

Report on:

New 2010 “Tort Law of the People’s Republic of China”

What is tort law?

Tort law is a body of law that addresses and provides remedies for civil wrongs not arising out of contractual obligations. A person who suffers legal damages may be able to use tort law to receive compensation from someone who is legally responsible or liable for those injuries. Generally speaking, tort law defines what constitutes a legal injury and establishes the circumstances under which one person may be held liable for another's injury. Tort law covers **intentional and negligent acts**.

The Chinese framework and evolution of Civil Rights

The new Tort Law does not represent a brand new provision in Chinese Civil Law. Many cases were already regulated by other regulations and laws, but the 2010 Tort Law aims to put together an ordered and unified legal code that regulates all these cases. This should enable an easier interpretation of laws by courts, given the fact that the provisions of the new Tort Law prevail over other laws regulating the same cases. This law should also should make tort law more transparent to companies and individuals, who may now have a clear understanding of how tort is regulated. Finally, and most important, the Tort Law represents for China a further step in the path towards the protection of individual rights and market-oriented institutional settings.

During the last decade the controversial aspects of tort law reform have been deeply examined by the Legislative Affairs Commission of the National People’s Congress, the body in charge of the civil codification process, leading to the final adoption of a new law at the 12th session of the Standing Committee of the Eleventh National People’s Congress on December 26, 2009.

The process that brought about the drafting of this law in a short time has been accelerated by **court decisions** in cases which had captured the attention of public opinion.

On June 27, a 13-floor building collapsed at the Lotus Riverside residential complex in Shanghai, killing a worker. An investigation later blamed the developer, construction company, supervisors and safety inspectors for the accident. The draft law was then revised for the fourth time following deliberation on whether developers and construction companies should take joint liability for the safety of their buildings.

The most significant case to date has involved Sanlu Group, the dairy company based in Hebei's provincial capital Shijiazhuang. This was found to have adulterated its infant formula milk powder with melamine, an industrial chemical, leaving at least six infants dead and about 300,000 others suffering kidney and other problems. The draft then covered compensation for harm from defective products. It stipulated that those who died or whose health was seriously damaged could seek "punitive compensation" higher than their actual losses, if companies knowingly produced or sold defective products.

Court judgements and public opinion therefore have played important roles in leading to this first unified law which protects individual rights from torts. Among these rights there are some totally new ones, such as the right of compensation for emotional loss and the principles for dealing with wrongs involving reputation and the rights of privacy.

In general terms, this new law should be seen as a considerable evolution of civil rights protection and a significant improvement of Chinese civil society. It will have not just the function of compensating individuals who suffered torts, but also that of encouraging companies and other individuals to pay more attention to their practices. Though not the type of law to influence companies' behaviour directly, it encourages individuals to protect their rights (through the compensation incentive), thus affecting companies indirectly.

Ch. I New General Provisions - Art. 1-5

The Chinese “Tort Law”, which passed on December 26, 2009 and will be **effective from July 1, 2010**, officially aims at “protecting the lawful rights and interests of civil law parties, explicitly defining tort liability, preventing and punishing torts, and promoting social harmony and stability”(Article 1).

“Civil rights and interests” used in this Law includes the rights to life, health, name, reputation, honour, self image, privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, the right to discovery, equities, succession, and other personal and property rights and interests.

This law enhances the unification of tort-related provisions embedded in PRC Civil Law, the PRC Law on Protection of Consumer Rights and Interests, the PRC Product Quality Law and the PRC Environmental Protection Law. The relevance of this law, though, is explained in Article 5: “where any other law provides otherwise for any tort liability in particular, such special provisions shall prevail”. From a juridical standpoint therefore, the 2010 Tort law has supremacy with respect to other laws on the same issues.

This collection of **92 articles in 11 chapters** covers different subjects, but Product Liability (Chapter V) and Liability for Environmental Pollution (Chapter VIII) offer the most important news for companies’ interests.

Ch. II Methods of assuming Liability - Art. 5-25

Determination of tort-feasors

With regard to the determination of liability, Art. 6 affirms that “One who is at fault for infringement upon a civil right or interest of another person shall be subject to tort liability” and Art. 8 specifies that where two or more persons commit a tort, they shall be **liable jointly and severally**. Also a person assisting another in committing a tort shall be liable jointly and severally with the tortfeasor. If a specific tortfeasor cannot be

determined, all the persons shall be liable jointly and severally (Art.10). And in the case of joint liability Art. 13 states that “the victim of torts shall be entitled to require some or all of the tortfeasors to assume the liability”.

Methods of assuming liability

The criteria that are used to apportion liability among tortfeasors, are stated in Art. 14: “the compensation amounts shall be determined according to the seriousness of each tortfeasor”. It is important to underline that in the event that a tortfeasor pays an amount of compensation exceeding his contribution to the tort, he is entitled to be reimbursed by the other tortfeasors who are jointly and severally liable. Art. 15 lists the methods of assuming tort liabilities:

1. cessation of infringement;
2. removal of obstruction;
3. **elimination of danger**;
4. return of property;
5. **restoration to the original status**;
6. **compensation** for losses;
7. apology; and
8. elimination of consequences and **restoration of reputation**.

