

The development of punitive damages for marine ecological harm within the People's Republic of China: Punitive damages with Chinese characteristics

Weilun Chen

Liverpool John Moores University, School of Law

email: Lawwchen@ljmu.ac.uk

Introduction

The full title of my PhD thesis is currently as follows: **Applying Punitive Damages through Public Interest Litigation with Chinese Characteristics: Preventing Marine Ecological Harm within the People's Republic of China**. Generally, my PhD thesis is based on the doctrinal analysis of both common law and civil law systems with a focus on the domestic legal system in China. This thesis will delve into the appropriateness of punitive damages through public interest litigation for marine environmental damage, looking at its logical continuity with traditional civil and common law theory and its legal implications for marine environmental protection generally. It will analyse the development of the legal concepts of punitive damages and public interest litigation in both common law and civil law countries, before moving on to focus on the development of punitive damages through public interest litigation in China. Following Chinese case law analysis, this research aims to systematically construct the procedure for applying punitive damages for marine environmental harm through public interest litigation.

Thus, 'Punitive Damages' is one of the two most important legal concepts that I will explore/engage with in my PhD thesis; the other one being 'Public Interest Litigation', both of these concepts applied to marine ecological harm in China.

A. (Increasing) Global Marine Environmental Damage

Regarding global marine environmental degradation, the United Nations IPBES (Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services) assessment has identified marine pollution as a significant problem. The Second World Ocean Assessment, 2021 (updated from its initial, 2015 report) confirms that the marine environment has worsened. The impacts of the marine environment are usually cumulative and can lead to degrading habitats and ecosystem functionality. Where marine ecosystems are damaged, denoting harm to wildlife and their habitats as well, this has been described as ecological, as opposed to environmental, damage.¹

B. Marine Environmental/Ecological Damage as a Compensable Harm under Tort Law

¹ World Wide Fund for Nature (WWF), Living Planet Report 2020, available online: [chrome-extension://kdpelmjpfafjppnhbloffcjpeomlnpah/https://www.wwf.org.uk/sites/default/files/2020-09/LPR20_Full_report.pdf](https://www.wwf.org.uk/sites/default/files/2020-09/LPR20_Full_report.pdf); Nicola J. Beaumont et al, 'Global ecological, social and economic impacts of marine plastic' (2019), *Marine Pollution Bulletin*, 142, pp189-195.

Formatted: Position: Horizontal: Right, Relative to: Margin, Vertical: 0 cm, Relative to: Paragraph

Neither marine environmental damage nor ecological damage can easily be categorised as ‘compensable damage’ according to traditional tort law because when marine environmental damage occurs, the harm to ecosystems is often huge and irreversible. Under the usual tort law liability headings, damage can only be compensated for property damage, personal injury, or latterly, economic loss.

Moreover, there is the problem of who can claim compensatory damages for marine environmental or ecological harm under tort law. This is because such environmental or ecological harm does not necessarily have a human victim who qualifies as a legal plaintiff. In other words, unless such marine environmental or ecological harm results in human-owned property or personal (human) injuries, or economic loss, such harm may not be compensable under tort law.

C. Punitive Damages

Therefore, punitive damages could be used as a supplementary sanction in exceptional cases where compensatory damages either cannot be claimed or do not provide sufficient levels of deterrence and retribution. Punitive damages in tort law has been recently described as damages in tort seeking ‘to punish and to deter. They are not compensatory, being awarded independently of any loss suffered. They go beyond the sum necessary to repair the harm caused to the victim. Conversely, an alternative understanding of punitive damages is grounded not on retribution, but in the economic principle of optimum deterrence: Compelling the actor to internalise the costs of potentially detrimental behaviour ensures that the actor will partake in such behaviour only to an economically efficient extent, refraining from allocating further resources to prevent harm when the expense of avoidance surpasses the cost of the harm itself; this is achieved through the mechanism of civil tort litigation.

Unlike punitive damages in the common law system, most civil law jurisdictions restrict the award of damages in private proceedings to an amount that reinstates a party to its pre-injury state.² In these nations, punitive damages are regarded as a penal consequence applicable solely through criminal procedures.³ However, civil law jurisdictions around the world are considering importing punitive damages into their remedy systems.

D. The Development of Punitive Damages in China

In the early 1990s, China introduced into its civil legal system the concept of punitive damages, marking a significant legal breakthrough among civil law countries. Punitive damages was first introduced in the Law on the Protection of Rights and Interests of Consumers in 1993, in relation to product quality and food safety. In

² Among the civil law countries that permit recovery of only compensatory damages in private actions are Argentina, Belgium, Bolivia, Costa Rica, the Czech Republic, Ecuador, Egypt, Finland, France, Guatemala, Germany, Greece, Libya, Honduras, Iran, Italy, Japan, Korea, Mexico, Netherlands, Panama, Russia, Spain, Switzerland, Taiwan, and Venezuela.

³ The codes of Norway, Poland, Brazil, Israel, and the Philippines allow for some form of exemplary relief.

2009, there was a further milestone with the implementation of the Tort Liability Law, which represented significant progress by including provisions for punitive damages for product liability that ‘In the event of death or serious damage to health arising from the manufacture or sale of a product known to be defective, the infringer shall be entitled to claim corresponding punitive compensation.’

Finally, the legal basis for applying punitive damages in ecological harm was included in article 1232 of China’s Civil Code 2021, which stipulates that ‘Where an infringer intentionally pollutes the environment or damages the ecology in violation of the law, causing serious consequences, the infringer shall have the right to claim corresponding punitive damages.’

On the other hand, as a civil law jurisdiction, China’s punitive penalties for environmental torts are mostly based on judicial interpretations from the Supreme People’s Court, granting lower court judges comparatively little discretionary authority. For example, in contrast to the aim of private citizen (including non-governmental organization (NGO) & civil society group) suits in the United States to support public authority enforcement of environmental regulations, China’s punitive damages in environmental public interest litigation mainly operate concurrently with environmental administrative enforcement. Moreover, unlike the objectives of NGOs in England, those in China are subject to several restrictions.

Only 2 out of 22 public interest litigation for marine ecological damage cases in China applied punitive damages. The first is Qiong 72 Mingchu no 37 (2022): the incident took place in 2019, and the defendants were sued by the Haikou procuratorate regarding illegal sand mining, which caused marine ecological damage. 32,0176 Chinese Yuan of punitive damages was raised for the harm and the defendants were sentenced to fixed-term imprisonment ranging from eight months to one year and five months, and additionally fined between 6,000 yuan and 16,000 yuan. The punitive damages were rejected by the court because the violation occurred before the Civil Code 2021 came into effect even if there were enough evidence provided.

The second case is Zhe 72 Mingchu no 2230 (2022): which occurred in 2021, the defendants were sued by Zhoushan procuratorate regarding illegal fishing using prohibited methods in a marine special protected area, which caused marine ecological damage. 7009.6 Chinese Yuan of punitive damages was raised for the harm while in the criminal case, 3,000 yuan and 2,000 yuan of illegal gains were respectively returned, and the court approved the request for punitive damages.

Despite there being limited cases applying punitive damages through public interest litigation in ecological tort cases at the moment they are significant and can be expected to lead to a mature punitive damages system in the coming years.

Commented [1]: This raises the question - can the individual claimant keep any punitive/exemplary damages won (over & above they’re normal compensation for personal injury, property damage & economic loss?)

Formatted: Position: Horizontal: Right, Relative to: Margin, Vertical: 0 cm, Relative to: Paragraph