

Compensatory Damages in Divorce Proceedings Under the Marriage Law of China

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Section 46 of the Marriage Law of China¹ provides that an innocent spouse shall have the right to apply for damages as compensation where divorce proceedings are brought under circumstances that involve (a) the commission of bigamy, (b) cohabitation of a married person with a third party, (c) domestic violence or (d) maltreatment or desertion of one family member by another. Academics have variously described this provision as creating either a system of compensatory damages resulting from divorce, or a system of damages resulting from fault based divorce.² For convenience the writer will refer to this system as that of “divorce compensatory damages” throughout this article. As the system of divorce compensatory damages is relatively new in China,³ and the provision from which the system derives may look simpler than it actually is,⁴ theoretical and practical questions may be raised about it. This article discusses this system from the perspectives of the legislative purpose behind its creation, its juridical nature,

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1 See Article 46 of the *Marriage Law of the People's Republic of China* [hereafter *Marriage Law*]. The People's Republic of China enacted two issues of the *Marriage Law* – *Marriage Law* (1950) and *Marriage Law* (1980). On the 28th of April 2001, an overwhelming majority passed the decision of the 21st session of the Standing Committee of the Ninth National People's Congress on the amendment of the Marriage Law of the People's Republic of China (1980). New content was added to Article 46 in the *Marriage Law*. The *Marriage Law* discussed in this article is the current *Marriage Law* as amended in 2001, unless otherwise stated.

2 Xue Ning Lan, 'A summary of the 2000 China Law Society's Research Conference on Marriage Law', *Law Year Book of China* [in Chinese] (Beijing: Law Year Book of China Press, 2001) 1118 at 1121.

3 The *Marriage Law Amendment* came into effect on the 28th of April 2001.

4 Article 46 of the *Marriage Law* is the only article on the system of divorce compensatory damages.

the elements of such an action, the losses that may be recovered, the procedural limits and the practical problems that arise from pursuing such compensation.

I. THE LEGISLATIVE PURPOSE OF DIVORCE COMPENSATORY DAMAGES

There have been writings supporting and opposing the creation of the system of divorce compensatory damages. The writer will analyse them to arrive at her view that, all things considered, the legislative purpose behind its creation deserves support.

1. *Views Supporting Enactment*

Chinese academics suggest three reasons for the legislature to have established the system for divorce compensatory damages.⁵ The first is that there was a need to protect the legal rights of the parties in a marriage. From the twenty years of reform and exposure to the outside world,⁶ Chinese marriage and family law faced challenges it never did before. 'The market economy has replaced the planned economy and economic pluralism has brought about pluralistic thinking.'⁷ 'With the development of material living standard, people's expectations regarding the connotation of marriage have also increased.'⁸ Divorce increased from 319,000 cases in 1979 to 1,197,000 cases in 1997. Prolonged commissions of adultery, cohabitation of a married person with another and even bigamy contribute to the rising divorce rates.⁹ In these circumstances, the purpose of the system of divorce compensatory damages is to allow the innocent spouse to make good his or her loss and thus have some comfort for the emotional distress resulting from the divorce. Conversely, the wrongful party is imposed some form of punishment. In these ways legal rights in marriage become strengthened.

The second reason suggested is that the system serves to ensure freedom of marriage. 'In order to avoid a poverty-stricken life, some

5 Lee Yin He and Ma Yi Nan ed., *Debates on Amendments to the Marriage Law* [in Chinese] (Beijing: Guang Ming Daily Press, 1999) at 230–254. The writer draws her inferences from various essays of this book.

6 The years of great reform are generally regarded to have been from the late 1970s through to the late 1990s.

7 Wu Chang Zhen, Yang Da Wen and Wang De Yi, *Interpretation and the Substantive Study of the Marriage Law of the People's Republic of China* [in Chinese] (Beijing: China Legal Press, 2001) at 6.

8 Tian Lan, 'The Duty to Make Compensatory Damages by the Wrongdoer in a Divorce', in Li Yin He & Ma Yi Nan, ed., *supra* note 5 at 249.

9 *Ibid.*

parties with an inferior economic status would force themselves to maintain the unfortunate marriage. By establishing a system for compensation of damages, the innocent party's worry of divorce can be dismissed.¹⁰

The third reason suggested is that the system completes the marriage legislation by providing civil remedy for the innocent party who has suffered from the spouse's wrongful act. Marriage is a kind of civil legal relationship.¹¹ A party to the marriage enjoys certain rights but also undertakes certain duties. While contemporary divorce law is not primarily aimed at 'punishment of the guilty' or 'rescue of the innocent' this does not mean that it should not play a role in regulating spouses' conduct. When a breach of matrimonial duties causes serious harm to the relationship between the spouses and results in breakdown of their marriage, the spouse who was responsible should bear some legal consequence such as having to pay compensatory damages.

2. *Views Opposing Enactment*

However, there are also many reasons offered to oppose the system of divorce compensatory damages. These include that there are few instances where there is only one single reason that results in the breakdown of the marriage so that fault during marriage may be virtually unascertainable and that marriage is a union of love involving some risk so that when one chooses to dissociate from it no question of damages should arise. The system of divorce compensatory damages in divorce may convey the unfortunate wrong impression that marriage does not involve an element of risk or that divorce cannot be pursued without payment of damages.¹²

3. *Writer's Analysis*

The writer submits that the system of compensatory damages in divorce should be supported. On analysis the three reasons given above to support this system and the two reasons opposing the system yields the following discussion.

10 Wang Ge Ya, 'A Discussion on the System for Compensatory Damages in Divorce Proceedings', in Li Yin He and Ma Yi Nan ed., *supra* note 5 at 237.

11 According to Article 2 of the *General Principles of the Civil Law of the People's Republic of China*, the Civil Law of the People's Republic of China shall adjust property relationships and personal relationships between civil subjects with equal status, that is, between citizens, between juridical persons and between citizens and juridical persons.

12 *Supra* note 2, 1118 at 1121.

First, even though there may not be a unitary reason for the breakdown of a marriage, nonetheless, the wrongful act committed in a marriage can be determined. 'Fault pertaining to marriage has a special meaning and it is not a subjective fault but is a type of objective act of fault.'¹³ Fault in marriage had always been identified in an act and not a mental state of the party in the marriage, especially in circumstances where the party commits wrongful acts that can cause breakdown of the marriage (*e.g.* bigamy, acts of family violence, *etc.*). Having confirmed the commission of these acts, there is no need for additional analysis of the other reasons contributing to the divorce. Thus that there were several reasons besides the commission of the wrongful act leading to divorce does not detract from the correctness of identifying the wrongful act itself.

Second, while it is true that marriage does involve an element of risk and that the law cannot forcibly hold the marriage together; the law does have a role to support marriage. Marriage is a basic building block of society and although there are various types of non-traditional families in our contemporary society, they will not supplant marriage in the short term.