This last point appears to be relatively new in Chinese law, giving more protection, together with concepts such as image and privacy, to the private individual sphere.

Since all these methods can be applied separately or jointly, the following articles prescribe the ways to compensate the victim in the case of injury, death, property damage or violation of rights. It is worth highlighting Art. 22, which defines that if the harm “inflicts **serious mental distress** on the victim of the tort, the victim may require compensation for the infliction of mental distress”. The word “serious” has to be underlined, since the case does not apply to every kind of mental distress, but just a few conditions.

Definition of methods of compensation - Art.25

The parties have the possibility to **consult each other** to define methods of compensation. In the case in which an agreement is not reached,

compensation shall be paid in a lump sum, or if too difficult in installments adjusted on present value.

Ch. III Methods to Waive or Mitigate Liability - Art. 26-31

There are different ways in which a liability can be waived or mitigated:

- Mitigated if the victim of the tort is also at fault Art.26
- Waived if the harm is caused intentionally by the victim Art.27
- Waived if the harm is caused by a third party Art.28
- Waived in a case of force majeure Art.29
- Waived if in self-defence, within proper limits Art.30
- Waived in a situation of necessity, within proper limits. In this case, if the situation is caused by another party, it will be liable Art.31

Ch. IV Special Provisions for Tortfeasors - Art. 32-40

This part concerns tortfeasors whose behaviour could have been determined or influenced by special conditions. The following are the most relevant cases:

- In a case of a person **without civil conduct capacity**, the liability may be assumed by the guardian. In any case, he has to compensate the victim with his property, while the guardian shall make up any deficit of the compensation (Art.32).
- In a case of a temporary loss of consciousness, if the person is at fault, he shall assume the tort liability, while if he is not at fault he should anyway compensate the victim according to his financial circumstances (Art.33).
- In the case of alcohol intoxication or drugs, he shall assume the tort liability (Art.33).

Particularly important is the regulation of liability in employment conditions:

- In the case of a harm caused by an employee during his work duty the liability is on the employer Art.34

- In the case that the party providing labor services causes any harm to another person as the result of the labor services, the party receiving labor services shall assume the tort liability Art.35
- If the party providing labor services causes any harm to himself as the result of the labor services, both parties shall assume corresponding liabilities according to their respective faults Art.35.

Ch. V Product Liability - Art. 41-47

Burden of the proof on plaintiff. Importance of joint liability.

Of particular interest is the apparent expansion of protection against defective products, and notably, the introduction of **punitive damages**. The Tort Law states that “where a defective product causes any harm to another person, the **manufacturer** shall assume the tort liability” (Article 41). But “where a product with any defect caused by the fault of the **seller** causes any harm to another person, the seller shall assume the tort liability” (Article 42). Both the manufacturer and the seller therefore are liable for the product. In cases where a seller is able to show that the defect was preexisting, the seller has the right to seek contribution from the producer, assuming that the producer is identifiable (Article 43).

Third parties in the product distribution chain are also affected, as the Tort Law explicitly provides that if injury to other persons is caused by defects resulting from parties such as transportation or storage services providers, the producer and seller of the defective product have the **right to seek contribution from the responsible third party**. Thus according to the case, compensation for the damage is due from these three different parties.

Article 45 of the Tort Law provides that plaintiffs have the right to request the producer or the seller **to eliminate the danger** or remove obstacles where defects in the product endanger the safety of persons or property, which may open the door to mandatory product recalls, additional warning labels and other ameliorative measures. Article 47 of the Tort Law provides that where a defendant knowingly produced or sold defective products causing injury to life or health, the injured party has the right to claim punitive damages.

In product liability, therefore, the measures that the tortfeasor has to undertake are various: from compensating eventual victims to remedial measures, such as the recall of a defective product, to be done in a timely manner.

Ch. VI Liability for Motor Vehicle Traffic Accident - Art. 48-53

Certain provisions relate to the Road Traffic Safety Law. The most important is Article 49: “Where the owner and the user of a motor vehicle are not the same person due to the relationship of **a lease, borrowing** or any other reason and the liability of a traffic accident is attributed to the motor vehicle, the insurance company shall make compensation within the liability limit of the mandatory motor vehicle insurance. **The user of the motor vehicle shall make up any deficit of the compensation**; and if the owner of the motor vehicle is at fault as to the harm, he shall assume the corresponding compensatory liability”.

In the other articles different cases are regulated which seek to establish a higher sense of responsibility for drivers.

Ch. VII Liability for Medical Malpractice - Art. 54-64

In this chapter are recorded important changes in patients’ rights. Firstly, Art. 54 states that where a patient sustains any harm during diagnosis and treatment, the medical institution shall assume the compensatory liability if it or any of its medical staff is at fault. Art. 55 provides that during the diagnosis and treatments, **the medical staff shall explain the illness or condition** and relevant medical measures to their patients. Thus all risks have to be explained, and the patient shall sign a written consent in the case of urgent surgery. Members of staff must not violate any law or procedure in treatments, must fulfill their obligations up to the standards in a timely manner, and must not refuse to provide medical history data related to a dispute. Otherwise they shall be at fault for any harm caused to the patient (Art. 57-58).

