Punitive Damages ............................................. 381

D. The Relationship between Punitive Damages and Mental Injury Compensation .................................................................................. 383

IV. BRIEF SUMMARY AND CONCLUSIONS ......................................................... 387

I. THE DEFINITION AND CHARACTERISTICS OF PUNITIVE DAMAGES IN CHINA

After the foundation of the People’s Republic of China, the term “punitive damages” in the field of civil law was first brought to the attention of and widely discussed by scholars in the early 1980s. Those discussions can be categorized into two main subjects: Firstly, pursuant to Article 351 of the Economic Contract Law of the People’s Republic of China (CECL) (July 1982–October 1999), the ideas of “the punitive penalty for breach of contract” or “punitiveness in the principle of penalty for breach of contract” were studied and explicated. However, in connection with the Contract Law of the People’s Republic of China (CCL) promulgated in 1999 and a better understanding of the punitive liability, later scholars began to realize the differences between “punitive damages” and the

---

1 Article 35: If a party breaches an economic contract, it shall pay damages for the breach to the other party. If the breach of contract has already caused the other party to suffer losses that exceed the amount of the damages, the breaching party shall make compensation for the amount exceeding the breach of contract damages. If the other party demands continued performance of the contract, the breaching party shall continue to perform.
“punitive penalty for breach of contract.”

Secondly, the institution of punitive damages in the American legal system was introduced by Chinese scholars in succinct translations, but few of these concerned formally conceiving punitive damages in China based on comparative legal studies. By the beginning of the 21st century, the emerging studies and expositions were mainly focused on punitive damages in the U.S., as well as the understanding and explanation of the provisions provided for punitive damages in the Chinese legal system. Largely, those discussions above could have been attributed to the fact that the legislature and scholars were inspired by improvements in the U.S. in regard to punitive damages toward malicious torts in product liability and preferential protection for consumers dating to the 20th century, and to the fact of the first statutory confirmation of punitive damages in Article 49 of the Law of the People’s Republic of China on the Protection of Consumers’ Rights and Interests (CPL) of 1993.

Therefore, from a comparative perspective in relation to the American legal system, punitive damages could usually be defined by Chinese scholars as an exceptional civil liability in excess of actual damages, corresponding to compensatory damages, that functions with a purpose of punishment and deterrence in the case of a malicious tortious or contractual misconduct. Compared with compensatory damages, punitive damages are characterized by the following three aspects:

1. As regards the purpose of the institution, it consists of both compensation and punishment. To a certain extent, it first functions as a compensation for real losses, then beyond that the sum is as a punishment for malicious or willful misconduct. But specifically, the defendant’s fault is to be severe, his motives malicious, and the behaviors

---

2 Punitive damages shall be awarded pursuant to certain provisions stipulated in statutory laws and regulations, and further be limited by a liability ceiling to ensure the clarity and predictability of law. In some cases, parties in contract are likely to stipulate that in the case of breach of contract by either party a certain amount of penalty shall be paid to the other party which exceeds the actual losses, reflecting punitive purpose. But that is not within the technical concept of punitive damages as discussed further here.

3 Such as: Jeremiah Y Spires (translated by WANG Zhilong), 美国产品质量方面的法律问题 (Legal Issues on the Product Liability in America), (4) 环球法律评论 (Global Law Review) 60 (1984); Thomas W Dumfries, (translated by CHENG Jianying), 违反合同时的补救办法 (Remedy Methods for Breach of Contract), 外国法学 (Foreign Legal Academia) 40 (1982).


6 The term “punitive damages” was not used in the statement of Article 49 of the CPL. However, the calculation method which increases the compensation for victims’ losses is of a punitive character. Further, according to the official legislative explanation of the CPL, the establishment of punitive damages in this law is based on the comparative studies of punitive damages in other countries. See 中华人民共和国消费者权益保护法释义 (The Explanation of the Law of the People’s Republic of China on the Protection of Consumers’ Rights and Interests), 全国人民代表大会常务委员会法制工作委员会编 (edited by the Regulations Department of the State Administration of Industry and Commerce, Changchun Press China, at 117–118 (1993).
antisocial. Only in such cases shall a claimant be awarded punitive damages. Hence, the specific purpose of punitive damages in relation to compensatory damages is to deter and prevent severe misconduct by means of awarding damages largely in excess of actual injury or losses suffered by the victim.

2. In fact, whether a certain sum of actual losses could be calculated precisely is not a necessary premise for an award of punitive damages in a specific case, although the premise is undoubtedly that the damage shall be actually incurred, and how to calculate the sum of punitive damages shall mainly relate to actual damage. For this reason, the damages aiming at punishment shall exceed the compensation for actual losses on a large scale. Specifically, when considering whether an award of punitive damages should be affirmed, the court is to take the seriousness of the defendant’s fault, his motives and income or wealth into account.

3. In respect to the source of provisions provided for punitive damages, parties in contract are legally allowed to stipulate that in the case of breach of contract by either party a certain amount of penalty shall be paid to the other party, which exceeds the actual losses for punitive purpose. But that is not punitive damages in an authentic sense. Punitive damages shall be only awarded by a court or in accordance with provisions in statutes rather than clauses stipulated by contractual parties, which is a character distinguishing punitive from compensatory damages.

II. THE LEGISLATION ON PUNITIVE DAMAGES IN CHINA

A. Background

The modernization of civil law in China was initiated by the legislative reform (xiulü) at the beginning of the 20th century, the late Qing Dynasty. Because China has a long history of codification in a manner similar to the civilian tradition and Chinese traditional philosophy also takes a deductive approach, China decided to transplant the European civil law, first via Japan due to its geographic proximity and intensive intellectual exchanges at that time. It was the first time that European civil law was introduced into China. The first

7 See WANG, fn. 5.
9 As to the reason why China transplanted the European civil law system instead of the common law, many explanations have been provided. The most convincing opinions, at least according to the results of modern research, point out that the political system, geographic neighborhood and legal communication between China and Japan have played a dominant role in the decision of copying the German legal system. See SUN Xianzhong, Die Rezeption der westlichen Zivilrechtswissenschaft und ihre Auswirkung im modernen China (The Reception of Western Civil Law and Its Influence in Modern China), Rabels Zeitschrift für Ausländisches und Internationales Privatrecht (RabelsZ) 71, 644 (2007); SHAO Jiandong, Zur Rezeption des deutschen Zivilrechts in China (On the Releption of German Civil Law in China), Juristenzeitung (Journal of Rabel for Foreign and International Private Law) (JZ) (Journal of Jurists), 80 (1999).
draft of a Chinese civil code (daqing minlü caoan) was published in 1911. It is obvious that the draft practically adopted the pandect system except for its last two books, namely, family law and the law of succession which retained the customs of the traditional consanguineous society in China. As far as tort law is concerned, the three general clauses provided in Articles 945, 946 and 947 of the draft best exemplify the historical affinity of Chinese tort law to German tort law.10

The first enacted Chinese Civil Code (CCC) was promulgated book by book from 1929 to 1930. Even today, the CCC with many amendments and modifications is still effective in Taiwan province. The CCC absorbed new legal theories and law-making techniques such as the combination of civil law and commercial law, rooted in the Swiss Civil Code (Zivilgesetzbuch) and oriented toward social interests.11

Since the foundation of the People’s Republic of China, theories and legislation of the former Soviet Union have at various points been introduced, learned and adopted in the field of civil law.12 However, since the policy of reform and opening up, China has turned back toward the continental European legal systems, which make clear that compensation is the main aim of tort law, as damages have to be calculated in accordance with losses suffered by the victim. To the contrary, the idea of punishment is an alien element in private law, and even tort law cannot justify awarding the claimant a windfall through the receipt of punitive damages when he has suffered no corresponding damage. As a typical legislative example, the compensatory principle mentioned above is well reflected by provisions, Articles 112, 113 and 114 of the CCL, with the exception of mental injury compensation, calculated with reference to the defendant’s subjective fault state, which thus reflects the purpose of punishment.