'The famous anthropologist Margaret Mead pointed out that as far as we know, since ancient times, man has lived in a family and we do not know a time when it was not so; We do not know who can disintegrate a family or replace a family successfully in the long run. Even where people have suggested a change in the system of family and have gone through actual experiments, the human race will confirm, time and again that society as well as the survival of mankind relies basically on the basic unit of a family that consists of a structure that composes of a father, mother and children.'¹⁴

In a society where the economy is less developed, and where the system of social security is not fully established, legal support of marriage is indispensable. The more stable marriage is the more stable the society is likely to be. While contemporary law does not restrict divorce, through its emphasis on the matrimonial duties of spouses and a system of imposing responsibility for breach of these obligations, the law can serve as a guide to married persons to abide by their matrimonial duties. Where this can be brought about the breakdown of marriages may be avoided or reduced.

13 Wang Li Ming, 'Issues Arising from the Amendments to the Marriage Law', (2001) 3 Law Science 45 at 46.

14 XiaYin Lan, *The System of Matrimonial and Family Law in America* [in Chinese] (Beijing: China University of Law and Politics Press, 1999) at 145.

Third, there are some sociologists who feel that the revised marriage law and the system of compensatory damages unfortunately emphasize fault in divorce with which they disagree.¹⁵ The sociologists would instead prefer that in a modern society one should adopt a magnanimous attitude towards family problems and respect the choices married persons make. To them any attempt to restrict divorce by introducing some consideration of fault is retrogressive.¹⁶

The writer believes that, although the apprehensions of sociologists have some basis, they have neglected one fundamental point. While one agrees with no-fault divorce, this does not mean that the wrongdoings of a spouse should not be considered in divorce proceedings. Under the principle of no-fault divorce, divorce itself is no longer a punishment for the wrongful party. Neither is it a form of relief for the innocent party. It is simply a release from an unhappy union or an affirmation of the death of a marriage. The death of a marriage does not mean, however, that all rights and responsibilities dissipate. Neither does it mean that no responsibility need be borne for breach of matrimonial duties. After the no-fault divorce legislation was established in 1969 in California, it rapidly gained acceptance in other countries.¹⁷ No-fault divorce legislation may have solved the problem of abuse of fault-based divorce and may be the ideal way to end a marriage. Where both husband and wife already suffer emotional pain from the death of their marriage and the process of divorce proceedings neither should have to add to the pain by proving the other party's fault.¹⁸ In time, however, there may arise the need to consider the abuse of no-fault divorce legislation. The enormously high divorce rate is one of the most important changes in the modern family life in America. The system of no-fault divorce has impacted the financial mainstay for the low-income American families, resulting in the phenomenon of poverty stricken 'single mothers'.¹⁹ It will become an inevitable concern how to combat abuse and fully protect parties' interest in a no-fault divorce regime. It is not uncommon in foreign

15 One of the sections in the amended *Marriage Law* gave examples of five various situations in which divorce is permitted, of which three related to the wrongdoings of the party, including 'bigamy or cohabitation of a married person with any third party, acts of domestic violence, maltreatment and desertion of one family member by another, bad habits of gambling or drug addiction which remain incorrigible despite repeated admonition' (Article 32). According to sociologists, the aforementioned amendments have the tendency to restrict divorce.

16 See Xu An Qi, 'The main objective of the amendment of the Marriage law should not serve to limit divorces', (2001) 1 Civil and Commercial Laws 12.

17 See, e.g. Peter Nash Swisher, 'Reassessing fault factors in no-fault divorce' (1997) 31 Family Law Quarterly 268 at 270.

18 Xia Yin Lan, *id.* supra note 14 at 142.

19 *Ibid.* at 148.

countries for no-fault divorce to co-exist with some system for the payment of damages.²⁰ This proves the feasibility and necessity for the compensation of damages even in a no-fault divorce regime.

II. THE NATURE OF DIVORCE COMPENSATORY DAMAGES

Chapter V of the *Marriage Law* on 'Succour Measures and Liability' governs divorce compensatory damages. The nature of this system of divorce compensatory damages is worth examining.

The civil law of China recognizes different civil obligations. 'Consequently, it classifies civil liabilities into three categories namely (a) liability for failure to discharge contractual obligations, (b) liability for a *delict* and (c) liability for non-fulfilment of other civil obligations like the failure to restore the fruits of unjust enrichment, to pay for the non-consensual management of one's affairs by another (*negotiorum gestio*), to effect maintenance or the upbringing and support payments.'²¹ Which of these three categories best suits divorce compensatory damages? The writer submits that it is category (c) for reasons that will be offered in her following analysis. It should be remembered from the start that divorce compensatory damages is related to a legally recognized marriage.

1. Contractual Obligation

If we see marriage as a civil contract, it may seem that divorce compensatory damages are one form of contractual liability. The marital contract is a product of contemporary capitalist notions of individualism and liberties. After the French Revolution, it was stated in the 1791 Constitution, 'In the eyes of the law, marriage is a form of civil contract.'²² The Code Napoléon of 1804 reinforced the position, 'There can be no marriage where consent is wanting.'²³ Divorce would be the result of one party breaching his or her marital obligations so that divorce compensatory damages would be liability for breach of these contractual marital obligations. Divorce compensatory damages have, therefore, been most easily understood as liability for breach of contract.

20 Civil law countries such as France, Japan, Switzerland, Russia etc. provide for some kind of compensatory damages arising from a divorce.

21 Peng Wan Lin, *Civil Law* [in Chinese] (Beijing: The Law Publishing Group, 2000) at 711-712.

22 Yang Da Wen, *Family Law* [in Chinese] (Beijing: The Law Publishing Group, 1997) at 74.

23 Article 146 of the *Code Napoléon* [in Chinese] (Beijing: The Commercial Press, 1996).

The writer would note, however, that marriage has never been treated as a civil contract under the law of the People's Republic of China. On the contrary, the law regards marriage as a legally protected system of personal status. Parties can choose whether to enter into such status but they cannot choose the effects of such status because the effects are imposed by law.²⁴ Seen in this light, she submits that divorce compensatory damages are not of the nature of contractual liability in China.

2. Delictual Liability

Divorce compensatory damages have been regarded as a form of *delictual* liability (the functional equivalent of tortious liability in the common law). This may be more accurate than regarding it as contractual liability since the damages flow from violation of spousal right.²⁵ Proponents of this view have suggested that, just as under the general principles of *delictual* liability law, the first step in the determination of liability involves defining the right or legal interest infringed and the second step involves defining the extent of damage or loss caused by infringement. It is generally agreed that under this delictual principle the right or legal interest that has been infringed is the other party's spousal right.

From this the writer submits that there are three problems in viewing spousal right as the basis of divorce compensatory damages and, therefore, that its nature lies in *delict*. First, the concept of spousal right is absent from Chinese law. To define it as 'personal rights and obligations between husband and wife'²⁶ over-simplifies the matter. With regard to the personal relations between spouses, the *Marriage Law* merely stipulates that husband and wife shall have equal status in the family, the right to use his or her own surname, the freedom to engage in production and other work, to study and participate in social activities, without restriction or interference from the other and the duty to practise family planning.²⁷ This exhausts the content of personal relations between spouses. As part of the General Provisions, the *Marriage Law* further provides that husband and wife shall be faithful and respect each other, family members shall respect the old and cherish

²⁴ Yang Da Wen, *supra* note 22 at 68.