It is important to know when a medical institution shall not assume compensatory liability for any harm caused to a patient (Art. 60):

1. if the patient or his close relative does not cooperate with the medical institution in the diagnosis and treatment in line with the procedures and standards;
2. if the medical staff have fulfilled the duty of reasonable diagnosis and treatment in the case of an emergency such as rescue of a patient in critical condition; or
3. if a diagnosis and treatment of the patient is difficult due to the limits of medical knowledge at the time.

Art. 62-63 give more rights to patients, stating that “a medical institution shall keep confidential the **privacy of a patient**” and “shall **not conduct unnecessary examinations** in violation of the procedures and standards for diagnosis and treatment”.

Ch. VIII Liability for Environmental Pollution - Art. 65-68 **Burden of the proof on defendant.**

Chapter 8 of the Tort Liability Law is dedicated to environmental tort and codifies special liability and evidentiary rules that are considerably more stringent than prior environmental legislations and court interpretations. It represents a new development in China's environmental laws and will have significant ramifications for companies doing business in China.

Article 65 of the Tort Liability Law provides that a company is liable for the damage caused by its pollution of the environment. It is important to underline that unlike the existing General Principles of Civil Law, violation of environmental laws or regulations is not a prerequisite for tort liability under the Tort Liability Law. Therefore, **a company that operates in compliance with all environmental laws and regulations can still be found liable in environmental tort.**

In general tort litigation, the plaintiff bears the burden of proving that the defendant's action caused the damage suffered by it. Article 66 of the Tort Liability Laws, however, shifts the **burden of proof on the defendant**, which must provide evidence showing that it is not legally liable, or

evidence mitigating its liability, and also show that its acts or omissions did not cause the alleged consequences. This special rule for environment tort **reduces the barrier for a plaintiff to bring an environmental tort claim**, and **increases the difficulty and cost for defending** against such a claim.

Article 67 provides that the plaintiff can seek relief from any of multiple tortfeasors who, in turn, bear the burden of apportioning damages among them. After it has compensated the injured party, a company that is not at fault may pursue **other third parties** at fault in contribution (Article 68).

The uncertain part remains the future interpretation and enforcement of this law, but an increase in environmental tort claims in the future should be expected.

Ch. IX Liability for Ultrahazardous Activities - Art. 69-77

Art. 69 sets the general provision that “one who causes any harm to another person while engaging in any ultrahazardous operation shall assume the tort liability”.

The situations covered by the following articles are various, but the most relevant are:

- In the **possession of inflammable, explosive or toxic materials**, the possessor is liable for any harm. Liability can be waived in cases of victim intentionality or *force majeure*. Liability can be mitigated in case of the victim’s gross negligence (Art. 72).
- In the case of an **underground excavation** activity, liability is on the operator, unless the conditions are as stated above (Art. 73).
- In the case of the **abandonment** of ultrahazardous materials, liability is on the owner. Here there can be joint or several liability with the manager of the material (Art. 74).
- In the case of **illegal possession** of ultrahazardous materials, the risk is for the owner or manager, who must prove their duty of a high degree of care in preventing others from illegal possession. Otherwise they shall be liable jointly and severally with the illegal possessor (Art. 75).

Chapter X Liability for Harm Caused by Domestic Animals - Art. 76-84

In this chapter increased responsibility is placed on owners of domestic animals, who become liable for any harm caused to other people, unless they prove the intentionality or gross negligence of the victim (Art. 78). Even abandoned animals are the responsibility of their original owners (Art. 82). In general, **“animals shall be kept in accordance with the law, in the manner of respecting the social morals, and without interference with the life of others”** (Art. 84).

Chapter XI Liability for Harm Caused by Object - Art. 85-91

As stated in Art. 85, if a structure or facility causes any harm to a person, the owner, manager or user must prove he was not at fault. Otherwise he shall assume tort liability. Thus the burden of the proof is on the owner, who can be compensated thereafter if the fault is at a third party. Art. 86 states that “where any building, structure or facility collapses, causing any harm to another person, the construction employer and contractor shall be **liable jointly and severally**”.

The following articles provide rights to individuals in accidents caused by broken trees, underground works or objects scattered on a public road.

Chapter XII Supplementary Provision

Article 92 This Law shall come into force on July 1, 2010.

Recommendations to Companies

The form of these 92 Articles suggests expectations about further guidance to fill in the necessary details and supply principles to guide calculation of damage awards, which are not stated here.

This Law represents an important step for China towards more Western-style regulations in giving more rights to individuals, but it will be important to see how courts will interpret these articles and the issuance

of actual damage awards.

While waiting to see the actual response to this new regulation, companies active in China are advised to **revise insurance policies, standard practices and risk management measures** in the light of this legal development.