

# Punitive Damages in Korea: Focusing on the Proposed Amendment to the Korean Commercial Act\*

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## I. Introduction

Illegal and anti-social acts have recently led to various unfortunate accidents in Korea. These include the Oxy humidifier sterilizer incident, the mis-selling of DLS (Derivative Linked Securities), and the BMW engine fires incident. The challenge is that affected consumers often struggle to receive sufficient compensation for the damages they have suffered. Many legal experts have suggested that punitive damages should be mandatory – both to compensate consumers who have suffered such damages at a reasonable level, and to deter such unlawful conduct in future.

On September 28, 2020, Korea’s Ministry of Justice announced a proposed amendment to the Korean Commercial Act, to satisfy these needs. The amendment includes a provision for punitive damages, which is applicable to merchants’ commercial activities. The amendment is expected to “remove incentives to conduct malign illegal acts and thus deter them,” according to the Ministry of Justice. Yet the amendment also faces severe opposition from some scholars, entrepreneurs, and economists.

This article aims to review the current status of punitive damages in

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Korea and to examine the possible problems that may emerge with the proposed amendment to the Korean Commercial Act, in a wide variety of ways. To achieve this, we will first consider the functions of tort laws and the basic concepts of punitive damages.

## II. The Functions of Tort Laws

Why do we need tort laws? There are a number of functions such laws can perform. In countries that apply civil law, tort laws are traditionally thought to prevent illegal acts and to compensate the injured from the harm caused by such illegal acts. However, some think that tort laws should also be utilized to punish wrongdoers.

### 1. Function of Compensation

Tort law functions to help the sufferer recover from the losses or harm s/he has experienced. Many scholars think that compensation is the key to tort law. However, not all harm caused by the injurer is subject to compensation. If the injurer must pay the sufferer for all actions s/he has taken, then s/he cannot fully enjoy his/her own freedom of action,<sup>1)</sup> which is protected by the Korean Constitution.<sup>2)</sup> Thus, only the harm caused by wrongdoing is subject to redress.<sup>3)</sup>

A value judgment is necessary, when deciding whether the injurer has any liability and how much the injurer must award to the sufferer. For example, those who could have controlled the risk hold greater responsibilities than those who could not. This is important, when illegal

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1) Young-joon Kwon, *Bulbeopaengwibeobui Sasangjeong Gichowa Geu Sisajeom – Yebanggwa Hoebogui Paerodaimeul Jungsimeuro* [Theoretical Foundation of Tort Law and its Implication – On the Prevention and Recovery Paradigm], 109 THE JUSTICE 73, 87 (2011) (In Korean).

2) The freedom of action is not mandated in the Constitution of the Republic of Korea. However, it is widely recognized that freedom of action can be derived from the right to pursuit of happiness (DAEHANMINKUK HUNBEOB [HUMBEOB] [CONSTITUTION] art. 4 (S. Kor.)). See NAK-IN SUNG, HEONBEOPAK [CONSTITUTIONAL LAW] 1094 (20th ed. 2020) (In Korean).

3) Kwon, *supra* note 1, at 87.

acts are caused by the negligence of the injurer.<sup>4)</sup>

## 2. *Function of Prevention*

Wrongful acts should be restricted, because they result in harming others. We all know that it is not right to commit reprehensible acts. Yet, in the absence of compulsive forces, people can freely commit such acts. A “rational” person (in the view of modern economics) chooses to act for his/her own benefit, without considering others’ interests – often harming others. To prevent such wrongful acts, it should be emphasized that such acts lead to expensive payouts. This can easily be achieved via tort laws. The message behind tort laws is broadcast to all members of society,<sup>5)</sup> to ensure that all members of society respect such laws.

Prevention is often thought to be a secondary function of tort laws.<sup>6)</sup> Yet opponents of this idea argue that it is more important to allocate social risks among members of society, than to distribute damages among the interested parties.<sup>7)</sup> Whatever one’s point of view, it is clear that the functions of prevention and compensation are both important.

## 3. *Function of Punishment*

In Korea, the scopes of civil law and criminal law are traditionally seen as separate. As a result, the punitive function of tort laws has been ignored to some degree. Yet tort law can perform the role of punishing injurers. For example, a large compensation award can be utilized not just to help the sufferer to recover from emotional damages, but also to punish the injurer.<sup>8)</sup> Punitive damages, which we will discuss later, are also devised to punish an injurer who has maliciously conducted illegal acts. Yet the punitive

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4) DONG-JIN PARK, *JUSEONGMINBEOM CHAEGWONGAKCHIK 6* [REMARK ON CIVIL LAW – PARTICULARS OF LAW OF CONTRACTS AND TORTS 6], 57 (4th ed, 2016) (In Korean).

5) Kwon, *supra* note 1, at 81-82.

6) Park, *supra* note 4, at 62.

7) Park, *supra* note 4, at 63.

8) Park, *supra* note 4, at 66.

function appears to be less important than the other functions of tort laws.<sup>9)</sup> Punishment does not belong to the civil-law domain, in principle; this function is thus often restricted to a supplementary function in tort laws. Therefore, most discussion of tort laws focuses on compensation and prevention, even in the United States.<sup>10)</sup>

### III. Tort Laws in Korea

Art. 750 of the Korean Civil Act is a general provision for torts. The article states, “Any person who causes losses to or inflicts injuries on another person by an unlawful act, intentionally or negligently, shall be bound to make compensation for damages arising therefrom.”

The plaintiff must prove the requirements of the article, for their loss to be compensated. Evidence should be in accordance with the principles of logic and experience, according to Art. 202 of the Korean Civil Procedure Act. Yet sometimes it is difficult for the plaintiff to prove the requirements of torts. To mitigate this problem, the burden of proof may at times be shifted to the injurer or the defendant—for example, in environmental damages cases.<sup>11)</sup>

The limited compensation principle is applied in torts laws.<sup>12)</sup> Art. 763 of the Korean Civil Act states, “The provisions of articles 393, 394, 396 and 399 shall apply *mutatis mutandis* to torts claims.” Paragraph 2 of Art. 393 of the Korean Civil Act states, “The obligor is responsible for reparation for damages that have arisen through special circumstances, only if he had foreseen or could have foreseen such circumstances.” The injurer’s ability to predict an outcome is thus taken into account, when deciding the amount of damages. Full compensation cannot be achieved, if the injurer was not

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9) Kwon, *supra* note 1, at 76.

