

CHINA LEGAL REPORT*

MARCH 2010



* CHINA LEGAL Report is a monthly collection of Chinese law related news gathered from various media and news services, edited by WENFEI ATTORNEYS-AT-LAW LTD. distributed to its clients and CHINA LEGAL Report subscribers. WENFEI ATTORNEYS-AT-LAW LTD. does not accept responsibility for accuracy of quotes or truthfulness of content. CHINA LEGAL Report is not intended to provide advice.

Subject	The Tort Law, which will officially enter into effect on July 1st, 2010, constitutes a significant and constructive improvement of the proposed PRC Civil Code.
I	Introduction
II	General Concepts
III	Key Highlights
IV	Conclusion

I. Introduction

The passing of the new PRC Tort Liability Law (hereinafter: “the Tort Law” or “the Law”) on December 26, 2009 by the Standing Committee of the National People's Congress has attracted widespread attention around the world. The Tort Law, which will officially enter into effect on July 1st, 2010, constitutes a significant and constructive improvement of the proposed PRC Civil Code.

The Tort Law, consisting of 12 chapters with 92 articles, stands as a combination and integration of the existing tort law fragments which are contained in a variety of effective laws and regulations. It outlines the general rules in defining tort liabilities and covers various specific areas to refine the current legislation.

II. General Concepts:

- Scope of Civil Rights and Interests

Any infringement of other's civil rights and interests caused by a person will result in corresponding tortious liability of such person. A great expansion could be found under the definition of the civil rights and interests, which cover the rights to life, health, name, reputation, honor, self image, privacy, marriage autonomy, guardianship, ownership, usufruct, security interests, IP rights, right to discovery, equity, rights of succession and other similar personal and property rights (Article 2).

- Constitution and Manners of Tort Liability Undertaking

Similar to tort laws in many western countries, a person may assume tort liability in case of his infringement upon any other person's civil rights and interests due to his own fault. Under some special circumstances, a person could still be assumed liable unless his/her non-fault is proved to be established (Article 6). In addition, the infringer's fault is an irrelevant factor in some certain cases like environmental tort (Article 7). The injured party may seek relief from any of multiple tortfeasors in case a joint and several liability is prescribed (Article 13). On the other hand, a willful act or negligence of the victim, or other situations like force majeure or self-defense may lead to the mitigation or elimination of the liability of a defendant (Chapter 3). The establishment of administrative or criminal liability will not affect the formation of the tort liability due to the same act. In case the tortfeasor has insufficient property to cover various forms of liabilities, the tort liability shall be satisfied in the first priority (Article 4).

- Remedies

The tortfeasor may be ordered to take the following steps to remedy the wrongs: cessation of infringement, exclusion of obstacles, elimination of danger, return of property, restoration to the original status, compensation for losses, apology, and elimination of ill effects and restoration of reputation.

III. Key Highlights

- Liability of Employer/of Dispatched Employer

The Tort Law offers clear guidance that an employer shall be responsible for the loss or physical harm caused by the employee to the other person arising from performance of his/her duties. The same applies, in case of labor dispatch, to the actual employer that receives and uses the dispatched employees. That is to say, the actual employer shall assume the liability for the harm caused to other person by the dispatched employee during the dispatching term. The dispatching employer (i.e. FESCO) may only bear supplementary liability where it is at fault (Article 34).

- Product Liability

The Tort Law enhances the protection against defective products as stipulated so far under the Product Liability Law. A plaintiff may seek compensation for damages either from the manufacturer or the seller of the defective products. In case a seller, who is not in fault for the damages, is able to identify the manufacturer or the supplier of the defective products, the seller may pursue contribution for the compensation from such manufacturer. Conversely, the manufacturer also has a recourse right against a seller, if the seller is at fault (Article 41~43).

Article 44 deals with the situations that the defect of the product arises from the fault of the transporter, storage operator, or other third party than the manufacturer or seller. In such situations, the manufacturer and seller shall be jointly responsible for compensating the injured party but have the right to seek compensation from the third party at fault afterwards.

An obligation of taking mitigating measures is further specified under Article 45. The manufacturer or the seller shall take remedial measures to eliminate the danger or remove the hindrances should any defect endanger the safety of persons or property. The product recall system may be triggered, if a product is discovered to be defective after it has been

put on the market. The manufacturer or the seller must adopt mitigating actions, such as warning or recall in a time effective manner. Failure to timely or effectively adopt such measures, the manufacturer or the seller has to bear tort liability for any damages occurred (Article 46).

If the manufacturer or seller clearly knows the existence of defects in the produced or sold products, but continues to manufacture or sell such defective products, an injured party is entitled to claim punitive damages against the manufacturer or the seller, if the products cause death or material damage to his/her health (Article 47).

- **Environmental Pollution (Chapter 8)**

Of particular interest is the introduction of a more stringent environmental pollution liability in the new Tort Law, compared with the current environmental legislation. A polluter is held to assume liability for the harm caused by environmental pollution, regardless of whether the polluter is at fault or not. That is to say that even a company that operates in compliance with all environmental protection regulations could still presumably be found liable in tort.