---

10 Helmut Koziol and ZHU Yan, Background and Key Contents of the New Chinese Tort Liability Law, 1 JETL 328 (2010).
12 Although China had adopted the German pandect system without essential changes, the People’s Republic of China, founded in 1949, abolished all the important laws from Republican times on political grounds (fei chu liu fa quan shu). Subsequent legislation was oriented completely toward the former Soviet Union, which basically denied the central position of civil law in governing horizontal social relations and the very idea of market transactions and personal freedom.
13 Article 112 of the CCL: Where a party fails to perform its obligations under the contract or its performance fails to conform to the agreement, and the other party still suffers from other damages after the performance of the obligations or adoption of remedial measures, such party shall compensate the other party for such damages. Paragraph 1 of Article 113: Where a party fails to perform its obligations under the contract or its performance fails to conform to the agreement and cause losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the interests receivable after the performance of the contract, provided not exceeding the probable losses caused by the breach of contract which has been foreseen or ought to be foreseen when the party in breach concludes the contract. Paragraph 2 of Article 114: Where the amount of liquidated damages agreed upon is lower than the damages incurred, a party may petition the People’s Court or an arbitration institution to make an increase; where the amount of liquidated damages agreed upon are significantly higher than the damages incurred, a party may petition the People’s Court or an arbitration institution to make an appropriate reduction.
Since the promulgation of General Principles of Civil Law (GPCL) of 1986, the compensatory principle mentioned above has been well adopted in both contractual liability and tortious liability.\(^\text{14}\) As for the former, Article 112 of the GPCL stipulates that the party who breaches a contract shall be liable for compensation equal to the losses consequently suffered by the other party; as for the latter, Articles 117 to 119 prescribe the compensation for damages of property or intellectual property and for infringement upon personal rights.\(^\text{15}\) However, Article 120 especially stipulates that if a citizen’s right of personal name, portrait, reputation or honor is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation rehabilitated, the ill effects eliminated and an apology made; he also is also entitled to demand compensation for losses. The so-called “compensation for losses” covers both pecuniary and non-pecuniary damages.\(^\text{16}\) So, mental compensation can be included as non-pecuniary damages, reflecting the purpose of punishment.

It should be noted that pursuant to Article 35 of the CECL of 1982, some scholars believed that the main purpose of liability for breach of contract is punishment in order to force parties to fulfill their obligations as contracted.\(^\text{17}\) But the provisions of Articles 112, 119 of GPCL stipulates that anyone who infringes upon a citizen’s person and causes him physical injury shall pay his medical expenses and his loss in income due to missed working time and shall pay him living subsidies if he is disabled; if the victim dies, the infringer shall also pay the funeral expenses, the necessary living expenses of the deceased’s dependents and other such expenses.


\(^{\text{15}}\) Article 119 of GPCL stipulates that anyone who infringes upon a citizen’s person and causes him physical injury shall pay his medical expenses and his loss in income due to missed working time and shall pay him living subsidies if he is disabled; if the victim dies, the infringer shall also pay the funeral expenses, the necessary living expenses of the deceased’s dependents and other such expenses.

\(^{\text{16}}\) LIANG Huixing, 中国民法经济法诸问题 (Key Issues on Civil Law and Economic Law in China), China Legal Publishing House (Beijing), at 70 (1999).

\(^{\text{17}}\) As to why the contract law of 1982 was developed with the purpose of punishment in the liability for breach of contract, two reasons, according to some viewpoints based on socialist system in the early 1980s, were that firstly, compared with the civil law system, the socialist legal system is of a distinguishing character, which indicates that the liability for breach of contract should be established under the function of maintaining the order of society and economy by means of ensuring the fulfillment of the obligations between both parties. Therefore, the contract penalty is different from the contractual damages, and the former may be awarded even without any actual losses caused by either party. Secondly, in the socialist planned economy, especially the highly centralized planned economy system, the state planning dominates the process of production and consumption of the whole society, which means that not only what and how the enterprises produce, but also where the raw materials come in and products go to are totally fixed and preplanned. For this reason, each contract fulfills state planning as a specific component of the general planning. Once a component fails to work, then the whole chain of the planning could be severely frustrated, which would cause heavy losses in a wide range of social and economic situations. This could be even more serious in the socialist planned economy than in the market economy. In addition, under the planned economy, because the material and the capital are separate and run under the quota system, if an enterprise on the one hand receives the capital from an administrative department and on the other hand obtains the material quota from another department, under the circumstance of the breach of contract, it may be impossible to purchase other alternatives without a corresponding material quota. Therefore, compensation is usually insufficient to make up for the losses. See CHEN Xueming, 惩罚性违约金的比较研究 (A Comparative Study on the Contract Penalty), 3–4 比较法研究 (Journal of Comparative Law) 47 (1990).
113 and 114 of the CCL of 1999 completely abolished the punitive purpose adopted in regard to liability for breach of contract of the CECL. The compensatory principle of the liability for breach of contract in the CCL indicates that the party that breaches a contract shall only be liable for compensation equal to the losses consequently suffered by the other party. However, many academic studies on punitive liability dating back a long time to the CECL of 1982 theoretically contributed to the preparation for the later legislation of the institution of punitive damages, which was first exemplified by the Article 49 of the Consumer Protection Law of 1993 (CPL). It worth discussing some ideas brought up at that time. For example, it was argued that compensatory damages do not always compensate fully, because an award of compensatory damages is usually insufficient in specific cases, especially when the losses or injury are of an elusive or intangible character.18

B. The First Law — The Law of the People’s Republic of China on the Protection of Consumers’ Rights and Interests (CPL)

Since China adopted its reform and opening-up policy in 1978, the market-oriented economy has been developing rapidly, consumer goods have become available in abundance, and the consumption level has gradually increased. Meanwhile, infringements of consumer rights have become more frequent and severe. Driven by economic interests, the increasing number of fake and shoddy goods, food, household appliances, pharmaceuticals, etc. has brought about a serious threat to the personal and property safety of consumers.19 In 1984, the China Consumer Association was established and began dealing with consumers’ complaints and helping consumers claim their rights. Between 1993 and 1994, a series of laws involving market regulations were enacted, such as the “Anti-Unfair Competition Law of the People’s Republic of China,” “Product Quality Law of the People’s Republic of China (2000 Amendment),” the “Law of the People’s Republic of China on the Protection of Consumers’ Rights and Interests (CPL)” and the “Advertising Law of the People’s Republic of China,” etc. In the context of such background, the institution of punitive damages was established, first aiming at deterring business operators from practicing fraud in providing commodities or services to consumers, and further at protecting the lawful rights and interests of consumers.

Punitive damages were first provided for in Article 49 of the CPL of 1993:20 Business operators engaging in fraudulent activities in supplying commodities or services were, on

---

18 See CHEN, fn. 17.
the demand of the consumers, to increase the compensation for victims’ losses; the increased amount of the compensation was listed as twice the costs that the consumers paid for the commodities purchased or services received. Further, Article 113(2) of the CCL of 1999 provides that a business operator who practices fraud in providing commodities or services to consumers shall undertake to compensate for the damage in accordance with the provisions of the Law of the People’s Republic of China on the Protection of Consumers’ Rights and Interests.

1. The Legal Nature of Punitive Damages. — With regard to the scope of application of Article 49 of the CPL, the institution of punitive damages is a kind of contractual liability. First of all, according to the framework of the CCL, Article 113 belongs to the “Chapter VII Liability for Breach of Contract,” which indicates that China has legislated punitive damages as a method of contractual remedy. Secondly, when a business operator provides consumers with counterfeit goods or defective services, the quality certainly fails to meet the agreed requirements, and thus the operator shall bear the liability for breach of contract; but in such cases as mentioned above, if or when either party causes losses to the other party, the former does not necessarily violate the provisions provided for protecting property or personal rights by tortious laws. Further, there shall be an award of punitive damages only under the very circumstance where a contractual dispute takes places between business operator and consumer. Since the liability shall be borne between both parties to contracts, the punitive damages could be of a contractual character.

Therefore, the first requirement of claiming punitive damages shall be to burden the claimant with introducing evidence concerning the existence of a valid contract between the business operator and the consumer, even though this contract could be invalid or revoked afterwards. This rule has been accepted in the field of judicial practice, as in the following classic case: On December 14, 1995, a consumer named Su Zhao in Nanjing purchased a J-2020SG Beijing Jeep from Nanjing Motor United Trade Company

---

22 See WANG, fn. 5.
24 This rule has been followed for almost 20 years and reflected again in the relation between Article 55 and Articles 48–54 of the latest amendment of the CPL. The punitive damages is a kind of extra extraction upon operators, thus in addition to the punitive damages pursuant to Article 55, a consumer is still entitled to claim his rights according to Articles 48–54, e.g. the rights of asking for fulfilling the obligations, or refunding advance payments, or returning the commodities respectively.
25 As for this case, please refer to 首例汽车双倍索赔成功 (The Double Compensation Affirmed by Court the First Case about Car-Defect Claim), 北京青年报 (The Beijing Youth Daily), Apr. 16, 1997.
at the price of 55,200 RMB. He drove the car back home, but it produced an abnormal sound as soon as the speed was accelerated to 80 kilometers per hour. On the next day, Su Zhao telephoned the seller to complain of this severe quality problem but received no reply from the company. On December 16, the car was sent to the Nanjing Special Service Centre of Beijing Motor Industry Associates by Su Zhao, and the test result proved that the rotary gear was heavily worn with obviously irregular welding joints on the chassis and inferior vehicle technology. In addition, this jeep did not possess a temporary license from Nanjing Municipal Public Security Bureau. The car was thereby identified as a counterfeit product, and Su Zhao proposed to return it to the selling company with a claim for double compensation on December 18. The seller agreed to the return but refused to pay the additional compensation, and on December 24, refunded 55,200 RMB plus 900 RMB for repair fees to Su Zhao, retrieving the jeep. Su Zhao then sent the certificate of the car to Beijing Jeep Company for verification, and this certificate turned out to be a counterfeit too. In March 1996, Su Zhao brought a lawsuit to the district court and required the selling company to bear the additional, compensation liability. The court of first instance held that the buyer had accepted the refund, and therefore no legal relation existed between both parties. The claim for compensation thus had no legal ground, and the court dismissed the lawsuit. However, Su Zhao appealed the decision, and the Nanjing Intermediate People’s court affirmed that the company was guilty of fraud and should assume the double compensation liability (i.e. 2x55,200 RMB).