10) Kwon, *supra* note 1, at 76.

11) Due to the fact that the injurer can easily investigate the causes of losses than the sufferer, and the injurer might conceal the causes, the injurer has to prove that he or she did not emit harmful substances to the air in order not to be found liable (Supreme Court [S. Ct.] 81Da558, June 12, 1984 (S. Kor.)).

12) Min-hee Kwak, *Gwasilbulbeopaengwiro Inhan Gyeongjejeong Sonhaeui Baesang* [Economic loss in torts], 16 EWHA L. J. 225, 227 (2011) (In Korean).

able to predict the losses incurred.

Considering the limited compensation principle and the low levels of monetary compensation awarded in practice,<sup>13)</sup> the key problems with tort laws in Korea are that: ① the deterrence of illegal acts is often ignored<sup>14)</sup> and ② new types of torts cannot be dealt with in an effective way.<sup>15)</sup> Punitive damages are necessary to alleviate these problems.

## IV. Punitive Damages

### 1. Concept and Functions

Punitive damages are defined as monetary damages awarded to a plaintiff in a private civil action—in addition to and apart from compensatory damages—that are assessed against a defendant guilty of flagrantly violating the plaintiff’s rights.<sup>16)</sup> Korea’s Appellate Court once defined punitive damages as “a type of remedy accepted in common law countries that aims to punish malicious injurer’s misconduct, for example, acts with intention, and deterring similar acts, as well as awarding compensatory damages.”<sup>17)</sup> As the name suggests, punitive damages are meant to punish wrongdoers while compensating the plaintiff. This is why they are “quasi-criminal”: they belong to both the civil-law domain and the criminal-law domain.<sup>18)</sup>

Most people seem to think that punitive damages function to compensate the sufferer, to prevent illegal acts, and to punish wrongdoers—similar to compensatory damages, but with a greater

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13) Jeom-in Lee, *Jingbeoljeok Sonhaebaesangjedoui Doip Piryoseonggwa Ganeungseonge Daehan Ilgochal* [A Study on Necessity and Possibility on the Introduction of Punitive Damages], 38 DONG-A L. R. 187, 205 (2006) (In Korean).

14) *Id.* at 200.

15) *Id.* at 205.

16) David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 364 (1994).

17) Seoul Eastern District Court [Seoul Eastern Dist. Ct.], 93Ga-Hap19069, Feb. 10, 1995 (S. Kor.).

18) Owen, *supra* note 16, at 365.

emphasis on punishment. Yet some point out that education and law enforcement are also functions of punitive damages.<sup>19)</sup> Acts that include provisions for punitive damages inform the sufferer that s/he has the right to claim damages from the injurer<sup>20)</sup>; this is the educational function of punitive damages. The law enforcement function of punitive damages, on the other hand, helps achieve other goals of punitive damages stated in the earlier parts of this essay.<sup>21)</sup>

## 2. Theories Based on Law and Economics

### 1) Different Theories on Punitive Damages

The concept of punitive damages originated in England in the 18th century<sup>22)</sup> and has been actively developed in common law countries, especially in the United States. Theories on punitive damages are often associated with economics.

One of the dominant economic theories on punitive damages is optimal deterrence theory, or loss internalization theory. According to this theory, if an actor has a chance of not being found liable, compensatory damages are not sufficient to deter the actor from conducting torts.<sup>23)</sup> The Hand Rule, developed by the American judge Billings Learned Hand (1872-1961) in the case of *United States v. Carroll Towing Co.*, is a simple and intuitive mathematical tool to analyze such a situation. The formula tells us that – if a burden (or marginal cost of precaution, B) is smaller than a liability (or cost of accidental harm, L), multiplied by probability (P) – an injurer should be responsible for his/her illegal actions and B should equal  $P*L$  in the socially efficient state. To summarize, optimal deterrence theory focuses on the preventive function of punitive damages.

Another prominent theory is gain elimination theory. Proponents of the theory argue that ill-gotten gains from torts should be eliminated, and that

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19) Owen, *supra* note 16, at 374.

20) Owen, *supra* note 16, at 374.

21) Owen, *supra* note 16, at 380.

22) SUNG-CHUN KIM, JINGBEOLJEOK SONHAEBAESANGJEDOWA SOBIIPIHAEJUJE [PUNITIVE DAMAGES AND REMEDIES] 66 (2003) (In Korean).

23) CATHERINE M. SHARKEY, ECONOMIC ANALYSIS OF PUNITIVE DAMAGES: THEORY, EMPIRICS, AND DOCTRINE 488 (2013).

punitive damages should aim to eradicate illegal acts.<sup>24)</sup> Gain elimination theory thus highlights the punishment function of punitive damages. Both theories are related to the function of punitive damages.

## 2) *The Concept of the Punitive Multiplier*

According to optimal deterrence theory, the role of punitive damages is to deter illegal acts. A rational injurer takes into account the damages that s/he must pay to the sufferer, when conducting an illegal act. If the injurer is required only to pay compensatory damages to the sufferer, then the number of wrongdoings will not decrease because the injurer can still make profits from illegal acts for which they are not found liable. Since it is impossible to detect every illegal act, more damages than compensatory damages must be imposed on the injurer to reach a socially optimal balance. A simple mathematical formula helps to determine the amount of punitive damages:

Let  $\theta$  be the probability that the injurer will be found liable. The amount the injurer pays to the sufferer equals compensatory damages plus punitive damages. The damages that the injurer thinks s/he may incur are equal to compensatory damages, or the sum of compensatory damages and punitive damages multiplied by  $\theta$ . In the equilibrium, the amount the injurer pays to the sufferer equals to the damages that the injurer thinks. From the fact stated above, we can find that the amount of punitive damages is the same as the compensatory damages, multiplied by  $(1 - \theta)/\theta$ . We now call the equation  $(1 - \theta)/\theta$  the punitive multiplier, or the total damages multiplier.

For example, if the probability  $\theta$  is equal to 10%, then the value of the punitive multiplier is 9. It makes intuitive sense that, if the injurer conducts the same torts ten times, just one of those illegal acts is most likely to be found liable. Thus, in the socially optimal state, the injurer is required to pay nine times the punitive damages – what s/he should have paid for the other nine acts of wrongdoing that were not caught – in addition to the usual compensatory damages.