²⁵ Lee Yin He and Ma Yi Nan ed., *Debates on Amendments to the Marriage Law* [in Chinese] (Beijing: Guang Ming Daily Press, 1999) at 230–254. The writer draws her inferences from various essays of this book.

Yang Li Xin, 'A Discussion on Compensatory Damages for Emotional Distress Caused by Violation of Spousal Right', (2002) 7 *Law Science* 55.

²⁶ Yang Da Wen, *supra* note 22 at 80.

²⁷ Articles 13–16 of the *Marriage Law*.

the young, help one another and maintain equal, harmonious and civilized marriage and family relations.²⁸ Though it concerns marital fidelity, it is submitted that the article is directory rather than mandatory. It would thus be overly liberal to use the General Provisions as the embodiment of spousal right.

Second, China's academics have not made definite pronouncements on the concept or content of spousal right.²⁹ It is more common to see spousal right as a basic status right of husband and wife that arises from their legitimate marital relations. This diversifies into rights concerning surnames, cohabitation, fidelity, residence, domestic affairs, and their corresponding obligations.³⁰ But this definition is under-inclusive, as the wrongful acts giving rise to divorce compensatory damages go beyond direct violation of spousal right. For instance, domestic violence is an infringement of the right to physical health. Where it does not result in divorce, relief is available under general principles of delictual liability instead of violation of spousal right. In contrast, violation of spousal right (*e.g.* bigamy) cannot lead to divorce compensatory damages if the violation of spousal right had not resulted in divorce.³¹

Third, defining divorce compensatory damages as liability for violation of spousal right leads to contradictions. Under civil law principles, spousal right is an absolute personal right so that a third party could be held liable for infringing the spousal right. One classic example is bigamy.³² The third party has infringed the spousal right of the party whose spouse the bigamist attempted to marry. As it is, however, judicial interpretation has established that, 'Divorce compensatory damages in Article 46 is [only] to be borne by the spouse of the innocent party in divorce proceedings'.³³ Third parties cannot be made liable for divorce compensatory damages.

28 Article 4 of the *Marriage Law*.

29 Liu Yin Ling, *The Research on Spousal Right* [in Chinese] (Beijing: China Procuratorial Press, 2001) at 66.

30 Ma Qiang, 'A Discussion of Consortium', (2000) 2 *Forum on Legal Science* 49 at 50.

31 See article 29 of the *Interpretation One of the Supreme People's court regarding problems of the marriage law of the People's Republic of China that have arisen over the years* [hereafter *Interpretation one*]: 'Divorce compensatory damages in Article 46 is to be borne by the spouse of the innocent party in divorce proceedings. Where the People's Court has ruled against divorce, a claim for divorce compensatory damages will not be upheld. Thus where the marriage is still ongoing and one party makes a claim for divorce compensatory damages the claim will be dismissed by the People's Court.'

32 Xia Yin Lan, *supra* note 14 at 81. In the USA, some state laws clearly stipulate that third parties should compensate in damages for harm caused to a marriage through the commission of adultery.

33 *Interpretation one, supra* note 31, article 29.

3. *Other Civil Obligations*

It follows from her dissatisfaction with the views of the divorce compensatory damages as either a form of contractual or *delictual* liability that the writer favours viewing it, instead, as liability for the non-fulfilment of other civil obligations. Article 46's content and legislative history would lead to the view that divorce compensatory damages do not protect civil rights under any other area of the law than this part of the *Marriage Law*. The damages protect a spouse's legal interest as the *Marriage Law* spells this out. Should such legal interest be extinguished by the other party's wrongful conduct as when the conduct leads to a divorce, further relief to the wronged party is available in the form of divorce compensatory damages. Where the wrongful conduct does not result in the spousal status being extinguished in divorce, then the wronged party cannot expect divorce compensatory damages but may seek a remedy from the general principles of delictual liability. The writer thus submits that the nature of divorce compensatory damages is best regarded, not as contractual or delictual, but as 'other liabilities'. The liability derives directly from specific statutory provisions in the *Marriage Law*.

III. CONSTITUTIVE ELEMENTS OF DIVORCE COMPENSATORY DAMAGES

The next issue that arises is: what are the elements that make up this action for divorce compensatory damages? What must an applicant prove to succeed in obtaining such damages? Three main views have been offered by academics but the writer will point out problems with each and suggest her own view of the necessary elements of this action.

1. *Three Views*

The first view starts from the proposition that liability for divorce compensatory damages is a form of delictual liability so that the elements would be the same as those required to establish delictual liability in general. These include wrongful intentional or negligent conduct, subsequent damage and proof of the causation between the wrongful conduct and the subsequent damage. This is a popularly held view.³⁴ The second view is a variation of the first. It proceeds from the proposition that liability for divorce compensatory damages is a particular form of delictual liability involving the violation of spousal rights. It

³⁴ Chen Wei, 'The Application of the Law of Divorce Compensatory Damages – An Investigation of Issues Raised' (2002) 2 *Law and Business Review* 80 at 81.

follows that four elements are necessary for this action in delict. These include wrongful intentional or negligent conduct, the violation of a spousal right, the subsequent damage to the enjoyment of the benefits of marital status of the spouse, proof of causation between the conduct amounting to violation of spousal right and the loss of benefits of marital status.³⁵ The third view is a further variation. It proceeds from the proposition that divorce compensatory damages is a form of delictual liability involving the violation of a spousal right but elaborates that this spousal right must be understood from reading Article 46 of the *Marriage Law*. The elements of the action therefore include the occurrence of any of the four unlawful conducts listed in Article 46, divorce being sought by the wronged spouse as a result of the occurrence of the above mentioned conduct, the wronged spouse suffers damage (including property damage as well as emotional distress) and the claimant as the wronged party must be innocent in all relevant aspects.³⁶

2. *Writer's Analysis*

The writer submits that all three views can be criticised for starting from the proposition that the nature of this liability for divorce compensatory damages is delictual. She has submitted in Part II above that its nature is not best regarded as delictual but simply as liability arising from the four unlawful conducts listed in Article 46 of the *Marriage Law*. Adding the connection to delictual liability confuses the nature of the action and its constitutive elements. The writer submits that all three views are flawed in this regard although to differing degrees.

In particular, the first and second views are confined to the general delictual liability stressing only that the precipitating conduct be intentional or negligent. In fact, the four unlawful conducts listed in Article 46 are described very clearly and they all refer to deliberate conduct. In leading to liability for divorce compensatory damages, the conduct

35 Yang Li Xin, 'The Legal Application of Liability for Compensatory Damages for Divorce and Wrongful Acts', (2001) 8 Civil and Commercial Laws 42 at 43. The article brings up a point: 'The system of imposing liability for compensatory damages for violation of spousal rights has evolved through 3 stages; the first stage was the categorization of the break up of a marriage as an act which violated the right of the husband. At the second stage, it was seen as an act capable of incurring liability for violating the reputation rights of a person, and was dealt with under the law regarding violation of reputation rights. The third stage saw the recognition of the act causing the break up of a marriage as a civil liability under the tort of violation of spousal rights and compensation for emotional distress can be imposed. The existing regulations now fall under this third stage.'

