

# **TORT LIABILITIES AND TORTS LAW: THE NEW FRONTIER OF CHINESE LEGAL HORIZON**

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## **ABSTRACT**

China did not have a single body of torts law until 2009. As a new piece of legislation in the country, the Torts Law of China, effective as of July 1, 2010, forms a comprehensive framework that regulates torts and provides a legal mechanism to govern liabilities and remedies. A product of the civil law tradition, common law practice and Chinese reality combined, adoption of the Torts Law is hailed in China as an important move toward a civil society that is ruled by law.

The Torts Law premises torts on the fault liability with a few exceptions where the non-fault liability is imposed. Structurally, the Torts Law is distinctive in that it stresses principles and rules of general application, and in the meantime prescribes peculiar tortfeasors and special torts that need to be dealt with differently. In substance, the Torts Law is ambitious because it intends to embrace not only traditional torts but also the newly developed area of torts. In many aspects, the Torts Law is also keen to maintain the Chinese characteristics.

Still, there is a substantial gap between the law on the paper and the law in action. Many ambiguities exist, which require both legislative and judicial interpretations. In addition, many unsolved issues may become obstacles to the application of Torts Law. More significantly, Torts Law enforcement remains a major challenge to the Chinese legal system in general and to the Chinese judiciary in particular.

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## I. INTRODUCTION

As part of its effort to adopt a comprehensive civil law (a general civil code), China enacted the Tort Liability Law – the first single piece of law on torts (the Torts Law) since 1949.<sup>2</sup> After more than 7 years of drafting, since 2002,<sup>3</sup> the Standing Committee of the National People's Congress (NPC) promulgated the Torts Law on December 26, 2009, effective July 1, 2010.<sup>4</sup> Despite lingering questions about whether the Standing Committee of the NPC may legitimately pass

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<sup>2</sup> At the very beginning of the economic reform in 1978, China had an ambitious plan to adopt a comprehensive civil code to replace the General Principles of Civil Law promulgated in 1986. But they never reached a consent among scholars and legislators on the substance of the civil code, and there were many issues that invited constant debates. In 1999, the Contract Law, which was supposed to be one chapter of the civil code, was adopted. In 2002, the first draft of the civil code was submitted to the Standing Committee of the NPC for review. Partly because of the wide disagreement over many provisions of the proposed civil code, the effort to adopt a comprehensive code at that time was abandoned. Instead, the attention was paid to the passage of separate law based on the each chapter of the proposed civil code. As a result, following the Contract Law, the Property Law was enacted in 2007. The adoption of the Tort Liability Law further exemplifies the legislative intention in this regard.

<sup>3</sup> The effort to draft the Torts Law was initiated in 2002. Although at that time, the torts law was considered as a chapter of the proposed civil code, the draft torts chapter laid the structural basis for the later drafting of the Tort Liability Law.

<sup>4</sup> Tort Liability Law of the People's Republic of China (promulgated by the Standing Comm., Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), *available at* [http://www.gov.cn/flfg/2009-12/26/content\\_1497345.htm](http://www.gov.cn/flfg/2009-12/26/content_1497345.htm) [hereinafter Tort Liability Law]. A full text of the Torts Law in English translation is available at <http://www.cnnlaw.com/show.asp?id=663>.

Torts Law,<sup>5</sup> Torts Law adoption is acclaimed in China as a significant modern legislative achievement in civil rights protection.<sup>6</sup>

China is known as a country where the clan and rites based Confucian orthodox dominated its legal system for thousands of years.<sup>7</sup> But civil law tradition has strongly influenced China's recent legal history.<sup>8</sup> In the law regulating civil affairs, for example, the civil law concept of *obligatio* (obligations in English) has been deeply embodied in the basic structure of the law.<sup>9</sup> Under the Roman law, the *obligatio* represented an obligatory relationship that is legally binding,<sup>10</sup> and was divided into *ex contractu* (contract) and *ex delicto* (delict).<sup>11</sup> It also covered quasi contract and quasi delict.<sup>12</sup>