The exact value of the punitive multiplier can only be deduced by

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24) Sharkey, *supra* note 23, at 492-493.

applying the exact value of the probability  $\theta$ . Yet, while probability  $\theta$  has been evaluated in empirical studies, it is sometimes difficult to estimate in the real world. This is mainly due to the lack of relevant data or time. In the United States, the probability is usually set to 25%, so that punitive multiplier equals 3.<sup>25)</sup>

It should be noted that the punitive multiplier discussed in this section has a slightly different meaning from the multiplier explored in later sections of this article. This is because punitive damages in Korea essentially show characteristics of “multiple damages.”<sup>26)</sup> According to the above theory, the money awarded to the plaintiff equals compensatory damages multiplied by the punitive multiplier [punitive damages], plus compensatory damages. Under the Korean legal system, in contrast, the money granted to the plaintiff equals the actual loss multiplied by a multiplier.

## V. Punitive Damages in Korea

In this section, we will examine prior research on punitive damages in Korea. We will also discuss the current legislation around punitive damages and an example of a judgment.

### 1. Prior Research

Past discussions of punitive damages in Korea centered on the implementation of the system. This is primarily because punitive damages,

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25) MYONG-SOO HONG, GONGJEONGGEORAEBEOPSANG JINGBEOLJEONG SONHAEBAESANGJEDOUT DOIP [INTRODUCTION OF PUNITIVE DAMAGES TO THE MONOPOLY REGULATION AND FAIR TRADE ACT] 86 (2007) (In Korean).

26) Tae-sun Kim, *Migung baeakbaesangjedo min beopjeongsonhaebaesangjedoui doibe gwanhan sogo* [A study on the introduction of the U.S. statutory damages and multiple damages] 66 KOR. JOURNAL OF CIVIL LAW 239, 241-242 (2014) (In Korean). However, multiple damages are no different than punitive damages because they have the commonality that the sufferer is compensated more than compensatory damages. See Dong-sup Um, *Hangung minbeopsang bijaesanjeong sonhaeui baesanggwa jingbeoljeong sonhaebaesang* [Compensation for Non-property Damages and Punitive Damages under Korean Civil Act] 71 KOR. JOURNAL OF CIVIL LAW 233, 253 (2015) (In Korean).



which originated from common law countries, do not comply with Korea's existing civil law system. Advocates of punitive damages stress their importance for deterring malicious illegal acts and offering realistic consolation to the sufferer. They believe the discrepancy between punitive damages and civil law can be overcome. Opponents of the idea, on the other hand, argue that: ① punitive damages do not conform with Korean law, and ② alternatives to punitive damages exist within the current law system.<sup>27)</sup> For example, consolation money and special damages<sup>28)</sup> (Art. 393 para. 2 of the Korean Civil Act) have been often suggested as alternatives.

Proponents of punitive damages argue that these cannot entirely substitute punitive damages, however, for the following reasons. ① Consolation money is supposed to help sufferers to recover from emotional/mental damages, while punitive damages are utilized primarily to recover from damages to property.<sup>29)</sup> ② Since special damages cannot exceed actual damages, punitive damages that exceed actual damages cannot be granted through special damages.<sup>30)</sup>

Despite intense refutation from proponents of punitive damages, negative opinions were prevalent in Korea, especially among civil law scholars,<sup>31)</sup> for the reasons stated above. Past efforts to stipulate punitive damages within the Korean legal system were not successful.<sup>32)</sup> Yet this situation changed after punitive damages were first introduced into the

27) Jong-ryeol Park, *Jingbeoljeok sonhaebaesange gwanhan yeongu* [A Study on the Law of Punitive Damages], 26 L. R. 137, 157 (2003) (In Korean); Jae-ok Jang and Eun-ok Lee, *Jingbeoljeong sonhaebaesang gaenyeomui suyongganeungseong* [Acceptability of Concept of Punitive Damages] 39 CHUNG-ANG JOURNAL OF L. S. 81, 106-108 (2019) (In Korean).

28) JEONG-HWAN KIM, JINGBEOLJEOK SONHAEBAESANGE GWANHAN YEONGU [STUDY ON THE SUITABLE OPERATION OF THE PUNITIVE DAMAGES SYSTEM] 146 (2019) (In Korean).

29) Tae-il Han, *Wijaryowa jingbeoljeok sonhaebaesangui bigyo—choegeun jingbeoljeok wijaryo nonuiwa gwallyeonghayeo—* [Comparison of Solatium and Punitive Damages—In Relation to Recent Punitive Solatium Discussions—] 20 INHA L. R. 99, 112-113 (2017) (In Korean).

30) Jae-kook Kim, *Jingbeoljeong sonhaebaesang* [Punitive Damages] 5 PRIVATE L. R. 83, 105 (1996) (In Korean).

31) Cha-dong Kim, *Jingbeoljeok sonhaebaesangjedo doipbangane gwanhan yeongu* [A Study on How to Stipulate the Punitive Damages] 13 KOR. JOURNAL OF LAW AND ECONOMICS 365, 367 (2016) (In Korean).

32) In 2006, The Presidential Committee on Judicial Reform pushed forward the legislation of punitive damages. See *Id.* at 367.

Fair Transactions in Subcontracting Act (FTSA) in 2011.<sup>33)</sup>

After this initial introduction of punitive damages into Korean law, the debate shifted focus to identifying problems with the individual law. Examples of commonly noted problems include the low maximum multiplier (up to 3 times of actual damages) legally applied in the Product Liability Act (PLA)<sup>34)</sup> and the low rate of lawsuits filed in the FTSA.<sup>35)</sup> The scope of discussion is rather limited, however, because most research focuses on just these two acts.

Debates around the introduction of punitive damages into general law have also been heated. Opponents of punitive damages are generally against implementing punitive damages into general law—for example, into the Korean Civil Act—or enacting a special act solely for punitive damages.<sup>36)</sup> Even some proponents of punitive damages believe that this would still be premature.<sup>37)</sup> Yet many advocates of punitive damages do strongly favor this idea, because it is necessary to deal with new types of illegal acts.<sup>38)</sup>

## 2. Relevant Acts

As of September 2020, there exist 20 acts with punitive damages provisions in Korea, according to the Ministry of Justice. The first act that was introduced punitive damages is the FTSA. Art. 35 para. 2 of the FTSA

33) *Id.* at 380.