36 Yang Da Wen, *An Explanation of the New Marriage Law* [in Chinese] (Beijing: China Renmin University Press, 2001) at 328–331.

must be wrongful. It serves no real purpose to further include the criteria of intention or negligence. Another problem with the second view is that it puts divorce compensatory damages and compensatory damages for violation of spousal rights on the same standing. Although an overlap does exist between divorce compensatory damages and damages for the violation of spousal rights, they are not the same. They can and should clearly be differentiated. Divorce does not always follow upon a violation of spousal rights which can occur at any time during the duration of a marriage. Where there has been a violation of spousal rights that does not lead to divorce, divorce compensatory damages cannot be sought.³⁷ These damages can only be sought in the specific circumstances where there has been a violation of spousal rights that leads to a divorce.

The third view integrates Article 46 with two particular elements, namely, the occurrence of an unlawful conduct which constitutes the reason for divorce and the claimant being an innocent party. Of the three, this is the most appropriate view to take. However, the writer submits that even the third view still suffers from the flaw of connecting the action for divorce compensatory damages with delictual liability. The connection under this view can still confuse. The kind of damage that supports an action for divorce compensatory damages is different from the kind of damage generally sought in delictual liability. For divorce compensatory damages, the innocent party has the right to pursue a claim once divorce occurs as the result of the wrongful conduct of the other spouse.

The writer submits that because liability for divorce compensatory damages is a unique form of “other liability” and it emerges from a particular statutory provision its elements should take guidance from and follow closely Article 46 of the *Marriage Law*. It follows that the elements of this action involve either spouse engaging in any of the listed unlawful conducts, the unlawful conduct resulting in divorce, and the claimant being the innocent party. An analysis of the material consequences of these rules leads to the action requiring the elements discussed below.

3. *Writer's Suggestion*

The writer submits that the action for divorce compensatory damages, being uniquely connected with Article 46 of the *Marriage Law*, requires proof of three elements.

³⁷ Analysis on this point was made earlier in the portion under Part II ‘The Nature of Divorce Compensatory Damages’, see above.

The first is that either spouse must have engaged in one of the four unlawful conducts spelt out in Article 46. This element will severely limit the scope of divorce compensatory damages. It is only when one spouse engages in an act either of bigamy, cohabitation with a third party, domestic violence (or abuse) or desertion of his family members that Article 46 comes into operation. Article 46 is crucial to any thought of seeking divorce compensatory damages.

The second element is that divorce results from the occurrence of any of the four unlawful conducts. It is only in situations where the unlawful behaviour is the cause of divorce that the right to divorce compensatory damages arises. This element distinguishes the right to divorce compensatory damages from other delictual rights. If the above mentioned conducts are not the cause of the divorce but still cause harm, such conduct constitutes a claim for other rights under the general principles of delictual liability. For example, domestic violence and abuse can give rise to the right to damages for personal injury, desertion can give rise to the right to maintenance while bigamy and cohabitation with a third party can give rise to the right to compensatory damages for the violation of spousal rights. Divorce is not a requirement for the crystallisation of these rights. These delictual actions can be sought while the marriage is ongoing. The same, however, cannot be said of divorce compensatory damages. As its name suggests, divorce is the main requirement that must be present before the right of divorce compensatory damages arises.

How do we determine causation or whether there was any relationship between the unlawful conduct and the divorce? This point has not been mentioned in relevant articles.³⁸ The reasons leading to divorce are usually multi-faceted and made up of many different factors; rarely would the divorce be caused by one factor alone. Hence, it is a difficult task for the judge to make a judgment on what the real reason or the main cause leading to the divorce might be. The writer thus believes that with regard to the determination of causation, we can only make inferences. If one party adduces evidence specifically against the unlawful behaviour of the other party and the judge is convinced by the evidence, the claim that divorce is a result of that unlawful behaviour will succeed, and there will not be a need to further adduce evidence to show that there is causation between the

38 Lee Yin He and Ma Yi Nan ed., *Debates on Amendments to the Marriage Law* (Beijing: Guang Ming Daily Press, 1999). The writer draws her inferences from several essays of this book and other materials in the preceding 3 years regarding divorce compensatory damages as well. Generally, they do not discuss the issue of causation between the unlawful act and the reason for divorce, but debate upon the possible relationship between the unlawful act and subsequent material damage and emotional distress instead.

unlawful conduct and the divorce. However, if the claimant has forgiven the injurer with respect to previously committed conduct which is unlawful under Article 46, the injurer may bring it up as a defence.

The third element is that the claimant must remain innocent of all relevant aspects of the case. This is another special rule regarding divorce compensatory damages. With regard to the understanding of the term 'innocent', a view of academics is that it is difficult to determine whether a party may be wrong or innocent. Hence, to require that a claimant seeking divorce compensatory damage is innocent is too rigid a condition. Several reasons may be offered. Family relationships are unique and require special consideration. Family disputes or the break up of marriages is usually not caused by just one party. Rather, they are caused by myriad reasons or inter-related causes. If the wife accuses her husband of being guilty of 'bao er nai',³⁹ he may turn around to accuse her of lacking in care and concern towards him for a long period of time. It must also be considered that the system of allowing compensatory damages for wrongful acts resulting in divorce is aimed at providing economic remedy to the victim and increasing the economic burden on the person who 'bao er nai' or perpetrates domestic violence and so on. If the conditions to be fulfilled by the victim-claimant are too harsh, it will be very difficult for the victim to make out the claim, and the regulation will not meet its legislative intent. It should further be considered that this rule does not differentiate between degrees of wrongfulness. The acts of the husband who 'bao er nai' and that of the wife that lacks in care and concern for her husband over a long period of time are different in nature.⁴⁰

The writer submits that the term 'innocent' must be understood in a way that is sensitive to the nature of family disputes and what causes marriage breakdown. Many possible causes may act together to lead to the break up of a marriage. Both spouses may have to bear a certain amount of responsibility for this eventuality. However, this responsibility or fault is not that which the law is concerned with. In a legal context, fault has close relation to certain duties and responsibilities. If it does not violate a legal duty owed, it is not classified as a legal fault. A wife's 'fault' in her lack of care and concern towards her husband over a long period of time can only be determined according to the standards of what is judged as morally right for parties to do in a marital consortium and it may be inappropriate to see this as a civil responsibility. Following from the example, a wife's lack of care and concern can be seen as a 'fault' in the sense that she has not done

39 'Bao Er Nai' is a colloquial term used by the mass media, generally referring to situations where "a married person cohabits with a third party".

40 Wang Li Ming, *supra* note 13, 45 at 46.

her part in maintaining a good relationship between her husband and herself and cultivating their feelings for each other; the husband can seek to solve this problem through proper communication with his wife. If he is unable to tolerate it, he can then bring up divorce. However, this cannot constitute the reason for the husband engaging in unlawful conduct to rid himself of his own responsibility. Hence, the meaning of 'innocent' in Article 46 should be commensurate with the 'wrong' involved, and since the article specifically refers to the four unlawful conducts as 'wrong', 'innocent' should be understood to mean actions not comprising of these four specific conducts.