Furthermore, and contrary to the most tort litigation cases, the burden of the proof has been shifted to the defendant in an environmental claim. It is his sole responsibility to defend himself by showing that he is not legally liable, and that no causative connection between his conduct and the harm caused to the victim exists.

If the environmental pollution is due to a third party's fault, the victim may seek relief and compensation either from the polluter or the third party. The polluter could pursue the responsible third party for compensation, once he has compensated the victims for the damages incurred.

- **Liabilities of Website Operator**

Article 36 of the Tort Law establishes the right of a party to request a website operator to delete, block or disconnect the content or take other necessary actions, if his/her civil rights or interests are infringed via such website. Should the website operator fail to adopt the necessary measures in a timely manner after receiving the notice from the injured party, the website operator will be subject to joint and several liabilities with the web user for the enlarged damages due to his failure.

Given the web operator is aware that web users are using its network service to commit a tort but fails to take necessary measures to prevent this, the joint and several liabilities shall be borne by the web operator and such web users (Article 36).

- **Liabilities of Medical Institution**

With respect to medical malpractice liability, the Law provides that medical institutions and their medical personnel are at fault, should they fail to fulfill the prevailing medical standards. The Law will make a presumption of tortious liability against the concerned medical institutions under the circumstances as described in Article 58, such as in case of forged, falsified or destroyed medical records.

- **Special Provisions on Torts in Other Areas**

Apart from the above, the Law also includes several chapters dealing with torts in other special areas, namely traffic accident by automobiles (Chapter 6), highly dangerous operations, such as operations involving explosive, inflammable, etc. (Chapter 9), animal acts (Chapter 10), damage caused by objects such as building, hanging object, etc. (Chapter 11).

IV. Conclusion

The birth of the Tort Law demonstrates the determination of the Chinese government to better protect the civil rights and interests of individuals. While the Law comes out with the intention to cure the loophole in the current PRC legal framework, it is obviously that further legislations, administrative regulations, and judicial interpretations are needed to clarify and expand areas that are not clear, and it will be of great interest to see how the concepts enshrined in the new Law are interpreted at the local level, where most problems usually arise.

Should you have questions regarding the information provided in this document, please do not hesitate to contact **Dr. Paul Thaler (paul.thaler@wenfei.com)**.

We may be reached under the following addresses:

Zurich

Wenfei Attorneys-at-Law Ltd.
Mainaustrasse 19
CH-8008 Zurich, Switzerland
T +41 43 210 8686
F +41 43 210 8688

苏黎世

瑞士文斐律师事务所
Mainaustrasse 19 号
CH-8008 瑞士文斐律师事务所
电话: +41 43 210 86 86
传真: +41 43 210 86 88

Beijing

Wenfei Attorneys-at-Law Ltd.
Room 706, Office Tower A
Beijing Fortune Plaza
No. 7, Dong San Huan Zhong Lu
Chaoyang District
Beijing 100020 P.R.C
T +86 10 6468 7331
F +86 10 6460 3132

北京

瑞士文斐律师事务所北京代表处
中国北京朝阳区东三环中路7号
财富中心A座706室
邮编 100020
电话: +86 10 6468 7331
传真: +86 10 6460 3132

Shanghai Cooperation:

Wenfei Consulting
Room 501, Tower 3,
X2 Creative Park,
No.20 Cha Ling Bei Lu,
Shanghai 200032
T +86 21 5170 2370
F +86 21 5170 2371

上海合作单位:

文斐商务咨询(上海)有限公司
中国上海市茶陵北路20号
X2徐汇创意空间3幢501室
邮编200032
电话: +86 21 5170 2370
传真: +86 21 5170 2371

Find more of our publications on: <http://www.wenfei.com/publications.html>

© Wenfei, Beijing, March 2010

◇ **DISCLAIMER:**

THIS PUBLICATION IS INTENDED TO PROVIDE ACCURATE INFORMATION IN REGARD TO THE SUBJECT MATTER COVERED. READERS ENTERING INTO TRANSACTIONS ON THE BASIS OF SUCH INFORMATION SHOULD SEEK ADDITIONAL, IN-DEPTH SERVICES OF A COMPETENT PROFESSIONAL ADVISOR. WENFEI ATTORNEYS-AT-LAW LTD., THE AUTHOR, CONSULTANT OR GENERAL EDITOR OF THIS PUBLICATION EXPRESSLY DISCLAIM ALL AND ANY LIABILITY AND RESPONSIBILITY TO ANY PERSON, WHETHER A FUTURE CLIENT OR MERE READER OF THIS PUBLICATION OR NOT, IN RESPECT OF ANYTHING AND OF THE CONSEQUENCES OF ANYTHING, DONE OR OMITTED TO BE DONE BY ANY SUCH PERSON IN RELIANCE, WHETHER WHOLLY OR PARTIALLY, UPON THE WHOLE OR ANY PART OF THE CONTENTS OF THIS PUBLICATION.