34) Kyung-gyu Lee, *Jejomulchaegime isseoseo jingbeoljeok sonhaebaesangui gwajewa jeonmang* [A Study on Punitive Damages in Product Liability in Korea] 20 INHA. L. R. 223, 246 (2017) (In Korean); Seok-chan Yoon, *Jejomulchaegimbeopsangui jingbeoljeok sonhaebaesangnon* [Punitive Damages Theory in Product Liability Act] 163 THE JUSTICE 6, 14 (2017) (In Korean).

35) Cha-dong Kim, *Hadogeupbeopsang jingbeoljeok sonhaebaesangui beopjipaengsang munjejeomgwa geu silhyoseong jegobangan* [A Study on how to improve the enforcement of the newest punitive damages of the Fair Transactions in Subcontracting Act] 33 HANYANG L. R. 207, 226 (2016) (In Korean).

36) Um, *supra* note 26, at 234.

37) Jae-mok Lee, *Jingbeoljeok sonhaebaesangjedoe gwanhan gungnae ipbeobui hyeonhwanggwa munjejeom* [Current Status and Problems of Domestic Legislation on the Punitive Damages] 19 HONGIK L. R. 245, 265 (2018) (In Korean); Kim, *supra* note 22, at 102.

38) Yoon, *supra* note 34, at 21, Jeom-in Lee, *Hyeonhaeng jingbeoljeok sonhaebaesang jedoe daehan bipanjeok gochal* [A Critical Study on the Punitive Damages under the Korean Legal System], 74 DONG-A L. R. 43, 67 (2017) (In Korean).

(amended by Act No. 10475, Mar. 29, 2011) states, “If any person suffers damages since a principal contractor abuses the acquired technical data in violation of Article 12-3 (3), the principal contractor shall be liable to compensate for such damages to the extent not exceeding three times the damages sustained by the person: Provided, That this shall not apply where the principal contractor proves that he/she has no intention of or has not been negligent in causing such damages.” Many articles that regulate punitive damages in other laws have the same structure as Art. 35 para 2. of the FTSA.

The reasons for the amendment in 2011 were: ① to support inclusive growth, via cooperation between large companies and small-and-medium-sized companies; ② to deter unfair subcontracting transactions; and ③ to facilitate fairness in subcontracting transactions, between small-and-medium-sized companies. As we can see, there is no mention at all of “punitive damages.” Yet it can be inferred that the FTSA’s provisions for punitive damages aim to prevent illegal subcontracting transactions (see reason ②, above). In other words, the FTSA appears to focus on the “preventive” role of punitive damages.

Following the FTSA, a number of other acts introduced punitive damages. One example is the PLA (amended by Act 14764, Apr. 18, 2017). Cited as the reason for the amendment is that: “Punitive damages are introduced to punish malicious torts caused by producers, to strengthen deterrence from similar acts in the future, and to compensate sufferers substantially.”

Another example is the Credit Information Use and Protection Act (amended by Act No. 13216, Mar. 11, 2015). The reason cited for this amendment is: “In light of recent credit information leaks, punitive damages are designed to prevent and punish leakage of credit information, and to strengthen remedies for consumers.”

As can be seen from the two examples above, punitive damages in the Korean legal system aim to prevent illegal acts, to compensate sufferers, and to punish injurers – which is what punitive damages are supposed to do.

The table below lists acts that include provisions for punitive damages and summarizes the relevant information.

**Table.** Acts Including Punitive Damages Provision

Name of Act	Requirements	Knowledge requirements	Burden of proof	Punitive damage limits
Fair Transactions in Subcontracting Act	Violating certain articles	intentional act or negligence	prime contractor	3 times the loss
Fair Transactions in Franchise Business Act	Violating certain articles	intention or negligence	franchiser	3 times the loss
Fair Agency Transactions Act	Violating certain articles	intention or negligence	supplier	3 times the loss
Personal Information Protection Act	Loss or theft of personal information	intention or gross negligence	personal information controller	3 times the loss
Credit Information Use and Protection Act	Credit information: any damage arising from its loss, stealth, divulgence, alteration or compromise	intention or gross negligence	credit information company, etc.	3 times the loss
Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc.	Personal information has been lost, stolen, leaked, forged, altered, or damaged	Intention or gross negligence	provider of information and communications services	3 times the loss
Product Liability Act	Causes serious damage to life or body of a person, as a result of not taking necessary measures against a defect of a product	intention	manufacturer	3 times the loss
Environmental Health Act	Causes an environmental disease in another person, due to environmentally hazardous factors generated from business activities	intention or gross negligence	business entity	3 times the loss
Act on the Protection, Etc. of Fixed-Term and Part-Time Employees	Discriminatory treatment occurs repeatedly	clear willfulness	sufferer	3 times the loss
Act on the Protection, Etc. of Temporary Agency Workers	Discriminatory treatment occurs repeatedly	clear willfulness	sufferer	3 times the loss

Protection of Public Interest Reporters Act	Taking disadvantageous measures on the grounds of public interest reports, etc.	intention or negligence	the person who took disadvantageous measures	3 times the loss
Patent Act	Infringement of patent	intention	sufferer	3 times the loss
Act on Livestock Farm Alliance Systems	Violating certain articles	intention or negligence	vertical integrator	3 times the loss
Act on the Promotion of Mutually Beneficial Cooperation between Large Enterprises and Small and Medium Enterprises	Violating certain articles	intention or negligence	commissioning enterprise	3 times the loss
Unfair Competition Prevention and Trade Secret Protection Act	Infringement of trade secrets	intention	sufferer	3 times the loss
Act on Fair Transactions in Large Retail Business	Violating certain articles	intention or negligence	large retail business entity	3 times the loss
Monopoly Regulation and Fair Trade Act	Violating certain articles	intention or negligence	business entity or business entities' organization	3 times the loss
Act on Prevention of Divulgence and Protection of Industrial Technology	Infringement of industrial technology	intention	sufferer	3 times the loss
Act on the Protection of New Varieties of Plants <sup>39)</sup>	Infringement of the holder of a plant variety right or exclusive license holder's right	intention or negligence	sufferer	3 times the loss
Motor Vehicle Management Act	Causes grave damage to life, body or property of a person as a result of concealing, reducing, or falsely publicizing defects	intention	sufferer	5 times the loss

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39) Note that the Ministry of Justice does not identify Act on the Protection of New

It is noteworthy that most of the acts put three times limits to the amount of damages—probably influenced by foreign laws such as the Clayton Antitrust Act. There is one exception to this: the Motor Vehicle Management Act, one of the most recent acts that introduced punitive damages, regulates that the injurer is liable for up to “five” times the damages sustained by the person, instead of “three.” This reflects the view that an award of just three times the harm suffered is not sufficient for deterrence<sup>40)</sup> and compensation, in the case of a car defect.