If both parties have engaged in the above mentioned unlawful conducts and both their conduct cause them to decide to divorce, can the principle of 'equal apportionment of damages' be applied? The writer holds the opinion as follows: Wrongs that can constitute the basis for divorce compensatory damages are all deliberate acts, and it is not easy to decide which nature of wrongs is more serious than the others. There are also views believe that 'If both spouses deliberately engage in unlawful conduct resulting in divorce and the nature of both conducts are the same, the frequency of the behaviour may still be different. However, much difficulty is posed in the ascertainment of the degree and magnitude of such unlawful behaviour; and considering that one of the functions of divorce compensatory damages is to prevent and punish unlawful conduct which violates the legal spousal right, such apportionment of fault or damages should not be allowed.'⁴¹

IV. LOSSES RECOVERABLE IN DIVORCE COMPENSATORY DAMAGES

There are many academic opinions on the losses that are recoverable in a successful action for divorce compensatory damages. Most discussion centre on what kind of property losses can be recovered apart from the main loss of emotional distress.⁴² The interpretation of Article 46 of the *Marriage Law* of China clearly explains that divorce compensatory damages include both property losses and emotional distress.⁴³

⁴¹ Chen Wei, *supra* note 34, 80 at 83.

⁴² Yang Li Xin, 'A Discussion on Compensatory Damages for Emotional Distress Caused by Violation of Spousal Right' (2002) 7 *Law Science* 55 at 60.

Lee Yin He and Ma Yi Nan ed., *Debates on Amendments to the Marriage Law* [in Chinese] (Beijing: Guang Ming Daily Press, 1999) at 230–253. The writer draws her inferences from various essays of this book.

⁴³ See Article 28 of *Interpretation One*, *supra* note 31.

1. *Academic Opinions on the Losses*

There are two points of note regarding property losses. Property loss in a divorce proceeding refers to the injurious acts of one spouse that causes the other spouse's present property interests to be reduced or lost, for example, the failure to maintain the family could cause the other spouse's present property to be reduced or joint property to be reduced. Similarly where one party commits domestic violence or maltreatment of the family or deserts the family these can result in property loss, for example, medical expenses and loss of employment due to injury or inability to work. Property losses can be incurred directly or indirectly. Further, property losses due to divorce can include reduction of property and probable loss of benefit including expectancy interests.⁴⁴

Professor Chen Wei has provided a more concrete analysis of the issues:

‘One of the main objectives of having legislation concerning loss of property due to divorce is to make up for the damage done. Thus, in considering the scope of property loss due to divorce, it naturally includes both present and positive damages. Whether foreseeable loss of interests and negative damages can be included in the scope of divorce compensatory damages is a different issue. Any expected loss of the couple's joint property caused by injurious acts of the party at fault should be included in the scope of divorce compensatory damages. However, loss of the spouse's right of inheritance and other reversionary interests should not be included as there are other essential statutory requirements, apart from the fact that the parties are married to each other, to be fulfilled before the spouse's right of inheritance can be recognised. For example, the living spouse's right to inheritance should not have been revoked when the other spouse is still alive. In other words, it is difficult to determine whether the right to inheritance can be recognised in the future. Therefore, beneficial rights to an insurance policy should not be included in the scope. Should the request for spousal maintenance be included in the scope of divorce compensatory damages? This question should be dealt with separately. If the innocent party possesses requirements to be maintained by the other party during the course of marriage and the party at fault did not provide for maintenance thus causing the innocent party

⁴⁴ Zhang Xiao Yuan, ‘A Discussion on the Implementation of the Divorce Compensatory Damages System’, *Legal Discussion of SiChuan University* [in Chinese] (ChengDu: SiChuan University Press, 2001) at 164.

to incur costs of maintenance, the wrongdoer must bear the liability of such losses. However, if the innocent party does not possess such requirements, the request for spousal maintenance should not be included in the scope. Under Chinese law, whether one spouse can request for maintenance from the other depends on whether certain preconditions are met.⁴⁵

2. *Writer's Analysis*

The writer submits that the above analysis could be even more comprehensive. What kind of losses can be included in the scope of present and positive losses? What about medical expenses incurred due to acts of violence causing injury? What about maintenance owed due to act of desertion? These debts can be claimed in the course of divorce proceedings. However, these debts can also be claimed even if divorce is not sought. In reality, it is rare to find parties in a subsisting marriage claiming such debts against each other even though in theory this is not impossible. What about the reduction of property interests (including separate and joint property interests)? We can rely on the principle of ownership to assess the amount of compensation. The writer would query what are 'the expected losses of the couple's joint property caused by injurious acts of one party'.⁴⁶ We await for an elucidation of the phrase 'expected losses'.

a. *Emotional Distress Main Loss*

It is difficult to accurately grasp this area of divorce compensatory damages. The writer suggests that a way out of the ambiguity requires us to focus on the legislative intent in enacting Article 46 of the *Marriage Law*. What was the mischief the law aims to suppress and what is the remedy the law gives?

Article 46 provides the 'causes of divorce'. Divorce compensatory damages can only be awarded when one spouse's wrongful conduct leads to divorce. Thus, the main aim of awarding divorce compensatory damages is to remedy the damage caused by the change in status after divorce. Divorce causes the parties agony and pain. Japanese academic Chuandao Wuyi commented:

'There will be damage to either the marriage itself or the status of the parties if they are left with no choice but divorce. Marriage is the basic foundation of society and thus it is important for

⁴⁵ Chen Wei, *supra* note 34, 80 at 81–82.

⁴⁶ *Ibid.*

the law to protect the institution of marriage. Negative appraisal from society due to divorce, despair about marriage life, unease about the future, pain from leaving the children are some consequences of divorce which will cause emotional distress to the parties involved.’⁴⁷

The main objective of divorce compensatory damages must be to give relief for the emotional distress caused by the loss of marital status on divorce.