China does not use the term "*quasi contract*" or "*quasi delict*." Instead, *obligatio* in China is comprehended to include contract, torts,

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<sup>5</sup> See XIANFA at art. 58 (1982). The passage of the law took an unusual step: instead of being adopted by the NPC full session, the Torts Liability Law took a short cut and was passed by the Standing Committee of the NPC – the permanent body of the NPC. Under Article 58 of the 1982 Chinese Constitution (as amended 2004), the National People's Congress and its Standing Committee exercise the legislative power of the State. *available at* <http://www.lawinfochina.com/law/display.asp?id=3437>. Pursuant to Article 62 of the Constitution and Article 7 of the Legislation Law of China, however, the legislative power of the Standing Committee is limited to the law other than the basic law of the nation (e.g. according to Article 7 of the Legislation Law, the NPC enacts and amends basic laws governing criminal offenses, civil affairs, the state organ and other matters, while the Standing Committee of the NPC enacts and amends laws other than the ones enacted by the NPC. Legislative Law (China), *available at* [http://www.npc.gov.cn/pc/11\\_4/2007-12/11/content\\_1617613.htm](http://www.npc.gov.cn/pc/11_4/2007-12/11/content_1617613.htm). Therefore, many questioned about the Standing Committee's authority to adopt such a law as the Torts Law that is considered the basic law related to the civil affairs. See Hou Guoyue, The Standing Committee of the NPC Lacks the Power to Enact the Torts Law, *available at* <http://www.civil-law.com.cn/article/default.asp?id=47528>. See also Xu Xianmin, The Torts Law Should be Submitted to the NPC's National Conference for Review, *available at* [http://www.npc.gov.cn/nc/xnwen/tpbd/cwhhy/2009-12/23/content\\_1531743.htm](http://www.npc.gov.cn/nc/xnwen/tpbd/cwhhy/2009-12/23/content_1531743.htm).

<sup>6</sup> See WANG LIMING, COURSEBOOK OF THE TORT LIABILITY LAW OF CHINA 1 (People's Court Press, 2010).

<sup>7</sup> See WANG CHENGUANG, *An Emerging Legal System*, in INTRODUCTION TO CHINESE LAW 4 (Zhang Xianchu & Wang Chenguang Ed., 1997); see also WILLIAM JONES, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 7-8 (C. Stephen Hsu ed., 2003).

<sup>8</sup> See JONES, *supra* note 7, at 18-22; see also George W. Conk, *A New Tort Code Emerges in China*, 30 FORDHAM INT'L L.J. 935 (2007).

<sup>9</sup> See LIMING, *supra* note 6, at 15.

<sup>10</sup> See generally WILLIAM SMITH, A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES, OBLIGATIONS 817 (John Murray, London 1875) [hereinafter SMITH'S DICTIONARY].

<sup>11</sup> *Id.*

<sup>12</sup> See *id.*

unjust enrichment and voluntary services (*negotiorum gestio*).<sup>13</sup> Thus, it is commonly held in China that an *obligatio* or obligations can be created by contract, tortious conduct, unjust enrichment or voluntary service.<sup>14</sup> In the recent decades, however, there has been a debate in China on whether the tortious conduct prompts an obligation or a liability.<sup>15</sup> Under Justinian's Institutes, *obligatio* was defined as "a legal bond, with which we are bound by a necessity of performing some act according to the laws of our state."<sup>16</sup> This definition apparently becomes an attribute to the debate.