Knowledge requirements are also notably different among these acts. Nine of the acts require intention or negligence, four acts require gross negligence, five acts require intention, and two acts go so far as to require “clear willfulness”. Lastly, the burden of proof is split between the sufferer and the injurer. These facts may imply that legislators have carefully considered the characteristics of each field, as governed by such acts.

### 3. Example of Judgment

Few cases regarding punitive damages have been taken to court in Korea, and most of these were subcontracting cases.<sup>41), 42)</sup> The admittance rate of punitive damages claims is also low.<sup>43)</sup>

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Varieties of Plants (APNVP) as a law that regulates punitive damages. However, Art. 85 para. 2 of the APNVP mandates that Art. 128 of the Patent Act, which includes a punitive damages provision, shall apply mutatis mutandis to claims for compensation for damage. Therefore, the APNVP should be included in the list of acts that have punitive damages provision.

40) Ha-myung Jeong, *Jingbeoljeong sonhaebaesangjedowa sangdangseongui wonching-jadongchajejosai 3bae jingbeoljeong sonhaebaesangjedoui munjeomeul jungsimeuro* [The Punitive Damages and Reasonableness] 68 KYUNGPOOK L. J. 37, 52-53 (2020) (In Korean).

41) Changwon District Court [Changwon Dist. Ct.], 2015Ga-Hap31582, Oct. 20, 2016 (S. Kor.); Seoul Western District Court [Seoul Western Dist. Ct.], 2016Ga-Hap32056, Mar. 30, 2017 (S. Kor.); Seoul Central District Court [Seoul Central Dist. Ct.], 2016Ga-Hap555462, May 4, 2018 (S. Kor.), etc.

42) Examples of judgments from other fields are: Seoul Administrative Court [Seoul Admin. Ct.], 2017Gu-Hap87074, Sept. 13, 2018 (S. Kor.) (Act on The Protection, Etc. of Fixed-Term and Part-Time Employees); Seoul High Court [Seoul High Ct.], 2018Na2030380, Jan. 23, 2019 (S. Kor.) (Fair Agency Transactions Act); Western Branch of Busan District Court [Western Branch of Busan Dist. Ct.], 2017Ga-Dan102875, Jan. 25, 2019 (S. Kor.) (Fair Transactions in Franchise Business Act).

43) A recent study found out that only 2 out of 12 cases admitted punitive damages claim.

Why are punitive damages provisions not applied widely? This is primarily due to the fact that punitive damages provisions have been implemented fairly recently – meaning that there have been few cases, thus far, in which the provisions were applicable. The concept of punitive damages is also not yet as widely recognized as expected. Nearly a third of small-and-medium-sized enterprises are unaware of the provisions, for example.<sup>44)</sup>

We will review, in the next section, a judgment in which a punitive damages claim was admitted.

1) *Judgment on June 14, 2019, 2016GaHap533325 (Principal Lawsuit), 2017GaHap568106 (Counterclaim)*

The Judgment on June 14, 2019, 2016GaHap533325 (Principal lawsuit), 2017GaHap568106 (Counterclaim) is one case in which a punitive damages claim was admitted. Among several plaintiffs' punitive damage claims, some were admitted while the others were abandoned. We will focus on the criteria applied by the court to either admit or abandon the plaintiffs' claims. Note: only some of the contents of the judgment are reviewed, due to the length of the judgment.

(1) *Matter of Fact*

The defendants were companies that had signed construction contracts with the Armed Forces Financial Management Corps; they subcontracted part of the construction to the plaintiff. The plaintiff was financially distressed, which led to halting construction in April 2015. The defendants informed the plaintiff of the termination of a contract in May 2015. The plaintiff filed a lawsuit for reimbursement of the construction cost.

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See Kim, *supra* note 28, at 220-221.

44) JUNGSOGIEOPJUNGHANGHOE, JINGBEOLJEONG SONHAEBAESANGJEDOE DAEHAN JUNGSOGIEOM INSING JOSA GYEOLGWABOGOSEO [RESEARCH ON THE PERCEPTION OF MANAGERS ON THE PUNITIVE DAMAGES] (2015) (In Korean).

(2) *Regarding Issues with Prefabricated Shoring System Construction*

A. Argument of the Litigants

The structural support was changed from steel support to prefabricated shores, according to the amendment agreement between the plaintiff and the defendants. The plaintiff's argument was as follows: since the defendants had not paid some of the increased construction cost, they should pay the remainder. The defendants had also reduced the unit price in the amendment agreement, which was a violation of Art. 4 para. 1 and Art. 11 para. 1 of the FTSA. The defendants thus had the responsibility to award three times the construction cost that the defendants were supposed to pay to the plaintiff for damages (Art. 35 para. 2 of the FTSA). The defendant's argument, in contrast, was that—based on the facts that ① they had paid the entire construction cost to the plaintiff; ② the reduction of the unit cost was due to the increase in supply of prefabricated shores; and ③ the plaintiff registered the reduced cost, when charging the additional construction cost—they had not reduced the unit cost unilaterally.

B. Judgment of the Court

The court's judgment was that the reduction of the unit cost of prefabricated shores was fixing an unreasonable subcontracting consideration, which was a violation of Art. 4 para. 1 and Art. 4 para. 2 subpara. 1 of the FTSA. Therefore, the defendants were responsible for compensating defendants' losses, according to Art. 35 para. 1 of the FTSA.

However, considering the facts—that ① the plaintiff accepted the unit price reduction request of the defendants, while signing the amendment agreement; ② the plaintiff did not make any claims on the unit cost of prefabricated shores to the defendants, when signing the amendment agreement or settling the progress payment; and ③ it is likely that, if the plaintiff is paid the remainder of the construction cost, the plaintiff's losses regarding the prefabricated shores appeared to be recovered; and ④ there is no evidence to admit liability for losses, according to Art. 35 para. 2 of the FTSA, regarding a reduction in the unit cost of prefabricated shores—the plaintiff's argument that the defendants were liable to pay three times the remainder of the construction cost as punitive damages was ruled not admissible.