It is incorrect for the parties to attempt to calculate divorce compensatory damages in the same way as property loss. According to judicial interpretation, factors such as: ‘a. exceptions with respect to the extent of misconduct by the wrongdoer; b. factual circumstances such as the method of injury, situation the parties were in, mode of behaviour and others; c. consequences of the infringing act; d. the profits earned by the party at fault; e. the financial capability of the party at fault; f. the general standard of living of the area in which the suit is taking place’ should be taken into account in assessing the concrete amount of divorce compensatory damages due to emotional distress.⁴⁸ Apart from the factors mentioned above, the writer submits that the length of the marriage should be taken into account when assessing the amount of divorce compensatory damages in respect of emotional distress. The longer the marriage lasted before the divorce, the higher should be the amount of divorce compensatory damages to be awarded.

b. *Proper Extent of Property Losses*

Property losses are clearly also included in divorce compensatory damages. Property losses must, however, still be related to the divorce that underlies the action, for example, costs due to division of assets, costs incurred in investigating and obtaining evidence, litigation costs and so on. Property losses in divorce compensatory damages should be different from the indirect losses that are recoverable in actions based on contractual or delictual liability.

c. *Medical Expenses, Maintenance and Other Costs*

Costs such as medical expenses, maintenance costs and other costs do not belong to the scope of divorce compensatory damages. They are

47 Luo Li, ‘A discussion on Japanese divorce compensatory damages system’, (2002) 2 Law Review 126 at 128.

48 ‘Supreme People’s Court Explanation on damages for emotional distress due to civil trespass’ passed by the Committee of the Supreme People’s Court at the 1161st session, effective on 26th February 2001.

damages incurred due to injurious acts. Since such damages are independent of whether divorce is being sought, strictly speaking, they do not belong to the scope of divorce compensatory damages. However, such family injurious acts are distinctive from others. It is very difficult to determine such injury-based damages under the present matrimonial property system when a marriage still subsists.⁴⁹ Thus, such injury-based damages are naturally being mentioned in the event of divorce. Therefore, the academic opinions concerned classify such damages as part of divorce compensatory damages. It must be clarified however that injury-based damages and divorce compensatory damages are different in nature, and that injury-based damages can be requested even in the course of marriage. The main reason for including these costs under divorce compensatory damages is to facilitate the litigation procedure.

The main loss recoverable in a successful action for divorce compensatory damages must be the emotional distress that results from the termination of the marriage by divorce, including costs incurred in pursuing the order of divorce. Other injuries that are not as obviously related with the trauma of divorce should not be recoverable as divorce compensatory damages.

V. PROCEDURAL LIMITS TO ACTION FOR DIVORCE COMPENSATORY DAMAGES

1. *Innocent Spouse only has Locus Standi*

The right to seek divorce compensatory damages is clearly available to the spouse who was innocent of the conduct that justified the divorce and who therefore suffered a violation of his or her marital rights. This point has not been disputed by academics and it has further received the acknowledgement of judicial interpretation.⁵⁰ Although the victim of domestic violence, acts of abuse or desertion may not be just the spouse and can involve children or other family members as well, these other victims can only seek recourse through a general *delictual* claim of a violation of their rights so as to make the injurer shoulder his civil responsibility towards them. They do not possess *locus standi* to pursue an action for divorce compensatory damages.

49 In fact, under the matrimonial regime established by the law China, there is joint ownership in matrimonial property during marriage, thus it is difficult to determine compensatory damages during the subsistence of marriage.

50 See article 29 of *Interpretation One*, *supra* note 31.

2. Third Party to Wrongdoing

Can the person liable to pay divorce compensatory damages include a third party, for example, the third party in a bigamous relationship? There have been many conflicting opinions and debates on this issue both during and after the amendment process of the legislation in the *Marriage Law*.

One view holds that in situations of bigamy or cohabitation of a married person with a third party, if the third party is fully aware that the person is married, then the third party should become a joint violator of a right and be made to shoulder joint responsibility.⁵¹ Another view is that the person who should shoulder the responsibility for divorce compensatory damages can only be the spouse that is guilty of an unlawful conduct. Third parties should not be involved. This is because 'Divorces and divorce compensatory damages are disputes which arise only between parties to a marital consortium and they solve issues concerning the civil identity and responsibilities arising from the marriage of these parties. Therefore, it is not advisable to impose divorce compensatory damages and civil responsibility to the third party.'⁵² Judicial interpretation of the Supreme People's Court has acknowledged the latter view, and specifically regulates: 'The main person who is liable to pay divorce compensatory damages under Article 46 of the *Marriage Law* is the spouse of the innocent party.'⁵³ From another perspective, this point proves as well that the nature of divorce compensatory damages is different from that of compensatory damages for the violation of general rights. Even if the conduct of the third party fully satisfies the elemental requirements of general delictual liability, the victim may only base the claim on a general delictual liability to seek compensatory damages from the third party; the third party cannot be named as a co-defendant in the action for divorce compensatory damages.

3. Time Bar

There has been clear pronouncement from the courts on the time after which an action for divorce compensatory damages becomes time-barred. The claim for divorce compensatory damages must be pursued at the same time as the action seeking divorce. Further, if the innocent party is only the defendant in the divorce application

51 Li Ming Shun, 'My View on the Problems Regarding Divorce Compensatory Damages', in Lee Yin He and Ma Yi Nan, ed., *Debates on Amendments to the Marriage Law* [in Chinese] (Beijing: Guang Ming Daily Press, 1999) 240 at 243–244.

52 Zhang Xiao Yuan, *supra* note 44.

53 See article 29 of *Interpretation One*, *supra* note 31.

(and he or she does not agree to the divorce) and does not bring up a claim to divorce compensatory damages, he or she can bring an independent action for divorce compensatory damages within a year of the finalisation of the divorce.⁵⁴

Differentiating the innocent party's position for bringing up the claim in these two situations and setting different rules and limitations are significant. The reason is that where the innocent party is the plaintiff in the divorce application, it is convenient for him or her to pursue compensatory damages at the same time. It is assumed that the plaintiff is fully aware of his or her right to divorce compensatory damages. Indeed the courts have a duty to inform him of these rights.⁵⁵ If the plaintiff waited until after the divorce to make the claim for divorce compensatory damages, this makes it harder to prove that the divorce is a result of the spouse's unlawful conduct. Where, on the contrary, the innocent party is the defendant in the divorce application and is against the application for divorce, it is natural that he or she will not bring up the issue of divorce compensatory damages. Nevertheless, the court may grant the divorce. Where this happens, the innocent party is allowed to bring up a claim for divorce compensatory damages after the divorce. This is only right because otherwise the innocent spouse would have to choose between agreeing to the divorce to be able to pursue compensatory damages or refuse to agree to the divorce and forgo the right to divorce compensatory damages. The writer submits that putting the innocent party in such a fix would be obviously unreasonable. It is also submitted, however, that there should be a limitation of time for the innocent party to bring up a rightful claim for compensatory damages after judgement for divorce is passed (which would be one year after the divorce). If this time limit is exceeded, the claim is rightly extinguished.

VI. PRACTICAL PROBLEMS

1. *Proving Wrongful Conduct*

The most pressing practical problem facing the party taking action for divorce compensatory damages is proving the element of the action that his or her spouse has committed one of the four kinds of conduct listed in Article 46 of the *Marriage Law* that justifies divorce.⁵⁶ It is

⁵⁴ Article 30 of *Interpretation One*, *supra* note 31.

⁵⁵ *Ibid.*, this further states that when the People's Court hears divorce proceedings, it is obliged to inform the parties of their relevant rights and duties under Article 46 or any other articles of the *Marriage Law*.