The whole point of the debate is related to the word "releasing," meaning an obligation to give.<sup>17</sup> Some argue that *obligatio*, by way of "releasing" or "giving," implicates a property relationship, and unlike the contractual obligation which possesses the nature of property in terms of performance or monetary damage, torts does not necessarily involve such a relationship.<sup>18</sup> On this ground, they believe that a tort does not fall within the realm of the *obligatio*.<sup>19</sup> Others try to differentiate obligation from liability by emphasizing that the *obligatio* contains both rights and obligations, while torts law does not create any rights, but remedies.<sup>20</sup>

Because of this debate, Chinese tort legislation does not strictly adhere to civil law tradition. In fact, to the extent that the torts law is structured, it departs from the common pattern of the civil law legislation concerning torts.<sup>21</sup> The first law that evidences this departure is the General Principles of Civil Law, adopted in 1986 (referred to as the 1986 Civil Code). In Article 84 of the 1986 Civil Code, the "*obligatio*" is defined as a special relationship of rights and obligations established between the parties according to either the agreed terms of a contract or of legal provisions.<sup>22</sup> Article 84 further provides that the party enti-

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<sup>13</sup> See LIMING, *supra* note 6, at 15.

<sup>14</sup> See *id.*

<sup>15</sup> See JIANG PING, STUDY ON TORTS LAW 1 (China Democracy & Legality Press 2004).

<sup>16</sup> See SMITH'S DICTIONARY, *supra* note 10, at 817; see also André Tunc, *Introduction to XI/1 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: TORTS 3-5* (1983).

<sup>17</sup> See PING, *supra* note 15, at 2.

<sup>18</sup> See *id.* at 1.

<sup>19</sup> *Id.* at 7-15.

<sup>20</sup> *Id.*; see also LIMING, *supra* note 6, at 17-18.

<sup>21</sup> See YANG LIXIN, DETAILED EXPLANATIONS TO THE TORT LIABILITY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 2-3 (Property Rights Press 2010) (explaining that in civil law countries, torts and contract are all within the law of obligations because they are considered as the two main sources of the obligations); see Tunc, *supra* note 16, at 11.

<sup>22</sup> See General Principles of the Civil Law of the People's Republic of China (promulgated by the Nat'l People's Ct., Apr. 12, 1986, effective Jan. 1, 1987), *avail-*

tled to the rights shall be the creditor while the party assuming obligations is the debtor.<sup>23</sup>

Many in China believe that Article 84 specifies the legal causes for the *obligatio*, which include the “agreed terms of a contract” and the “legal provisions.” The former refers to the contractual obligations and the latter denotes non-contractual obligations.<sup>24</sup> Again, under civil law tradition, non-contractual obligations are those arising from torts, unjust enrichment and voluntary services.<sup>25</sup> The common feature of the non-contractual obligations is that all such obligations are created under the operation of law.<sup>26</sup>

Despite the definition of *obligatio* in Article 84, the 1986 Civil Code nevertheless separates tort liability from the provisions of the “*obligation*,” and places it in a different chapter under the title of civil liability.<sup>27</sup> The message that the 1986 Civil Code intends to send is that torts primarily deal with civil liability, rather than the rights and obligations, and thus should be differentiated from *obligatio*.<sup>28</sup> The tort provisions in the 1986 Civil Code are considered innovative in China because they break the civil law tradition in confining torts within the *obligation*.<sup>29</sup> Still, some insist that since the tortious conduct would result in rights and obligations between the parties concerned in terms of damages, torts remain as a major cause of the *obligatio* even though under the 1986 Civil Code, torts are provided separately as the civil liability.<sup>30</sup>

In this respect, the Torts Law, to a great extent, follows the blueprints of the 1986 Civil Code.<sup>31</sup> As a specific statute on torts, the Torts Law is different from its common law counterpart because in common law countries, in the United States for example, torts law “re-

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able at <http://www.lawinfochina.com/display.aspx?lib=law&id=1165> [hereinafter Civil Law].

<sup>23</sup> See *id.*

<sup>24</sup> See WANG JIAFU & LIANG HUIXING, *The Obligation in Civil Law* 31-32 (Law Press, 1998).

<sup>25</sup> See SMITH’S DICTIONARY, *supra* note 10, at 871.