2. The Purposes within a System of Chinese Characteristics. — The institution of punitive damages has already established by Article 49 of the CPL, with a conspicuous purpose that is of a punitive, exemplary and deterrent character. More specifically, on the one hand, an award of punitive damages is necessary to urge business operators to practice in good faith and with integrity; also, the right to claim for punitive damages could encourage consumers to fight against those business operators with unscrupulous practices.\(^{26}\) To sum up, the most notable feature of the CPL in China is the purpose of stimulating the fights for the rights and interests of consumers and against business operators’ adulterating the products (for sale) or posing fake ones as authentic, shoddy ones as of good quality, or of sub-standard as standard.

And why it is necessary or possible to add a punitive exaction upon producers or sellers in some cases? As for the legitimacy of such awards, some elusive and intangible costs, losses or injury should be taken into consideration. Given the difficulty in quantifying some losses or injuries such as time and negative emotions in the process of claiming lawful rights, the compensatory damages are likely to fall short of the actual

\(^{26}\) LI Changqi, and XU Mingyue 消費者保護法 (The People’s Republic of China on the Protection of Consumers’ Rights and Interests), Law Press China (Beijing), at 319 (1997).
costs or injury. Thus, for the majority of consumers whose lawful rights and interests have been infringed, it is common that they “take rights seriously” and “struggle for rights.” So one theory held by some scholars\textsuperscript{27} is that receipt of punitive damages shall not be deemed to be a windfall or an undeserved enrichment; such awards could be regarded as a bonus or reward for cracking down on business operators’ fraud or counterfeiting. In other words, Article 49 of the CPL providing for punitive damages imposes a punitive exaction upon business operators to urge consumers to fight against operators themselves.

Now there still remains a tough issue on whether Article 49 of the CPL should be applied in the case of buying-fake-while-knowing-it.\textsuperscript{28} In other words, how is the policy or purpose of ‘stimulating fake while knowing it’ to be precisely understood? Shall the court affirm an award of punitive damages when civilians crack down on business operators’ fraud or counterfeiting as a profitable business by the receipt of an extra sum in excess of the price at which they purchase goods or services?

\textit{C. A Further Supplement — The “Interpretation Concerning Contract for the Sale of Commodity Houses”}

A judicial interpretation concerning contract for the sale of commodity houses of 2003 (CSCHI)\textsuperscript{29} has clarified circumstances under which punitive damages shall be awarded in cases of sale of commodity houses.

Article 8 of the interpretation stipulates that: In case of any of the following circumstances, which causes the purpose of a contract for the sale of commodity houses unable to be realized, the buyer who is unable to obtain the house may request the rescission of the contract, refund of the already-paid money for purchase of the house and the interest thereof, as well as the compensation for losses, and may also request that the seller should bear the liability for compensating no more than once the already-paid money for purchase of the house: (a) after the contract for the sale of commodity houses is concluded, the seller mortgages the house to a third person without notifying the buyer;

\textsuperscript{27} See WANG, fn. 20.

\textsuperscript{28} It means that a consumer knowing the defect of the product in advance still buys the product and then claims punitive damages. This situation was named by scholars and the media as the “Wang Hai phenomenon,” which this article discusses further below.

\textsuperscript{29} Interpretation of the Supreme People’s Court on the Relevant Issues concerning the Application of Law for Trying Cases on Dispute over Contract for the Sale of Commodity Houses (Interpretation 7 (2003) of the Supreme People’s Court). The present interpretation is formulated in accordance with the GPCL, the CCL, the Urban Real Estate Administration Law of the People’s Republic of China, the Guaranty Law of the People’s Republic of China and other relevant laws and in combination with the civil judicial practices with a view to correctly and timely trying the cases on dispute over contract for the sale of commodity houses.
(b) after the contract for the sale of commodity houses is concluded, the seller sells the house to a third person. Further, Article 9: If, when concluding a contract for the sale of commodity houses, the seller is under any of the following circumstances which causes the contract to be invalid or canceled or rescinded, the buyer may request the refund of the already-paid money for purchase of the house and the interest thereof, as well as the compensation for losses, and may also request that the seller should bear the liability for compensating no more than one time of the already paid money for purchase of houses: (a) the seller intentionally conceals the fact of not having obtained the certificate on permit of advance sale of commodity houses or provides false certificate on permit of advance sale of commodity houses; (b) the seller intentionally conceals the fact that the sold house has been mortgaged; (c) the seller intentionally conceals the fact that the sold house has been sold to a third person or is the house for compensation and resettlement due to demolishment.

The interpretation elaborates the application of punitive damages in cases of sale of commodity houses and indicates the standpoint on this issue in judicial practice. On one hand, does a commodity house belong as a “commodity” written in Article 49 of the CPL? Given the provisions provided above, the answer is obviously yes.  

30 This semantic interpretation only matters in the clarification of whether the trade of commodity houses shall be included in the scope of the “living consumption behavior,” which is an essential requirement for the application of punitive damages of Article 49 of the CPL.  

On the other hand, the interpretation provides for cases in which the punitive damages shall be applied: (1) where the selling-one-house-to-two-buyers-respectively (yifang ermai) or mortgaging-the-house-to-a-third-person causes the purpose of a contract for the sale of commodity houses impossible to be realized after the contract concluded; (2) where seller’s concealing key facts or providing false information causes the contract to be invalid or canceled or rescinded.

D. An Extension of the Scope — The Food Safety Law of the People’s Republic of China (FSL)

1. Deficiencies in the Understanding of Punitive Damages in Article 49 of the CPL. — In the first place, the scope of the punitive damages of Article 49 only deals with a contractual relationship. Where business operators provide consumers with counterfeit goods or defective services under Article 49, the breach of contract may just cause

30 See YANG, fn. 14.
31 In fact, before the interpretation was issued, intense debates had been aroused among scholars on the subject: Should homebuyers be protected under the CPL? Even in a few cases since 2001, the court has affirmed the compensation required by homebuyers. See GUAN Shufang, 惩罚性赔偿制度研究 (A Study on the Institution of Punitive Damages), Chinese People’s Public Security University Press (Beijing), at 205 (2008).
expectation losses instead of any infringement of property or personal rights, punitive damages shall be still awarded, but if the fraudulent activities in supplying commodities cause severe injury or damage to property or personal rights of a user who is not in any contractual relationship with producers or sellers, there would be no application of punitive damages to provide victims generous compensation and to deter malicious operators. Therefore, scholars regard the respective ways in which the two situations above are treated in the legal system of rights remedies as unjust and unreasonable.\(^{32}\)

Furthermore, in the case where operators’ supplying counterfeit goods or defective services and a breach of contract unfortunately causes severe injury or damage to property or personal rights of a consumer (the other party of the contract), the victim may ask for contractual or tortious remedy depending on the evidence of damage or misconduct or other legal facts possessed as a plaintiff. But the choice between the contractual and tortious lawsuit would result in different amounts of compensation, which may improperly influence the victim’s decision.\(^{33}\)

Secondly, under Article 49 of the CPL, the compensation for consumers’ losses shall be enhanced by two times the payment made by a consumer for the commodity purchased or the service received. In fact, the way of calculation in fixed multiples could be too simple and rigid. For one thing, when the price of a product or service is low, misconduct could not be sufficiently deterred, while if the price is quite high this calculation method could overwhelm operators, thus hindering the development of new products and technological advances. For another, if consumers suffer injury from operators’ fraudulent activities, only in existence of a payment corresponding to the commodity or service can punitive damages be awarded. In this sense, the commodity or service provided as a gift or price or complimentary benefit would not meet the requirements of Article 49, which goes against the purpose of protecting the lawful rights and interests of consumers.\(^{34}\) In addition, under Article 49, the subjective fault state, the level of damage, and operator’s income or wealth etc. have not yet been taken into account.

2. Comments on Article 96 of the Food Safety Law of the People’s Republic of China (FSL). — On account of a series of severe food safety scandals,\(^{35}\) Article 96(2) of the


\(^{34}\) See KONG fn. 32.