⁵⁶ In May 2002 the writer attended a conference organized by the Women's Association of Shanghai on the problems that arise under the amended *Marriage Law*. There

worthwhile discussing the practical problems of proving each of these conducts.

a. *Bigamy*

In China, bigamy occurs when a person already married, marries another person.⁵⁷ The clearer situation is when a married person registers marriage with a person other than his or her legal spouse. 'It is also bigamy, however, if a married person cohabits with a third party so that they are publicly regarded as a married couple even though they do not register a marriage between themselves.'⁵⁸ The former situation invites no controversy because the double registration of marriage is of irrefutable evidential value. In the latter scenario, however, the plaintiff must prove two things; firstly, that the wrongdoer and the third party treat each other as man and wife, and secondly, that it is public knowledge that the two share a relationship of cohabitation. In practice, proof of bigamy includes the holding of a wedding by the wrongdoer, cohabitation and public proclamation that the third party is the wrongdoer's spouse. Due to the possibility that bigamous behaviour may be a violation of criminal law,⁵⁹ the standard of proof is appropriately strict.

Another problem in bigamy is the definition of "married person". This is not altogether clear at present. The *Marriage Law* includes provisions on void marriages.⁶⁰ Before the decree of nullity is granted, should the plaintiff be classified as a married person? The writer submits that this should be the case. Before the decree of nullity is awarded, the plaintiff should still be subject to the restrictions imposed by law, because to public perception, the marriage still stands. Judicial interpretation provides that 'Marriages declared void *ab initio* in Article 12 of The *Marriage Law*, refer to marriages which are legally unprotected after such marriages are legally declared ineffective or void.'⁶¹ Hence, although there may exist reasons for a marriage to be declared void, a married person may still not marry another before

a lawyer who had represented many applicants for divorce compensatory damages revealed that only very few of his clients succeed in their actions because most of the time the courts decided that the precipitating conduct had not been proved.

57 *Supra* note 22 at 41.

58 *Supra* note 22 at 89.

59 See Article 258 of the *Criminal Law of the People's Republic of China* which provides that 'Whoever has a spouse and commits bigamy or knowingly marries a person who has a spouse shall be sentenced to fixed term imprisonment of not more than two years or criminal detention.'

60 See Articles 10 and 12 of the *Marriage Law*.

61 See Article 12 of *Interpretation One*, *supra* note 31.

the decree of nullity is awarded, or this may also be construed to be bigamy.

b. *Cohabitation of a Married Person with any Third Party*

This is one of the more common situations for which actions are brought in practice.⁶² However, certain problems arise, both in the adducing of evidence by the plaintiff and in the adjudication by the judge. According to the relevant judicial explanation, cohabitation refers to “a continuous and stable period of living in common, but does not treat each other as man and wife”.⁶³ Here, the requirement of ‘does not treat each other as husband and wife’ is used to differentiate cohabitation more clearly from bigamy. But what is ‘a continuous and stable period of living in common’? It may be difficult to determine the circumstances that fall within this phrase. For example, a lawyer obtained evidence for his female client, that her spouse had gone on a ‘Singapore, Malaysia and Thailand in a Week’ tour with a female third party, sharing the same hotel room throughout. Could a court find that there was in fact cohabitation on this piece of evidence?

The writer submits that, in adjudicating this kind of behaviour, it is necessary to consider the legislative background. While revising the matrimonial law, a huge controversy arose over the extent to which law should interfere with extra-marital sexual behaviour.⁶⁴ The legislative attitude finally adopted was one of compromise: the law would only impose limits upon behaviour deemed to be of greater harm to the matrimonial relationship; for example by commission of acts of bigamy or cohabitation. Cohabitation here places special emphasis on the fact that the wrongdoer lives together and has set up a family with a third party, although they may not live together as husband and wife. Therefore, cohabitees normally have a relatively stable place of residence, and have lived there together for a certain period of time. It follows that cases such as the one described above, where there is only evidence attesting to a single overseas trip together, are insufficient to satisfy the requirements for cohabitation in Article 46.

62 Most applicants for divorce compensatory damages cite the conduct of the spouse having extra-marital affairs. These applicants would all cite this conduct as justifying divorce.

63 See Article 2 of *Interpretation One*, *supra* note 31.

64 Should the law control extra-marital sexual behaviour? Is this a civil or a criminal aspect of the law? Should all extra-marital sexual behaviour be controlled or only those deemed more injurious to the marital interests of the other spouse? These are controversial issues taking up much attention of the popular media.

c. *Domestic Violence*

Judicial interpretation describes domestic violence as where ‘the acting party beats, ties up, injures, enforcedly restricts the personal freedom of, or otherwise causes physical, mental or other harm to a family member’.⁶⁵ It follows from this definition that some form of injury is required in order to constitute domestic violence. Therefore in practice, the victim must produce proof of injury, a stronger example of which would be medical certification of injury obtained from a police office. The writer submits, nevertheless, that the requirement as to the extent of said harm should not be overly excessive, because what is being advocated in this instance is liability to pay divorce compensatory damages, which is different from other kinds of damages.

d. *Maltreatment and Desertion of One Family Member by Another*

It is more difficult to differentiate between maltreatment here and the domestic violence described in the preceding paragraph. Judicial interpretation characterizes maltreatment as ‘continuous and frequent domestic violence’.⁶⁶ It is apparent from this definition that maltreatment has a temporal or time requirement. The writer submits that maltreatment and domestic violence may be differentiated on the grounds of the kind of behaviour required. Maltreatment may take the form of omissions or inactions, but domestic violence usually takes the form of positive acts. ‘Desertion refers to the refusal of persons owing an obligation of maintenance or support to discharge such obligation’⁶⁷ and is thus easier to identify.

The writer submits that due to Chinese legislation’s severe restriction of the scope of divorce compensatory damages, and the inherently complicated nature of matrimonial life, judges should be flexible and not be overly rigid when it comes to evidential requirements. If not, liability to pay divorce compensatory damages will remain fixed in theory only.

The wrongful acts described above may occur while the marriage still subsists, but is there any time restriction applicable to the period between the injurious act and the divorce itself? Academics have not yet discussed this. The writer submits that no problems arise in the more usual circumstances where the injurious act continues until the time of divorce. If a long period of time has elapsed between the

⁶⁵ See Article 1 of *Interpretation One*, *supra* note 31.

⁶⁶ *Ibid.*

⁶⁷ *Supra* note 22 at 43.

time of the injurious act and the time when the plaintiff petitions for divorce, the issue arises whether the plaintiff has excused the injurious act. If the wrongdoer has sufficient evidence to prove that the plaintiff has indeed excused the injurious act, liability to pay divorce compensatory damages cannot arise. This is because in such a situation, there is no causality between the injurious act and the divorce.