### (3) *Regarding Acceleration<sup>45)</sup> Costs*

#### A. Argument of the Litigants

The plaintiff claimed that the defendants were responsible for paying the cost of acceleration from November 1, 2014 to April 30, 2015. Since the defendants' reduction of the acceleration cost was a violation of Art. 4 and Art. 11 of the FTSA, the plaintiff claimed that they were additionally liable to pay twice the acceleration cost, according to Art. 35 para. 2 of the FTSA. The defendants argued that, due to an agreement between the plaintiff and the defendants, were not liable to pay more than half of the cost arising from acceleration.

#### B. Judgement of the Court

The fact that there was an agreement for the plaintiff to pay half of the labor cost due to acceleration was accepted. However, the court decided that the agreement was void because it fell under Art. 25 para. 1 and Art. 25 para. 5 subpara. 1 of the Framework Act on the Construction Industry, and might be a violation of Art. 4 para. 1 of the FTSA. Therefore, the defendants were deemed responsible for paying the entire construction cost regarding the acceleration of construction. They thus had to pay 896,500,500 Korean won (approximately 0.8 million US dollars) to the plaintiff, as construction costs.

The court also ruled that the defendants were responsible for paying 50% of the construction cost as punitive damages, in addition to the construction cost itself. This was based on Art. 35 para. 2 of the FTSA. The reasons were as follow. ① The plaintiff was financially distressed, because the defendants did not pay the immense acceleration construction cost. ② After the acceleration was complete, the defendants abused their preferred position, as they proposed additional conditions against the plaintiff. ③ The plaintiff bore additional losses, due to the initiation of the construction acceleration. In contrast, the defendants had benefited from an economic gain due to the shortened construction period, without paying an acceleration cost to the plaintiff.

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45) Acceleration is the process in which the undergoing construction is done at a quicker pace than it is supposed to.

#### *(4) Conclusion*

In both situations, the plaintiff suffered a loss and the defendants were liable for damages. Yet there was a difference: while the judges did admit the punitive damages claims in the case of the plaintiff regarding acceleration costs, they did not admit the claims in the case regarding prefabricated shoring system construction—even though the defendants' behaviors would *prima facie* constitute illegal acts of Art. 35 para. 2 of the FTSA.

We can assume that the degree of malignancy of the defendants' behaviors was evaluated, considering several factors listed in Art. 35 para. 3 of the FTSA. The behaviors of the plaintiff were also taken particularly into account, to see if there had been any conflicts between the parties interested—thus evaluating any ill-will on the part of the defendants. Therefore, the objective of punitive damages was appropriately reflected in the judgment: punishing malicious acts by the injurer. The judgment also reveals why punitive damages are not widely utilized: the degree of malice was evaluated strictly. Yet the judges did not reveal how they reached the conclusion, in which 50% of the actual losses were to be awarded to the plaintiff as punitive damages.

## **VII. Proposed Amendment to the Korean Commercial Act**

As seen above, a number of acts include punitive damages provisions. However, there have been criticisms of the current Korean law. Many people have argued that introducing punitive damages to general law is necessary, rather than introducing them through individual acts. As a result, the Ministry of Justice announced a proposed amendment to the Korean Commercial Act, which includes a punitive damages provision, on September 28, 2020. As expected, this was to integrate the individual laws regulating punitive damages into one general act: the Korean Commercial Act. A translation of the amendment will be presented below.

### *1. The Article*

Below is a translation of the proposed amendment to the Korean

## Commercial Act.

Article 66-2 (Special cases to liability for damages of merchant)

Paragraph 1 If a merchant inflicts an injury or loss upon a person by intention or gross negligence, he or she shall be liable to compensate the injury or loss to an extent not exceeding five times the injury or loss, provided that the foregoing shall not apply where the merchant proves that such loss or injury has not been caused by commercial activities.

Paragraph 2 Claims for compensation for damage in the responsibility of paragraph 1 may be exercised only by a lawsuit.

Paragraph 3 Where a court determines the amount of damages of paragraph 1, it shall take into account the following matters:

1. The degree of intention or gross negligence;
2. The degree of losses or injuries;
3. The financial gain the merchant earned from such acts;
4. The contents and degree of the criminal punishment or the administrative disposition the merchant received for the acts;
5. The assets of the merchant;
6. The degree of efforts the merchant has made for damage relief

Paragraph 4 No special agreement that excludes or restricts the liability of paragraph 1 in advance shall be valid.

Paragraph 5 This article shall take precedence over provisions of any other act governing liability for damages.

It should be noted that the article ① applies to commercial activities of a public cooperation (Art. 2 of the Korean Commercial Act), and ② will not be applied to activities conducted before the amended act enters into force. Also, the article does not apply to every civil transaction.

## 2. Reasons for the Amendment

Below is a translation of the reasons cited, for the amendment.

① To deter acts that cause losses or injuries by intention or gross negligence of a merchant under for-profit activities of merchants, including enterprises; ② to induce reasonable and lawful business management of merchants, including enterprises; ③ to unify punitive damages provisions that were introduced in individual acts by fields and to increase the

effectiveness of them, a punitive damages provision is now introduced in the Korean Commercial Act, which is a fundamental act on corporate activities, as liability for damages regarding commercial activities of merchants. (Numbering added by author)

### VIII. Potential Problems of the Proposed Amendment to the Korean Commercial Act

As examined above, the proposed amendment to the Korean Commercial Act aims to introduce punitive damages into general law. It is unusual because these punitive damages provisions are stipulated in the Korean Commercial Act, rather than in the Korean Civil Act.<sup>46)</sup> Still, this may help improve consumers' rights and deter illegal acts by merchants. Yet several problems may arise if it is carried as it is, and the downsides may outweigh the benefits.

#### 1. No Grounds for "5 Times Limit" of the Damages

According to the proposed amendment to the Korean Commercial Act, a merchant has liability to compensate the sufferer for up to five times the amount of the injury or loss s/he incurred. Where does the number "five" come from? The amendment does not describe the reasons for this.

Opinions are divided, regarding the appropriate number of maximum multipliers, even among people who are favorable to punitive damages. Many think three is sufficient.<sup>47)</sup> Some think 10 is optimal,<sup>48)</sup> while others think there should be no limit.<sup>49)</sup> Yet nowhere can we find an answer, as to

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46) Seok-chan Yoon, *Jingbeoljeok sonhaebaesang doibui sangbeopgaejeongane gwanhan gochal* [Consideration on the amendment to the commercial law for the legislation of punitive damages provision] 37 THE JOURNAL OF PROPERTY LAW 197, 208 (2020) (In Korean).