\(^{35}\) For example, the “Sanlu Milk Powder Incident” is relevant here. In September 2008, Sanlu Group had to recall baby formula because it was contaminated with melamine, which caused kidney stones. Around 294,000 babies in China became ill after drinking the milk; at least six babies died.
FSL of 2009 stipulates: Besides claiming damages, a consumer may require the producer, who produces food which does not conform to the food safety standards, or the seller who knowingly sells food which does not conform to the food safety standards, to pay 10 times the money paid. This is the first time for the institution of punitive damages established in the field of tort law. In the following paragraphs, the authors will present some ideas concerning the merits and downsides of Article 96 of the FSL compared with Article 49 of the CPL:

(1) Article 96(2) indicates that the scope of punitive damages has been extended from only contractual to tortious lawsuits. Mainly due to the significant impact of series of food safety incidents such as the “Sanlu milk powder incident,” the institution of punitive damages was adopted legislatively in tort law, thus broadening its application scope, and the theory and calculation method of the institution marked by the common law system have been accepted by ordinary Chinese people. Some scholars therefore claim that the breakthrough of the application scope is undoubtedly a milestone, and that people should fully approve of the institutional improvement.  

But it is worth noting that the scope of Article 96 is not limited to tortious lawsuits, but is also applicable in contractual lawsuits. Hence, consumers are able to claim punitive damages based on Article 96 of the FSL in either the contractual lawsuit or tortious lawsuit. For example, in the Case No. 23 in “The Sixth Batch of Guiding Cases by Supreme People’s Court” (Notice No.18 in 2014) of the Supreme People’s Court), the consumer in this case claimed 10 times the money already paid pursuant to Article 96, and punitive damages were awarded.

(2) The provision clarifies the requirement of operators’ subjective state and the liability borne by sellers. The seller should certainly know whether the food for sale conforms to the food safety standards. As for the producer, if the food products do not conform to the food safety standards, it is assumed that the producer acts in the malicious subjective state, which would fulfill the requirement of Article 96. Furthermore, the clause “…conform to the food safety standards” in Article 96 shall be interpreted as “foods without unreasonable defects or risks threatening personal safety and health,” and the “food safety standards” are usually set in laws and regulations as national or local

---

36 See YANG, fn. 14.

37 Here are some main facts of the case: On May 1, 2012, the plaintiff, SUN Yinshan, bought 14 bags of “Yutu Brand” sausage in Jiangning Oushang Supermarket (the defendant) labeled with a production date that had already passed. Then he went straight to the service desk and asked for double compensation pursuant to Article 49 of the CPL as soon as he paid. The supermarket rejected his demand, so he sued the supermarket in court, claiming punitive damages of 5,586 RMB, which was ten times the food price pursuant to Article 96 of the FSL.
standards or standards of enterprise. However, the food safety standards shall not be limited to such written provisions.

(3) With respect to the amount of damages, considering that the sum calculated by doubling the price of the commodity or service is usually insufficient, as a majority of foods are at a lower price largely while the injury caused by defective food would tend to be severe, thus the calculation multiple has been raised to ten times in Article 96 of the FSL. However, by the same token, because the starting point of ten times is a low sum when considering food prices, the amount of damages may not be generous enough to deter such misconduct or to compensate victims fully. For instance, if a consumer buys a bottle of mineral water at the price of 2 RMB and then suffers severe sickness after drinking it they may end up with damages amounting to 1,500 RMB. But all he can claim is no more than 20 RMB pursuant to Article 96. For the reasons above, the calculation according to the food price is not an actual institution of punitive damages.

E. The Final Establishment — The Tort Law of the People’s Republic of China (CTL)

To some extent, the CTL was enacted at the right time, given a series of severe food safety incidents happening in the public eye with the full attention of the media, the public’s deep concern and strict enforcement by the authorities. For those reasons, the legislature and scholars usually thought highly of the institution of punitive damages, hoping that it would deter and prevent malicious torts in the field of the product

---

38 Article 21 of the FSL: “The national food safety standards shall be formulated and announced by the health administrative department of the State Council, for which the standardization administrative department of the State Council shall provide the serial number of national standards.” “The provisions on limits of pesticide residues and veterinary medicine residues, and the inspection methods and procedures thereof shall be formulated by the health administrative department and agriculture administrative department of the State Council.” “The inspection procedures for slaughtered livestock and poultry shall be formulated by the relevant competent department of the State Council jointly with the health administrative department of the State Council.” “Where any national product standard involves provisions of the national food safety standards, it shall assure its consistency with the national food safety standards.” Article 24: “In the absence of national food safety standards, local food safety standards may be formulated.” “When organizing the formulation of local food safety standards, the health administrative department of the people’s government of a province, autonomous region or municipality directly under the Central Government shall refer to the provisions of this Law regarding the formulation of national food safety standards and report them to the health administrative department of the State Council for archival purposes.” Article 25: “In the absence of national food standards or local standards for the food produced by an enterprise, the enterprise shall formulate enterprise standards as the basis for organizing the production thereof. The state shall encourage food production enterprises to formulate standards more stringent than the national food safety standards or than the local food safety standards. The standards of an enterprise shall be submitted to the provincial health administrative department for archival purposes and be applied inside the said enterprise.”

39 ZHANG Xinbao and LI Qian, 惩罚性赔偿的立法选择 (How to Design the Institution of Punitive Damages), 4 清华法学 (Tsinghua Law Review) 5 (2009).
liability.40

The inclusion of the term “punitive damages” in Article 47 of the CTL of 2009 was the first time it was written explicitly in Chinese legislation. Article 47 stipulates that where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to the corresponding punitive compensation. This provision set up a principle in tort law that only under the circumstance of malicious torts shall punitive damages be awarded as stipulated by law. Punitive damages are not universally applicable to all fields of tort law, which thus could be deemed as an exception to compensatory damages in tort law.

The requirements of the application of punitive damages in Article 47 mainly embrace the following aspects: (1) As for the tortfeasor, he shall be a manufacturer or seller, not a carrier or warehouseman,41 and as to the victim, he could be either the one who bought a product or another person who did not buy it but used it, including a close relative of the deceased victim; (2) As for the subjective state, the tortfeasor shall clearly know any defect of a product but continue to manufacture or sell the product, which indicates that he acts deliberately. Thus the negligence or gross negligence shall be excluded under Article 47 and the “knowing” in Article 47 should not be interpreted as “should have known.”42 In practice, the “knowing” could be assumed by some facts, such as that a manufacturer or seller has been informed by consumers of defects of the product, or the product has been tested as defective, or defects of the product have been found on the manufacturer or seller’s own;43 (3) As for some objectively required facts, the product shall at least have a defect, and further, the defect should have caused a death or any serious damage to the health of another person; (4) Last but not least, the theory of causation shall be concerned between the damages or injury and a defect of the product.44


41 Article 44 of the CTL: Where any harm is caused to another person by a defective product and the defect is caused by the fault of a third party such as carrier or warehouseman, the manufacturer or seller of the product that has paid the compensation shall be entitled to be reimbursed by the third party.

42 ZHANG Xinbao, 侵权责任法 [Tort Law (2th edition)], China Renmin University Press (Beijing), at 259 (2010).


44 In general, the theory of causation could be divided into the causation of constituting liability and the causation of assuming liability in the field of the civil law system, or into the causation in fact and causation in law in the field of the common law system. In China, some theories shall be considered in specific cases, such as the Adequacy Theory (but for test), the Substantial Theory, Proximate Causation Theory and die Gefahrbereichstheorie. See ZHU Yan, 侵权责任法 (Tort Law), Law Press China (Beijing), at 185–7, 189–201 (2011).
Compared with the FSL, the institution of punitive damages has been improved in the CTL at least in two aspects: Firstly, punitive damages shall only be required under the circumstance of malicious torts and serious injury in product liability, which makes the scope of application of punitive damages quite explicit and indicates a meticulous or even conservative standpoint in the legislature toward the institution.\(^{45}\) Secondly, Article 47 stipulates that it is one of the objective requirements that the product shall at least have a defect, which pertains to the pertinent provisions of product liability in the Product Quality Law of the People’s Republic of China (PQL) of 2000. For reasons above, it is legitimate to interpret the “…conform to the food safety standards” in Article 96 of the FSL as the “foods without unreasonable defects or risks threatening personal safety and health.”

\[F. \text{The Further Improvement} — \text{The CPL Amendment of 2013}\]

By the same token, to better protect the lawful rights and interests of consumers and to deter and prevent business operators’ fraudulent and counterfeiting behaviors, the institution of punitive damages had to be developed in the CPL when modified in 2013. Therefore, an award of punitive damages shall be generous enough to achieve the functions above which are of a punitive and deterrent character.\(^{46}\) Article 55 of the latest CPL amended in October 2013, in reference to Article 49 of the former CPL of 1993, stipulates:

“Business operators which fraudulently provide commodities or services shall, as required by consumers, increase the compensation for consumers’ losses, and the increase in compensation shall be three times the payment made by a consumer for the commodity purchased or the service received or be 500 yuan if the increase as calculated before is less than 500 yuan, except as otherwise provided for by the law.”