<sup>26</sup> See *id.* at 3.

<sup>27</sup> See Civil Law, *supra* note 22. In the 1986 Civil Code, Chapter 6, Section III provides Civil Liability for Torts, which contains seventeen articles, from Article 117 to Article 133. Article 84 is within Section II Creditor’s Right of Chapter 5, Civil Rights.

<sup>28</sup> See LIXIN, *supra* note 21, at 2-3.

<sup>29</sup> See *id.*

<sup>30</sup> See JIAFU & HUIXING, *supra* note 24, at 32.

<sup>31</sup> See LIXIN, *supra* note 21, at 3. The independence of torts law might be affected when a comprehensive civil code is enacted in China. It may become part of the code or remain as a separate law depending on how the code is to be formed. At any rate, torts law in China is separated from the *obligatio*.

mains un-codified and in large part unaffected by statute.”<sup>32</sup> On the other hand, Torts Law is also distinctive from the civil law tort legislation since in major civil law countries, like Germany, “the law of torts is a set of rules that is part of the private law of obligation.”<sup>33</sup> The Torts Law, as its title (the Tort Liability Law of the People’s Republic of China) indicates, is the codified law explicitly governing tort liabilities.

In contrast to the 1986 Civil Code, the Torts Law is much more extensive in coverage and inclusive in substance. First, the Torts Law expands the tort provisions from 17 articles in the 1986 Civil Code to the currently 12 chapters and 92 articles. Secondly, the Torts Law not only covers torts in general, but also deals with special torts in particular, and contains the provisions pertaining to the liability of various tortfeasors as well. Thirdly, the Torts Law provides a set of rules of the tort liability imputation and the principles of compensation. Finally, the Torts Law creates new causes of action to deal with certain legal issues of growing importance. One such issue is the liability for medical damages.

A highly notable feature of the Torts Law is that it is a product of combination of the civil law tradition and the common law practice.<sup>34</sup> Many Torts Law provisions are actually a hybrid of civil law and common law.<sup>35</sup> As far as damages are concerned, the Torts Law allows restitution, in addition to monetary compensation, and also imposes punitive damages. Restitution is a common method of tort relief in the civil law system and punitive damages are mostly seen in common law.<sup>36</sup> In fact, American tort theories and practices were substantially referenced while drafting China’s Torts Law, particularly in the areas of special torts.<sup>37</sup>

Like both Contract Law<sup>38</sup> and Property Law,<sup>39</sup> Chinese Torts Law is an important piece of legislation to regulate civil matters. Chi-

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<sup>32</sup> See EDWARD J. KIONKA, TORTS IN A NUTSHELL 2 (West 1999).

<sup>33</sup> See J. ZEKOLL & M. REIMANN, INTRODUCTION TO GERMAN LAW 205 (Kluwer 2005).

<sup>34</sup> See LIXIN, *supra* note 21, at 9-15.

<sup>35</sup> See *id.* at 1, 10-13. Some scholars in China describe the Torts Law as “civil law body mixed with common law concepts and Chinese judicial practices.”

<sup>36</sup> See ZEKOLL & REIMANN, *supra* note 33, at 222-23. In Germany for example, repairs of damages in kind is a basic method of compensation. Under the German law of damage, compensation in the sense of *restitutio ad integrum* is a basic principle and punitive damages are not allowed.

<sup>37</sup> See LIXIN, *supra* note 21, at 13-15.