47) Lee, *supra* note 37, at 267.

48) Kim, *supra* note 31, at 395.

49) This point of view is often supported by civic groups. For example, see People's Solidarity for Participatory Democracy, *Beommubuui jipdansosongbeopjejeongan, jingbeolbaesangjeane daehan uigyeonseo jechul* [Submission of Opinions on the Proposed Class Action Law and Punitive Damages by the Ministry of Justice], PEOPLEPOWER21.ORG, <http://www.>

how these numbers are derived. The majority of these opinions appear to be justified on normative grounds (or for no reasons at all). The Ministry of Justice is no different.

It would be ideal if an individual punitive multiplier could be derived for every case. Yet this is practically impossible—which is why we need a maximum multiplier. It is necessary to give concrete reasons for the derivation of the number, so that people can understand the purpose of punitive damages while avoiding excessive punishment or deterrence. To achieve this, it is essential to set up a scientific model to conduct empirical research for the derivation of an optimal maximum multiplier.

This problem has existed, for every act that has included punitive damages provisions, since the amendment of the FTSA in 2011. Yet the punitive damages provisions of individual acts can be justified, to some extent, by foreign legislation<sup>50</sup>: For example, the Patent Laws of the United States regulate a maximum multiplier of three (Art. 284) and the Clayton Antitrust Act of the United States also regulates a multiplier of three (Art. 4(a)).<sup>51</sup> Conversely, it is difficult to find examples of foreign legislations that demand up to five times the actual loss for damages. While it is true that foreign legislation cannot perfectly justify the current status of such multipliers in Korea, they can be utilized to set up guidelines, since the history of punitive damages in Korea is short.

## *2. Depending Too Much on a Judge's Subjective Point of View*

It is also problematic that a judge's subjective point of view can vastly affect the determination of the multiplier. The amount of damages (according to the Korean Civil Act) depends on the decision of a judge. A judge follows the principle of free evaluation of evidence when making decisions (Art. 202 of the Korean Civil Procedure Act). Particularly in calculating damages, where it is admitted that damage has occurred, if it is considerably difficult to prove the specific amount of damages in light of

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peoplepower21.org/PublicLaw/1742851 (last visited Feb. 10, 2021) (In Korean).

50) Lee, *supra* note 37, at 267.

51) Note that the act mandates recovering exactly three times of damages—discretion of the judge cannot be involved.

the nature of the case. The court may set an amount of damages that is deemed reasonable—taking into consideration all circumstances and based on the entire purport of the pleadings and the results of the examination of evidence (Art. 202-2 of the Korean Civil Procedure Act).

Why is it a problem that a judge's subjective point of view affects the amount of punitive damages, given that the amount of compensatory damages also depends on it? A judge's viewpoint affects the determination of the amount of punitive damages twice: ① the amount of incurred loss and ② the damages multiplier. The existence of the punitive multiplier aggravates the problem, because the possible range of damages becomes wider.

This is more problematic in the proposed amendment to the Korean Commercial Act than in the individual acts that include punitive damages provisions. This is because the maximum multiplier is higher in the amendment, thus allowing more room for a judge's personal viewpoint to play a major role. Think of a situation where a judge is favorably biased towards the defendants. The broader range in the amount of punitive damages that could potentially be imposed could thus imply a heavier burden on the defendant under a lawsuit. The problem of excessive punishment may arise more frequently, if the amendment is passed with no changes.

On the other hand, some people worry about lenient punishment. These people think judges tend to side with the injurer (which is often a large enterprise), because they are high-ranking officials in Korea.<sup>52)</sup> Therefore, judges may undervalue the punitive damages multiplier, leading to lenient punishment of the injurer.<sup>53)</sup> This result would not match the overall emotional sense around legality and fairness in Korea, and thus is unacceptable to the public.

To mitigate the problem stated above, utilizing citizen participation is often suggested a solution.<sup>54)</sup> The Ministry of Justice has also proposed "the Class Action Act," in conjunction with the proposed amendment to the

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52) Young-in Lee, *Jingbeoljeong sonhaebaesangboda baesimjega meonjeoda* [The jury system precedes the punitive damages], 68 *DEMOCRATIC L. S.* 153, 196-197 (2018) (In Korean).

53) *Id.* at 197.

54) Kim, *supra* note 34, at 247.

Korean Commercial Act, to enhance the effectiveness of consumer compensation. The first trial of class-action cases is subject to citizen participation (Art. 53 para. 1 of the proposal of the Class Action Act). However, the proposed act faces severe opposition from enterprises and economists, because it would increase legal costs.<sup>55)</sup> Even if the act enters into force, it is not applicable to every case. For instance, it requires at least 50 persons for a case to be classified as a class-action case (Art. 12 para. 1 subpara. 1 of the proposal of the Class Action Act). Moreover, citizen participation does not guarantee that the proper amount of damages will be determined.

The best solution is to develop detailed criteria, as much as possible, so that a judge's discretion is less involved. Art. 66-2 para. 3 of the proposed amendment to the Korean Commercial Act lists several such factors, which are somewhat abstract. Examples from other countries and local cases should thus be examined to set up detailed judgment criteria.

### *3. Causing Rapid Changes in the Current Legal System*

It has been less than 10 years since the punitive damages provision was introduced in FTSA in 2011. Therefore, few cases have been tried—and, especially, no punitive damages claim case has yet to be admitted to Korea's Supreme Court. As a result, sufficient legal principles around punitive damages have yet to be accumulated.

In the current situation, the abrupt introduction of a general punitive damages provision in the Korean Commercial Act would dramatically increase uncertainty for business management. Nobody else can easily anticipate how it will work, which leads to an increase in the overall social cost. Even as intention or gross negligence is required, most enterprises would be concerned that their acts might fall into the category of malign conduct that is subject to punitive damages. If a lawsuit is filed against them, they are thus highly likely to increase their legal costs, which are

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55) Korean Federation of SMEs, *Beommubuejipdansosongbeopjejeongbandaeuigyeonseojechul* [Submission of Opinions against Enactment of the Class Action Act to the Ministry of Justice], kbiz.or.kr, [https://www.kbiz.or.kr/ko/contents/bbs/view.do?mnSeq=207&seq=148884 (last visited Feb. 03, 2021) (In Korean)].

easily transferable to consumers. While the deterrence of unlawful actions is important, social efficiency likewise cannot be underestimated.