“Where business operators knowingly provide consumers with defective commodities or services, causing death or serious damage to the health of consumers or other victims, the victims shall have the right to require business operators to compensate them for losses in accordance with Articles 49 and 51 of this Law and other provisions of laws, and have the right to claim punitive compensation of not more than two times the amount of losses incurred.”

The latest amendment of the CPL has drawn attention mainly on the following two points: (1) the calculation method has been amended, and thus the amount of punitive damages could be enhanced in most cases. If a business operator is engaged in fraud,
pursuant to Paragraph 1 of Article 55, the increase in compensation shall be three times the payment; but given that the payment is comparatively low in most cases, the multiple of three times would still be inadequate and definitely frustrate the function of punishment. For this reason, where the increase as calculated before is less than 500 RMB, the punitive damages shall be awarded as 500 RMB;\(^47\) (2) Article 55 specifies the corresponding provision in the CTL. Article 47 of the CTL says “…the victim shall be entitled to require the corresponding punitive compensation,” but what has been left behind to be clarified is what the “corresponding punitive compensation” means. The amendment makes it clear for it in the Paragraph 2 as “…claim punitive compensation of not more than two times the amount of losses incurred.” A case where a defect of product causes a death as taken as an example: the punitive compensation operators shall assume ≥ (the personal injury (the reasonable costs and expenses for treatment and rehabilitation, such as medical treatment expenses, nursing fees and travel expenses, as well as the lost wages + the funeral service fees and the death compensation) + the property losses + the mental injury compensation) × 2.\(^48\)

III. MAIN DISCUSSIONS ON PUNITIVE DAMAGES IN CHINESE LEGAL ACADEMIA

A. The Legitimacy of Punitive Damages

Based on most academic literature and treatises, the consensus point of view among scholars shows the approval of the institution of punitive damages established in the civil law system of China.\(^49\) (1) From a theoretical perspective, the tort law system has been always developed with multiple purposes in the Chinese legal system, embracing compensation, punishment, deterrence, precaution and education. The compensatory damages do not always compensate fully, because they usually fall short in specific cases, especially when the losses or injury are of an elusive or intangible character, thus punitive damages are necessary in such cases in order to ensure that tortious conduct is not undeterred.\(^50\) (2) In general, the punitive damages function with the purpose of maintaining the order of the society and economy, and promoting the sound development of the socialist market economy. Where the cost of private liability is lower with more

---

\(^{47}\) Where an operator’s fraud does not cause severe personal injury, which means the seriousness of the misconduct is at a low level, likewise the amount of punitive damages should not be awarded at a high level. Pursuant to Article 55 of the CPL, the compensation shall be three times of the payment or be 500 RMB if the increase as calculated before is less than 500 RMB. That is certainly sufficient for deterrence and education. Id, at 276.

\(^{48}\) Id. at 280.

\(^{49}\) See WANG Limin, fn. 5; ZHU, fn. 8; WANG Xueqin, fn. 5; WANG Lifeng, fn. 5; XIE Xiaoyao, 惩罚性赔偿: 一个激励的观点 (The Punitive Damages: A Kind of Encouragement), 6 学术研究 (Academic Research) 44 (2004).

\(^{50}\) See Epstein, fn.8 at 910.
encouragement and high efficiency than public enforcement, private liability should be primarily considered, which could form a civilian force as real-time monitoring against such malicious misconducts.\(^{51}\) (3) From the perspective of Law & Economics,\(^{52}\) it is not difficult to justify the adoption of punitive damages in legislation. Business operators are forced to pay not only the cost of the harm to the victims of their torts but also some multiple of that cost, so they are likely to hesitate before engaging in such costly behavior again.\(^{53}\) For this reason, by adding a punitive exaction, a fraud or tort would be unprofitable and operators are forced to make the choice of transactions through the market. (4) Some scholars also come up with an idea that the extra sum in excess of the actual injury required by a victim is not just a windfall or an unjust enrichment but a full compensation for such intangible injury inflicted by the fraud or tort. Thus, the compensatory purpose of liability could be competent to justify the institution of punitive damages.\(^{54}\)

For those reasons above, China should undoubtedly adopt the institution of punitive damages in the civil law system, including the contractual and tortious liability.\(^{55}\) From the perspective of comparative law, some scholars present opposite standpoints: this

\(^{51}\) See GUAN, fn. 31, at 179; WANG Lifeng, fn. 5.


\(^{53}\) See Epstein, fn. 8 at 912.

\(^{54}\) Because the mental injury compensation has been established in China, the victim or the close relative thereof who have suffered severe mental distress or trauma could be compensated partly by that institution. However, where the misconduct is committed in a very malicious subjective state, punitive damages shall be awarded at an adequate or generous amount, which could be much more the sum of a mental compensation. See MA Xinyan, 内幕交易惩罚性赔偿制度的构建 (The Establishment of Punitive Damages in the Case of Insider Trading), 6 法学研究 (Chinese Journal of Law) 112 (2011).

\(^{55}\) It is worth noting that some scholars have developed opposite viewpoints. Firstly, the civil laws are the rules just applied between every equal subjects in sociality concerning the property or personal relationship. Therefore, the scope of application of civil laws and regulations is limited and excludes other a lot of kinds of social relationship which could be dealt with by laws of other legal departments. Secondly, the idea of punishment is an alien element in private law, and even tort law cannot justify awarding the plaintiff a windfall through the receipt of punitive damages when he has suffered no corresponding damage. Further, awarding punitive damages under tort law is contrary to the separation of criminal law and private law, which is thought to be an aim of modern legal culture. Thirdly, the calculation method is quite obscure, ambiguous, and unpredictable in American judicial practice. Even though there are some necessary factors which could be asserted in advance and provided for the court to take into account, it is still unclear when the punitive damages shall be awarded and how much they should be. Fourthly, even if the public enforcement may fail to safeguard the overall interests of the community in some specific cases, the problem should be solved by improving the efficiency of public enforcement, rather than by entitling civilians a public power to punish each other. See WANG Limin, fn.5; YIN Zhiqiang, 我国民事法律中是否需要导入惩罚性赔偿制度 (Should the Punitive Damages Be Established in Chinese Civil Law), 3 法学杂志 (Law Science Magazine) 76 (2006); Koziol and ZHU, fn.10.
institution raises further questions about unreasonable consequences in cases of more than one victim. To take the example of a claimant who seeks compensation and punitive damages after being severely injured by a defective product of the defendant company: the claimant is awarded punitive damages. Shortly afterward, another victim claims damages. If the defendant has been punished to an adequate extent by the punitive damages the first claimant received, it would be highly unreasonable to punish him again and again for every victim. On the other hand, it seems unjust if only the first victim, who has the opportunity to lodge a claim earlier, is the only one to receive a high amount of compensation for his damage, and the other, perhaps more seriously injured; victims end up with no punitive damages at all. Further questions can be asked whether the court has to take into consideration whether the defendant has already been punished by criminal or administrative sanctions. If yes, does not it seem an unreasonable result that whether or not the victim receives a windfall depends on the pure chance of whether criminal proceedings are started before or after the civil procedure? If no, does not it seem unreasonable that different sanctions are accumulated without one court taking regard of the other?\footnote{See Koziol and ZHU, fn.10.}

B. The Commentaries on Buying-Fake-While-Knowing-It

1. The First Batch of Cases involving the Buying-Fake-While-Knowing-It — “Wang Hai Phenomenon.” — Early in 1995, a young salesman from a factory in Shandong Province, named Wang Hai, went to Beijing on a business trip and became acquainted with a book on Chinese Consumer Protection Law. He noticed Article 49 of the CPL was very special and intended to test its application. At the shopping mall in Longfu Mansion, he suspected Sony headphones priced at 48 RMB were fake and bought a pair. Wang Hai then went to the Beijing Liaison Office of Sony Corporation to confirm his suspicion and returned to the shop to buy another ten pairs of the same headphones. Referring to Article 49, Wang Hai claimed double compensation but was rejected by the shopping mall for the payment of the later ten pairs. The shopping mall accused Wang Hai of buying-fake-while-knowing-it, while Wang Hai insisted that he was aiming to safeguard the interests of consumer rather than seeking personal profit. His fight did not cease. Wang Hai returned to Beijing in the autumn of 1995 and searched for fake products in several shops, bought them, tested their quality and then demanded double compensation. Most sellers agreed to pay while some refused. This story was released by the media and triggered intense discussion across China. Wang Hai was recognized as a hero by ordinary people and even some sellers, gaining great recognition, while his action simultaneously astonished those who were producing or selling counterfeits. The China Consumer Protection Foundation presented Wang Hai with an award in December 1996.
Early in 1996, Wang Hai’s battlefield was moved to shopping malls in southern China, but sellers’ rejections and the government’s indifference disappointed him. Lessons could be drawn from his experiences, as some lawyers summarized, that the power of the media and public opinion is inadequate and one should use the weapon of lawsuits to protect rights. In November 1996, Wang Hai won a lawsuit in a court in Tianjin, and following the case of “Shan He v. Wanda Plaza,”57 sued Isedan Limited Company for fraud in sales calls, eventually receiving double compensation based on Article 49.