2. *Effect of Liability to Pay Divorce Compensatory Damages on Property Issues*

The divorce compensatory damages system in China was established in the sole Article on legal responsibility, and its legislative intent bears distinctly punitive overtones. However, it is clear from the nature of the legislation that divorce compensatory damages are inseparable from divorce itself, and may be seen as a consequence of divorce. In practice, the issue of damages is normally dealt with at the same time as the divorce case. There is therefore a need to analyse the relationship between divorce compensatory damages and the other effects of divorce on property.

a. *Relationship with Division of Jointly-Owned Property*

According to Chinese law and judicial definition, there should, in theory, be an equal division of jointly-owned property when the marriage comes to an end. At the same time, there may also be an unequal division based on living expenses, the source from which the property was obtained, etc.⁶⁸ The general principle governing division of jointly-owned property is as follows: 'At the time of divorce, the disposition of the property in the joint possession of husband and wife is subject to agreement between the two parties. In cases where an agreement cannot be reached, the people's court shall make a judgement in consideration of the actual circumstance of the property and on the principle of caring for the rights and interests of the wife and child or children'.⁶⁹ 'In deciding upon the division of jointly-owned property in divorce cases, the people's court shall adhere to the principles of enhancing productivity, making life more convenient, caring for the rights and interests of the wife and child or children, and caring for

68 Various Chinese legislations such as the *Marriage Law*, *Law Safeguarding Women's Rights and Interests*, and the Supreme Court's Interpretation of it touch on the division of matrimonial property.

69 See Article 39 of the *Marriage Law*.

the rights and interests of the innocent party'.⁷⁰ This principle of 'caring for the rights and interests of the innocent party' is found in the judicial interpretation prior to the amendment of the *Marriage Law*. After the addition of the divorce compensatory damages system, is there still any need to care for the rights and interests of the innocent party in the division of matrimonial property?

As far as legal effect is concerned, the original judicial interpretation is still good law where it is not inconsistent with both the *Marriage Law* and '*Interpretation One*'.⁷¹ On a direct comparison of the relevant articles, the 'caring for the rights and interests of the innocent party' principle espoused in the original judicial interpretation does not contradict either the *Marriage Law* or '*Interpretation One*'. But the crux of the problem lies in whether the institution of the divorce compensatory damages system has replaced the principle of caring for the innocent party during the division of matrimonial assets.

The writer submits that the establishment of the compensatory damages system has removed the foundation on which the principle of caring for the innocent party was based. Firstly, the two share a common legislative intent, serving the dual purposes of compensation and reprimand. If they were both in force at the same time, it would cause the problem of having 'multiple punishments for a single crime'. Secondly, the division of matrimonial property involves proprietary rights, and it seems inappropriate, from a legal point of view, to consider responsibility for marital breakdown when adjudicating on proprietary disputes. Moreover, in the no-fault divorce legislation, the inclination has gradually shifted away from sanctioning or punishing injurious acts causing the breakdown of the matrimonial relationship. Likewise, 'wrongdoing is also not a consideration in the division of matrimonial property. Considering the financial status of each party is a better alternative to considering which party was at fault has become a suitable mainstream guideline for those countries administering divorce legislation not based on fault or wrongdoing'.⁷² Thirdly, the principle of caring for the rights and interests of the innocent party may, in practice, create conflicts with another principle, that of caring for the rights and interests of the wife and child or children. If the wife is at the same time the wrongdoer, difficulties arise as to

70 See *General Approach of the People's Court to the division of matrimonial property in adjudicating divorce case* passed by the Supreme Court in 1993.

71 See Article 33 of *Interpretation One*, *supra* note 31: 'If any relevant judicial interpretation previously passed by the Supreme People's Court is inconsistent with the interpretation contained here, this shall be the governing definition.'

72 Ma Yi Nan 'Several controversial issues in the revision of matrimonial law' (2001) 1 *Law Science of China* 140 at 142.

whether her rights and interests can be cared for. Such contradictions would not exist if the divorce compensatory damages system were to replace the 'caring for the innocent party' principle.

It is worth mentioning that the 'innocent party' in the principle and the same term in divorce compensatory damages do not refer to the same concept. Based on the body of judgements in divorce, 'injurious acts' is given a wider meaning when applied to the principle of caring for the innocent party compared to its meaning under Article 46. For example, if a party frequently indulges in drunkenness, compulsive gambling or other bad habits and this leads to the divorce, the judge may employ the principle of 'caring for the rights and interests of the innocent party' while deciding on the division of matrimonial assets. This illustrates a clear difference from the definition in Article 46.

It is the opinion of the writer that the concept of 'injurious acts' should be standardized. If it is given an excessively broad meaning, to the extent of amalgamating moral and legal obligations, divorce cases would be embroiled in debates over the reasons for and responsibilities for the matrimonial breakdown, leading inevitably to lengthy litigation. The injurious acts described in the divorce compensatory damages system refer only to the four kinds of behaviour prohibited in the *Marriage Law*; such a definition is clear and comprehensive, and as such should be the standing definition.

b. Relationship with Financial Compensation and Financial Assistance

The *Marriage Law* also provides for the financial compensation and financial assistance a party should furnish the other with on divorce.

Financial compensation means that 'According to a couple's written agreement, the items of property acquired during their marriage are in the separate possession. In this connection, if one party performs more duties in rearing their children, looking after their elders and assisting the other party in work, he or she shall have the right at the time of divorce to request compensation from the other party who shall make the compensation'.⁷³ It is thus evident that the legislative objective is to remedy any unfairness in the agreement on division of property, by assisting the party who has contributed more towards the matrimonial household. The right to request financial compensation and the right to divorce compensatory damages may be exercised at the same time.

Financial assistance refers to situations where, 'if, at the time of divorce, one party has difficulties supporting himself or herself, the

⁷³ See Article 40 of the *Marriage Law*.

other party shall render the appropriate help from her or his personal property such as a dwelling house. Specific arrangements shall be made between both parties through consultation. If they fail to reach an agreement, the people's court shall make a judgement'.⁷⁴ The legislative intent of financial assistance is to remedy inadequacies in the maintenance system. Due to China's never having instituted a proper system for the payment of maintenance in divorce, situations of financial hardship often arise after divorce. In order to preserve the freedom of marriage, the financial assistance system was instituted, replacing the system of maintenance in divorce. It therefore follows that such assistance does not conflict with the purpose of, and may be implemented at the same time as the divorce compensatory damages system.

VII. CONCLUSION

In the People's Republic of China's twenty years of reform and opening up economic diversification has brought about a similar diversification of the ways in which marriage is perceived. This is the state of affairs Chinese matrimonial legislation must respond to. The divorce compensatory damages system is a result of this diversification. The institution of this system, and the limitations on its scope of applicability in the *Marriage Law*, which are aimed towards finding equilibrium in the conflict of interests between the parties, render legislative intent ambiguous. Due to restrictions on the magnitude of revision,⁷⁵ the legal substance of the system is also not sufficiently comprehensive.⁷⁶ Whatever the case, the divorce compensatory damages system has imposed certain demarcations on both the moral and legal responsibilities in the matrimonial relationship. It has deemed matrimonial rights a form of civil right, worthy of rescue, and is thus a system of considerable practical value. The writer has discussed this valuable system from several perspectives in the hope that the system will develop rationally and work smoothly to achieve its full legislative intent.

⁷⁴ See Article 42 of the *Marriage Law*.

⁷⁵ The proportion of revised parts could not be excessively high as this was only a revision, and not a complete reformulation of existing law.

⁷⁶ The substance of law in this area is limited to Article 46, leaving ambiguities as to the limits on time, compensation, *etc.* in petitions for divorce. Thus in practice, only the interpretation of the Supreme Court is resorted to.