Another problem is that punitive damages are heterogeneous to the Korean legal system,<sup>56)</sup> as many scholars suggest. Heterogeneity cannot be a reason for leaving a punitive damages provision out of a general law, such as the Korean Commercial Act.<sup>57)</sup> However, it can be a reason for exercising more caution in the legislation. There have been sufficient debates on the theory of punitive damages, but few discussions around how punitive damages work in Korea, in practice. It would not be too late to wait and see—until ample discussions have assessed the possible problems and side-effects of punitive damages.

#### 4. *Downplaying Legislator's Intentions in the Past*

Currently, the punitive damages provisions of individual acts have different knowledge requirements, based on the characteristics of each field. This is assumed to have been the legislators' intention. Conversely, the proposed amendment to the Korean Commercial Act requires intention or gross negligence—regardless of the field—as long as the act or commercial activity has been carried out by a merchant. This may distort the intentions of legislators of the past.

The same can be also said for the burden of proof—which is split between the plaintiff and the defendant, depending on the field, in the individual laws. However, the proposed amendment to the Korean Commercial Act does not make any exceptions: a merchant has the burden of proof, to avoid liability. This can be too disadvantageous to the defendant, in certain situations, because the plaintiff has to prove that the defendant had the intention or negligence to conduct the wrongdoing.

“Commercial activity,” in the Korean Commercial Act, encompasses many type of activity. Article 46 of the Korean Commercial Act lists 22

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56) Se-Il Ko, *Daeryukbeobeseo jingbeoljeong sonhaebaesang nonui—minbeobui gwanjeomeseo—* [Discussions of Punitive Damages in the Civil Law Countries—A perspective of Civil Law—] 688 K. L. A. J. 142, 181-182 (2013) (In Korean).

57) Tae-sun Kim, *Jingbeoljeok sonhaebaesangjedoe daehan gochal: minbeopgaejeonge ttareun doimnonuiwa gwallyeonhayeo* [A Study on Punitive Damages: Introducing punitive damages into Korean Law] 50 THE KOR. JOURNAL OF CIVIL LAW 235, 249-250 (2010) (In Korean).



types of commercial acts. In addition, Art. 47 of the Korean Commercial Act states, “Activities of a merchant for the purpose of his or her business shall be deemed commercial activities (para. 1), and the activities of a merchant shall be presumed effected for the purpose of his or her business (para. 2).” Quasi commercial transactions<sup>58)</sup> are also regulated, to further widen the domain of commercial activity. Punitive damages are designed to punish malign acts and the degree of malignity can be differently defined, depending on the type of activity. Therefore, it is not desirable to assess all types of commercial activities on the basis of a single norm.

### *5. Claims Exercisable Only by Lawsuits*

According to the proposed amendment to the Korean Commercial Act, punitive damage claims may be exercised only by lawsuit. Yet this is onerous to both the plaintiff and the defendant.<sup>59)</sup> Increased lawsuit costs would negatively affect enterprises, causing a chain effect – where increased cost is reflected in the price of goods or services, harming consumers as well. Some scholars also criticize the punitive damages provision as hampering the potential for reconciliation before a sufferer sues the injurer.<sup>60)</sup>

### *6. Title of the Article Not Representing Punitive Damages*

The fact that the article’s title is “Special cases to liability for damages of merchant” is also a questionable decision. If the act is passed as it is, even those who are aware of punitive damages will be unable to find the article easily since the title is not straightforward. The phrase ‘punitive damages’ should be included in the name, to strengthen the educational function of punitive damages—people should know that they have the right to claim for damages.

Some people think that the term “punitive damages” should not be

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58) Sangbeop [Commercial Act], Act No. 1000, Jan. 20, 1962, amended by Act No. 17764, Dec. 29, 2020, art. 66 (S. Kor.).

59) Yoon, *supra* note 46, at 200.

60) Yoon, *supra* note 46, at 200.

included elsewhere in the legal provisions, because it is a legal term.<sup>61)</sup> However, “punitive damages” itself is the clearest phrase for this. The phrase even appears in the reasons for the amendment. If the Korean legal system accepts punitive damages into its scope, the phrase “punitive damages” must be used.

## IX. Conclusion

From what we have seen, many problems could arise if the proposed amendment to the Korean Commercial Act is passed with no changes. The introduction of punitive damages into general law will cause a radical change in the current legal system, causing massive social costs. It is undeniable that punitive damages are necessary, as new types of illegal acts emerge over time. The compensation regulated in the current Korean Civil Act is often insufficient for sufferers to recover their losses. The current system is also ineffective at deterring extreme wrongdoing. Yet the costs can overwhelm the benefits, if potential problems are not examined carefully. It has been only ten years since punitive damages were first introduced in Korea, and we still do not know whether they work in the desired way. In this stage, the inclusion of punitive damages provisions should fall under the domain of individual acts, to minimize unnecessary social costs.

Some point out that legislating punitive damages only in individual laws could result in discriminating against injurers who commit similar illegal acts—with no rational criteria, but merely depending on the presence or absence of legislation.<sup>62)</sup> However, this should be viewed from the point of a gradual improvement of the legal system.<sup>63)</sup> In the legal

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61) KIM, *supra* note 22, at 102-103.

62) Jeom-In Lee, *Hyeonhaeng jingbeoljeong sonhaebaesang jedoe daehan bipanjeong gochal [A Critical Study on the Punitive Damages under the Korean Legal System]* 74 DONG-A L. R. 43, 67 (2017) (In Korean).

63) If the gradual improvement of the system is not allowed, any improvement of the system is not possible barring the case that the improvement is beneficial to everybody, owing to the principle of equality, which is not reasonable and is against the value that the principle of equality realizes. (Constitutional Court [Const. Ct.] 98Hun-Ga1, Dec. 24, 1998 (S. Kor.)).

systems of the United Kingdom and the United States—the originators of punitive damages—it took decades to develop legal principles around punitive damages.<sup>64)</sup> We cannot expect the same in Korea, for the time being. Speed is not always better; it is more important to construct systems with the fewest flaws possible. To achieve this, more research—especially empirical research—should be conducted. Legislators should take these studies into account when legislating punitive damages, rather than relying on unproven beliefs. Legislators must also develop a number of detailed criteria, to evaluate the degree of malign acts. These efforts—combined with the discreet decision of judges—can prevent unexpected victims from arising.

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64) Park, *supra* note 27, at 147-153.