As Wang Hai was confronted with a series of frustrations in early 1996, Mr. Di in Nanjing shared the same experience. On January 4, he bought three Shengbo cashmere shirts in Nanjing Centre Mall and on the bill was written the description “cashmere shirt.” However, the cashmere content of these shirts was lower than 2%, and Mr. Di claimed double compensation from the seller. Being refused by the shopping mall, Mr. Di brought a lawsuit to the court, but his action was dismissed. As Mr. Di had purchased another kind of cashmere shirt elsewhere and successfully obtained compensation, the judge suggested that he owned certain knowledge about these products. The other reason of the judgment was that labeling a shirt with 2% cashmere as cashmere was proper and should not be regarded as fraud.

At that time, those cases in the consumer field, namely buying-fake-while-knowing-it, were named by scholars and the media as “Wang Hai phenomenon” and sparked fierce discussion with unprecedentedly wide participation and depth.58

2. Legal Validity of the Buying-Fake-While-Knowing-It Phenomenon. — The “Wang Hai phenomenon” has undoubtedly aroused intense discussion among lawyers and scholars, and opinions are divided on the legal validity of buying-fake-while-knowing-it.

First of all, the reason why buying-fake-while-knowing-it was thought to be ineligible for punitive damages is that those buyers could not be identified as real consumers in the realm of consumer legal system, and their acts were not “living consumption behaviors.” According to the important principle in civil law hermeneutics, any interpretation should not exceed the possible semantic scope of the legal provision, and the buying-fake-while-knowing-it goes beyond “living consumption behaviour.” Furthermore, if Article 49 is applicable in such case, a sea of professional anti-counterfeit individuals

57 In April 1996, Shan He bought two paintings from Lewanda Firm whose main business was selling celebrity paintings and calligraphy. One of Shan He’s paintings was a single horse, and the other displayed a herd of horses. Both were sold as authentic works by the late Chinese painting master Beihong Xu. A month later, Shan He suspected these two painting were counterfeits and brought a lawsuit to the Xicheng District People’s Court of Beijing. In August 1996, the court confirmed the two painting were fake and compelled the Lewanda Firm to pay the double compensation pursuant to Article 49.

and companies would be encouraged into prosperity, creating a so-called anti-counterfeit industry neither producing nor selling products. This industry might interfere with the protection of ordinary consumers’ rights and even the market order maintained by specialized state organs. It would be unpredictable as to whether or not this condition would benefit China’s pursuit of democracy, the rule of law and a legal system with a socialist market economy. Rather, civilians who are eager to fight against counterfeits should report the illegal acts they have discovered to relevant state organs and receive certain material rewards, while those dishonest sellers should be punished by specialized state organs. At another angle, those special fake-buyers have never been deceived by the seller, and referring to the basic principles of civil law, the seller’s behavior does not meet the requirements of fraud. Additionally, it is certainly immoral to sell counterfeits, but buying-fake-while-knowing-it is thought by some to also be subject to moral rebuke. To prevent one improper act by conducting another improper act is unwise and inappropriate, because the law as a means to secure a nation’s rule of virtue might be vulgarized into a tool for individual benefit in this circumstance.

With respect to the opposite view, supporters of the action of buying-fake-while-knowing-it consider that it does meet the requirements of Article 49 and is eligible for punitive damages. Firstly, there exists a paradox in the judgment that fake-buyers are not consumers, as pointed out by some scholars. If they are not consumers, they could not return the products pursuant to Article 49, so they would have to keep and use the product. In this sense those buyers definitely become consumers. In addition, some legal workers in judicial system indicated that the meaning of “consummation for living demand” in Article 2 of the CPL should not be narrowly and limitedly interpreted, and the notion of “consumer” originally aimed to exclude producers and sellers. So any buyer who purchases should be regarded as a consumer regardless of the motive or intent, as it might be morally challenged but not as a matter of law. The Case No. 23 in “The Sixth Batch of Guiding Cases by Supreme People’s Court” suggests that the consumer is a concept distinguished from seller and producer and in market transactions anyone who purchases and uses a product or service for their individual or family’s living needs rather for

59 See LIANG, fn. 23.
60 See GUAN, fn. 31.
62 October 1996, the second “Deter Fraud, Implement Double Compensation Symposium” held in Beijing. At the meeting, how to correctly understand the legislative intent of Article 49 of the CPL became a central topic. The vice president of the Beijing First Intermediate People’s Court commented on this provision at the meeting as mentioned above. The chief judge of a tribunal of the Beijing Haidian District People’s Court, Jiguan Zhan, reached the same conclusion according to judicial practice. He believed that as long as operators commit fraud, Article 49 damages shall be awarded, regardless of the consumer’s shopping motivation.
production or business sale should be identified as a consumer for living needs and be therefore under the protection of the CPL.

Secondly, some scholars maintain a positive stance on the act of buying-fake-while-knowing-it, and an award of punitive damages in this case matches the legislative intent and value orientation of the CPL, because it can turn the illegal benefit of the fake-seller into rewards to fake-fighters and hence transform the negative effect of punitive damages into positive. Therefore, people are encouraged into the anti-counterfeit battle and the purpose of punitive damages is to be fulfilled. From the perspective of law and economics, and law and sociology, some scholars confirm the stimulative function of buying-fake-while-knowing-it. The boundary between public law and private law is not fixed and definite because of the abilities of government, the level of its commonweal, judicial efficiency and the cost-benefit of private enforcement. As the cost of private enforcement is lower and may encourage higher efficiency, private enforcement should be primarily considered, especially when confronted with lower efficiency of public enforcement. There are many factors worth considering, namely the government’s ability of anti-counterfeit enforcement, its commonweal level, the spreading of fake products and the proportion of honest trade in the market, thus under such circumstances the punitive damages should be awarded in the case of buying-fake-while-knowing-it in order to prevent and restrain counterfeits.

3. What is “Knowing-Fake” or “Fraud.” — In recent practices, the standpoint toward the issue above is not preponderant. Taking the “Case of Ping Xue Suing Beijing Lufthansa Centre” as a typical example. Ping Xue bought three pieces of Terracotta Warriors in Beijing Lufthansa Centre in March 1997, and days later she found them to be imitations. Hence, she negotiated with the center in order to try and obtain double compensation but was rejected, so she brought a lawsuit to the Chaoyang District People’s Court of Beijing. The centre filed a counterclaim, accusing Ping Xue of fraud by buying-fake-while-knowing-it and the court affirmed the center’s argument for the reason that it is common sense that Terracotta Warriors are precious relics in China that are forbidden to be circulated. In other words, even if the seller does not label it clearly as authentic, an ordinary consumer would naturally assume the product to be an imitation. However, the center was supposed by the court to articulate the qualities of the product accurately in case of misleading the customer, and the court finally adjudicated that Ping Xue could return the product but without double compensation, and each party should

63 See YANG, fn.14; WANG, fn.20.
65 As for the main facts of this case, see WANG Fengbin, 谁在欺诈 (Who Committed A Fraud?), The Legal Daily, Oct. 13, 1997.
bear half of the court cost.

This case clarifies the basic principle applied in the judgment of whether a behavior should constitute a fraud. From the angle of the consumer, in Case No. 23 in “The Sixth Batch of Guiding Cases by Supreme People’s Court” (Notice No. 18 in 2014 of the Supreme People’s Court), the court affirmed that where the consumer bought food labeled with a production date that had already manifested itself as expired, and asked for double compensation pursuant to the Article 49 as soon as he paid, the explicit or presumptive awareness of the expired state of the food should be deemed as a matter of the consumer’s motive, and the motive would not impede the constitution of fraud in this case. Nonetheless, there may be an exception where the defendant could introduce adequate evidence to prove that the consumer not only knew the defect of the product but also claims the punitive payment repeatedly in different cases for profit. It would be impossible for a consumer to be misled as the contract concluded, so the court shall affirm no fraud in such case.67

From the angle of a business operator, where the appearance or description of a commodity easily misleads a prudent and reasonable person to believe that what he buys or pays for is genuine, or authentic, or without any defect, except in the lucrative business engaged by the consumer, the behavior of this operator would be deemed as a fraud. To sum up, where an operator conceals key facts or provides false information so as to mislead a consumer who is willing to enter into a contract with the operator based on inaccurate knowledge incurred by operator’s behavior, the court should affirm a case of fraud.68

C. The Calculation Method of Punitive Damages

As far as the issue in this title is concerned, there are two notable disadvantages: First, the starting point of calculation is the sum of the price of the commodity or service. Second, the multiple of calculation is less and fixed. According to the provisions of the CPL and other relevant judicial interpretations, the amount shall be calculated by doubling the sum of the price; although then the FSL makes it tenfold, due to the fact that a majority of foods are sold at a very low price, to some extent, the ostensible improvement with a higher multiple has not made a substantial difference between Article

66 As for the main facts of this case, see fn.37.
67 As for the circumstance where a consumer makes use of punitive damages in the CPL as a profitable or even lucrative tool, the value judgment of law would be inclined to urge consumers to report the fraud to administrative departments, or disclose it to the public or mass media. According to the latest official legislation explanation of the CPL of 2013 (edited by Legislative Affairs Commission of the Standing Committee of National People’s Congress), the so-called fraud, namely that the operator willfully conceals key facts or provides false information so as to lead consumers to make mistakes, further induces the consumer to enter into the contract. Thus it is not a wholly effective rule that a consumer with Buying-Fake-While-Knowing-It could still claim punitive damages under any circumstances.
68 See fn.47, at 275.
49 of the CPL and Article 96 of the FSL, not to mention the implicit expression concerning the matter of amount in Article 47 of the CTL of 2009.

Most scholars have paid intense attention to the problems above, thus their comments, criticisms and suggestions could be summarized below:

As for the compensation figure, some scholars argue that the sum of punitive damages is always insufficient, and this would obstruct the function of punitive damages in practice, from the perspective of the sociology of law.\(^69\) Firstly, the variety of cost and uncertainty of benefit are two important factors: the cost contains the exercise of rights, proofing, seeking for professional help, traffic fees and the suffering from the counter-party’s acts while the indefinite benefit is rooted in the possible failure to exercise rights, owing to unequal social status, difficulties in proving the case or miscarriage of justice. Secondly, it has been presented that double compensation could not in all circumstances meet consumer’s minimal standard of losses. When the price of a product or service is lower than 199 RMB in Shenzhen, 158 RMB in Zhuji, 97 RMB in Neijiang, consumers would not refer to Article 49 of the CPL. With a fixed price, the amount of compensation determines whether the Article 49 would be claimed. When the price is 50 RMB, the expected multiple of the amount of money is 5.3 in Shenzhen, 3.3 in Zhuji, 2 in Neijiang and with 20 RMB, the the average expected multiple is 11 in Shenzhen, 8 in Zhuji, 5.2 in Neijiang, all much higher than that stipulated in Article 49. Thirdly, consumers lack sufficient information. The sellers’ fraud is so difficult to figure out that consumers may hardly notice the infringement of rights, or have any say in defending the rights.

Some scholars take practical cases into consideration and suggest that the small amount of compensation calculated in multiples would cast doubt on the reasonableness and justification of punitive damages.\(^70\) In the astonishing Incident of Methotrexate, the highest retail price of one MTX injection of 5 mg was 4 RMB, but a contaminated or inferior MTX injection might cause paralysis and gatism in a patient suffering from leukemia. In this case, double compensation would amount to 8 RMB, which is too low to fulfill the function of this legal policy, and the victim would instead have to rely on laws of liability for breach of contract or tort liability and claim for compensation only based on the actual losses proved. Thus a typical case for punitive damages had to be abandoned in this case.

Given such disadvantages presented above, most scholars maintain that by absorbing some excellent ideas in practice in the US and Taiwan province, some necessary factors could be asserted in advance and provided for the court to take into account with a judgment of whether an award of punitive damages shall be affirmed in a specific case. Here are some necessary factors in question: (1) the seriousness of the defendant’s fault or

---

\(^{69}\) See YING, fn.65.

\(^{70}\) See GUAN, fn.31, at 207.
the defendant’s subjective state (e.g. intent, malice and gross negligence); (2) the impact of the misconduct (e.g. tort or breach of contract) on the plaintiff or society; (3) the sum of the award of compensatory damages and the difficulty or possibility to introduce proof of actual injury or losses; (4) the defendant’s income or wealth could exceed some specific level; (5) the amount of profit gained by the defendant through his misconduct; (6) whether the defendant has already been punished by criminal or administrative sanctions. In addition, it is necessary to set a ceiling for the award of punitive damages. For instance, the liability ceiling could be based on two or three times the actual losses.

In conclusion, justice is mostly based on the clarity and predictability of law. During the early development of the institution of punitive damages, it is reasonable and also necessary to set a clear calculation method using fixed standards concerning a specific price and multiple, especially in the field of the contract law which places an emphasis on market mechanisms. For those reasons, on the one hand, Article 47 of the CTL stipulates that “…the victim shall be entitled to require the corresponding punitive compensation.” The term “corresponding” means that the award of punitive damages shall be affirmed with reference to the seriousness of the tortfeasor’s intent, the injury or losses caused by the tort, the level of deterrence towards the tortfeasor in a specific case. On the other hand, Article 55 of the latest CPL of 2013 makes it clearer in Paragraph 2 as “…claim punitive compensation of not more than two times the amount of losses incurred.” Under Article 47 of the CTL, a ceiling has been set for the award of punitive damages at two times the actual losses.

D. The Relationship between Punitive Damages and Mental Injury Compensation

In the field of Chinese tort law, as one of the methods of assuming liability, the Mental Injury Compensation has been stipulated in the “Chapter II Constituting Liability and Methods of Assuming Liability” of the CTL, which indicates the victim would be able to claim mental compensation and other methods of assuming liability, e.g. compensation for losses, at the same time. Article 22 of the CTL stipulates that

---

71 The more wealth the defendant has, the smaller is the relative bite that an award of punitive damages not actually geared to that wealth will take out of his pocketbook, while if he has a very little wealth the award of punitive damages may exceed his ability to pay and perhaps drive him into bankruptcy. This is known in economics as the principle of diminishing marginal utility. Rich people are not famous for being indifferent to money, and if they are forced to pay not merely the cost of the harm to the victims of their torts but also some multiple of that cost they are likely to think twice before engaging in such expensive behavior again. See Richard A. Epstein, fn.8, at 911–2.

72 See See ZHANG & LI, fn.39; ZHU, fn.21; DONG, fn.19; KONG, fn.31.

73 See WANG, fn.40 at 272.

74 Article 15 of the CTL: “The methods of assuming tort liabilities shall include: (1) cessation of infringement; (2) removal of obstruction; (3) elimination of danger; (4) return of property; (5) restoration to the original status; (6) compensation for losses; (7) apology; and (8) elimination of consequences and restoration of reputation.” “The above methods of assuming the tort liability may be adopted individually or jointly.”
where any harm caused by a tort to a personal right or interest of another person inflicts a serious mental distress on the victim of the tort, the victim of the tort may require compensation for the infliction of mental distress. Therefore, the “personal right or interest” shall be interpreted in two categories, one of which refers to the personal rights, e.g. the right to life, the right to health, the right to name, the right to reputation, right to self-image, right of privacy guardianship, ownership, usufruct and security interest (pursuant to Article 2 of the CTL); The other means the personal interests partly embracing the name, portrait, reputation, honor, privacy, etc. of a deceased person.75

According to the provisions and interpretations above, the mental injury compensation could be categorized as one of the modes of compensatory damages. The mental compensation is of some character different from punitive damages: (1) The mental compensation belongs as the non-pecuniary damages, which works by means of comforting victims who have suffered emotional distress or trauma inflicted by torts with an extra sum awarded in excess of the pecuniary damages. Therefore, the mental compensation does not mainly function as a punishment, but rather a deterrence on the torts causing personal injury; (2) The mental injury compensation is mainly applied in the field of tort law. This institution has been developed in modern civil law to fulfill its primary purpose of protecting and compensating the personal rights and interests. However, there shall be no award of mental compensation in the case of infringement of property rights and interests in judicial practice of China.76 (3) The requirements of the level of defendant’s subjective state are different between the mental compensation and

---

75 Article 3 of the Interpretation of the Supreme People’s Court on Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts stipulates: The people’s court shall accept according to law cases arising from any of the following infringements related to the death of a person that caused mental suffering to the close relative of the deceased, and brought to the court by the relative for claiming emotional damages:
(1) infringement upon the name, portrait, reputation or honor of a deceased person by insulting, libeling, disparaging, vilifying or by other means contrary to the societal public interests or societal morality;
(2) illegal disclosure or use of the privacy of a deceased person or infringement upon the privacy by other means contrary to the societal public interests or societal morality;
(3) illegal use of or damage to the remains of a deceased person or infringement upon the remains by other means contrary to the societal public interests or societal morality.

76 For this reason, the contractual liability shall exclude the mental compensation. For instance, in judicial practice, the mental compensation shall be limited in the field of tort law, according to “Interpretation of the Supreme People’s Court on Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts” [Interpretation No. 7 (2001) of the Supreme People’s Court]; In the “Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Cases about Tour Disputes” [Interpretation No.13 (2010) of the Supreme People’s Court], Article 21 stipulates that where a tourist files a lawsuit for breach of contract but claims compensation for mental distress, the people’s court shall inform him to change the lawsuit into a tort action; and if the tourist insists on filing a lawsuit for breach of contract, the people’s court shall not support his claim for compensation for mental distress.
the punitive damages. The former may be awarded in the case of not only malice or intent, but also negligence, and even whether at fault or not. But the later shall only be required by claimant under the circumstance of malicious or willful misconducts.

Scholars in the field of civil law usually connect mental compensation and punitive damages within a discussion in the following cases: (1) In theory, the two institutions emphasize different purposes, though some of their functions are quite similar. In some specific cases, they may be substitutable or replaceable for each other. On one hand, punitive damages could be applied based on the compensatory aim, especially when the losses or injury are of an elusive or intangible character, leaving the compensation damages insufficient. Therefore, where the mental compensation shall be awarded to mitigate a victim’s mental distress or trauma, the punitive damages may function in the same way to alleviate the mental injury; (2) On the other hand, the mental compensation should be awarded with the purpose of punishment. The pecuniary damages shall usually correspond with the actual losses, while the non-pecuniary damages, the mental compensation, is an award of payment beyond the compensation for actual losses. Since no one would be willing to assume more liability, it would result in the effect of preventing or deterring torts.77

By the same token, scholars have been trying to substitute mental compensation for punitive damages in some specific cases. For one thing, the court in principle shall not affirm mental compensation in a lawsuit of contractual liability.78 For another, it should be noted that the mental compensation has been awarded by courts in some cases79 with the support of some scholars,80 especially under such circumstances where the severe mental distress or spiritual suffering is inflicted by a breach of contract (e.g. a party is disfigured in a cosmetic surgery contract) or the obligation of the contract obviously contained some spiritual factors (e.g. a funeral service contract). For this reason, based on the purpose of preferentially protecting those paramount personal rights and interests like human beings’ life, health and dignity, the enhancement of compensation to the victim and of liability to the breaching party could be naturally justified in such very special cases. These ideas above have led scholars into the consideration of application of punitive damages in the field of contractual liability in order to solve the dilemma lying

77 ZHANG Xinbao, 侵权责任法原理 (Basic Theory of Tort Law), China Renmin University Press (Beijing), at 523 (2005).
78 CHENG Xiao, 侵权责任法 (Tort Law), Law Press China (Beijing), at 570 (2011); As for more arguments, see the standpoint in judicial practice, fn.77.
79 A typical case is “Litao Ma v. Mengzhen Beauty Salon (Cosmetic damage compensation dispute case).” In this case, the court affirmed not only the medical treatment expenses but also the mental injury compensation at 2,000 RMB. See 人民法院案例选 第1辑 (The People’s Court Chosen Cases, Vol. 1), The People’s Court Press (Beijing), (1994).
between the necessity of generous damages and the rejection of it in judicial practice, even though this substitution method may be merely an expedient.

From the perspective of comparative law, (1) civil law countries have never wholly adopted punitive damages owing to their legal tradition and the different social and economic conditions of each country. Taking Germany as an example, its economic and social security systems has little ground for the application of punitive damages,\(^8\) and the same goes for China. However, the award of punitive damages has been extensively applied in the U.S., because it is well adapted for the jury, lawyer and civil procedure system and developed economy. Though intense discussion has long been roused on the applicability of this system in the U.S, China lacks the accessorily accessible legal system and supporting social and economic conditions; (2) On the other hand, China now has a comparatively sound compensation for mental damage. From the GPCL in 1986 to the judicial interpretation for mental damages, China has unified the requirements of the compensation for mental damage and relative legislation, judicial practices and theoretical studies have gradually grown mature. Mental compensation well protects the personal rights and limitedly expands into some cases involving the infringement of property rights with personality factors. Some scholars therefore have assumed that China should give priority to mental compensation, and that punitive damages should only be applicable in special cases as stipulated by law.\(^2\)

In conclusion, at least in the field of consumer contract law, the latest CPL of 2013 has coordinated and harmonized the two institutions, namely, by entitling the consumer to the “right to claim punitive compensation of not more than two times the amount of losses incurred” and that “the amount of losses” shall contain mental injury compensation.\(^3\) In fact, there shall be no contradiction between the two kinds of damages for the reason that one aims at compensation and the other punishment. Thus, under Article 47 of the CTL the two kinds of methods of assuming liability shall be required by the consumer at the same time,\(^4\) with a sound result of reflecting the multiple purposes of tort law.

\(^8\) See WANG, fn. 5.
\(^2\) See ZHANG & LI, fn.39.
\(^3\) Article 55 of the CPL of 2013 states that “…the victims shall have the right to require business operators to compensate them for losses in accordance with Articles 49 and 51 of this Law and other provisions of laws, and have the right to claim punitive compensation of not more than two times the amount of losses incurred.” And Article 51 provides where business operators insult or defame, search the persons of, violate the personal freedom of, or otherwise infringe upon the personal rights of consumers or other victims, inflicting serious mental distress on the victims, the victims may claim damages for the infliction of mental distress.
\(^4\) See “Xiyue Pan v. Mingxiang Long (product liability dispute case),” [Zhou, First Civil Tribunal, Final, No. 220 (2012)]. In this case, the court affirmed the medical treatment expenses, the funeral service fees, the death compensation, the punitive damages and the mental injury compensation.
IV. BRIEF SUMMARY AND CONCLUSIONS

From the early 1990s till now, the institution of punitive damages in Chinese civil law were introduced in translation, learned in discussion, and then adopted over the past twenty years. Though the reform and opening up policy started in 1978, it was not until the early 1990s that the development of the market economy commenced. Thereafter, strict formal justice in the contract law system was found deficient and compromised, and the positions of the operator and consumer needed to be clarified, providing a theoretical basis for the pursuit of substantive justice and hence inclined protection for consumers. In the background above, it became necessary and rational for the establishment of punitive damages in Chinese Consumer Protection Law, and its later expansion into the field of tort liability with later laws and judicial interpretation as supplements. The developing history of the punitive damages in China in total has two distinctive characteristics. First, the scope of punitive damages has been limited to some specific cases based on restrictive requirements such as the malicious or willful misconducts, or the field of consumer contract, or the field of food safety liability, or in cases when the defect causes a death or any serious damage to health. Secondly, scholars and the legislature have long been engaged in improving the institution of punitive damages, especially the calculation method thereof, which is well exemplified by Article 55 of the latest amendment of the CPL of 2013.

Maybe what can be highlighted in conclusion is some negative inclinations in application of punitive damages:

(1) In the field of contractual liability, or even the consumer contract thereof, where the defendant can introduce sufficient evidence to prove that a consumer knowing the defect of the product claims the punitive payment repetitiously in many different cases as a profitable or even lucrative business, meaning that this consumer has not actually been misled, the court shall affirm no fraud. Indeed, that is an extremely exceptional circumstance which only excludes those who would make the institution professional and an operational tool. When it comes to the policy, that means imposing a punitive exaction upon business operators to encourage consumers to fight with operators themselves, it shall be deemed as an administrative award implemented by the government or other administration, rather than by a court or through any judicial procedure within a contractual legal relation. However, it is

85 The defendant shall bear the duty to introduce evidence to prove the circumstances mentioned above. Namely, it shall be assumed that it is just a matter of motivation for the consumer to know the defect before he buys the commodity.
86 See WANG, fn.20.
87 In theory, where an infringer commits damage upon a specific subject, the victim shall be vested by the right of claiming the compensation for the damage; However, when the damage involves the public interest, the specific subject empowered shall be the state, which is established to stand for the public interest. For this reason, if the compensation for the damage can be claimed by a private subject based on the institution of punitive damages, this liability of compensation would not be justified with an unjust implication of empowering private subjects to punish each other. See YIN, fn.55.
worth noting that the rules and theory mentioned above would be applied only in a very limited number of cases, so that we shall in principle regard the “buying-fake-while-knowing-it” as a qualified circumstance when it comes to an award of punitive damages.

(2) In the field of tort law, punitive damages shall never be awarded for a defendant’s negligence for the reason that compensatory damages have functioned to set up a reasonable duty of care with prudence and good faith, and thus if an award of punitive extraction imposed upon the tortfeasor is introduced under such circumstance, because the negligence is almost inevitable, the extra payment would never make punitive damages more effective, but instead create a moral hazard to making a profit on it.

(3) Still from the perspective of tort law, even if the tortfeasor behaves with malice or intent, the punitive damages shall not be awarded in the case of the infringement of property rights. Because property is of tradable, replaceable and equivalent character under the market economy, the victim could well be compensated fully based on the fault liability and the compensatory damages.