<sup>38</sup> Contract Law (promulgated Mar. 15, 1999, effective Oct. 1, 1999) (China), available at [http://www.foreignercn.com/index.php?option=com\\_content&view=article&id=1131:contract-law-of-the-peoples-republic-of-china&catid=55:chinese-law&Itemid=99](http://www.foreignercn.com/index.php?option=com_content&view=article&id=1131:contract-law-of-the-peoples-republic-of-china&catid=55:chinese-law&Itemid=99).

nese Torts Law responds to the increasingly urgent need for a unified torts law system that provides well-defined causes of action and mechanisms for torts to effectively redress civil grievances in the courts.<sup>40</sup> Together with Contract Law and Property Law, the Torts Law helps lay legal foundations for a civil society that China would need to develop in its commitment to the rule of law.<sup>41</sup>

This article offers in-depth study and analysis of the Torts Law and discusses the issues essential to its application. The article focuses on the basic principles and rules set forth in Chinese Torts Law, analyzing both their conceptual grounds and practical significance. This analysis will also address some pressing issues to be encountered in Torts Law application. In addition, Torts Law provisions will be viewed from a comparative perspective, mainly between Chinese and American laws.

Section II examines the concept of torts in the Chinese context and the functions of the Torts Law in China. It analyses the basic elements for the finding of tort liabilities, the subjects the Torts Law regulates, and the substance that tort liability covers. Section III concentrates on imputation of tort liabilities. It provides an analytical review of the principles under which tort liability is sought, and tort liability imposition on various tortfeasors. Section IV discusses joint torts, the peculiar tortfeasors that the Torts Law classifies, and their applicable rules. Section V examines the legal grounds for tort liability defenses. Section VI addresses the remedies available under the Torts Law and the rules of damages. Section VII looks into the special torts and analyzes their distinctive factors and liability imputation. The focus is on those special torts that are believed to have significant impacts on the development of torts law in China.

In conclusion, Section VII argues that despite the best efforts in the drafting of Torts Law, there are still many unresolved issues. In addition, given the considerable breadth of its coverage, more legislative interpretations and judicial explanations are necessarily needed to help fill the gaps. More importantly, the fair application and effec-

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<sup>39</sup> Property Rights Law (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) (China), *available at* <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html> [hereinafter Property Law].

<sup>40</sup> See WANG SHENGMING, EXPLANATIONS TO THE TORT LIABILITY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 2 (China Law Press, 2010). In 2007, the tort cases brought to the people's courts reached 830,000, and in 2008, this number increased to 992,000; *see also* PETER NEUMANN & CALVIN DING, *China's New Torts Law: Dawn of the Product Liability Era*, in THE CHINA BUSINESS REVIEW ONLINE, *available at* <http://chinabusinessreview.net/public/1003/neumann.html>.

<sup>41</sup> See LIMING, *supra* note 6, at 1-3.



tive enforcement of the Torts Law remain yet to be seen, particularly when the damage awards become an issue.

## II. CONCEPT OF TORTS AND ROLES OF THE TORTS LAW: UNDERSTANDING OF TORTS IN CHINA

"Torts" is an imported concept in China.<sup>42</sup> In Chinese legal history, because of the dominance of criminal law, little attention was ever paid to civil matters.<sup>43</sup> Not until the late Qing Dynasty (1644-1911) when foreign forces broke the tranquility of Chinese society, did western legal concepts begin to be introduced into China.<sup>44</sup> Torts, as a legal concept, was first used in the drafting of the Qing Civil Code as "*Qin Yuan Xing Wei*" (conduct of infringement of civil rights) in Chinese.<sup>45</sup> Ever since, the term of torts has widely been accepted and has become a common legal vocabulary in the country.<sup>46</sup>

### A. *Torts in Chinese Conception*

Nowadays, a "tort" is generally understood in China as a conduct of civil wrong.<sup>47</sup> Chinese scholars have tried to articulate a definition for torts but there is hardly any one that is satisfactory.<sup>48</sup> In at least two respects, scholars fail to reach any consent.

First is the question of whether there should be a difference between rights and interests. Some assert that rights are created by law, and thus any infringement of the rights shall be held liable; while interests are not necessarily legally provided and therefore harm to interests may not fall within torts.<sup>49</sup> Others disagree, arguing that in-

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<sup>42</sup> See *id.* at 1. Interestingly, it has been observed that the civilian jurists do not have exactly the concept of a tort but speak rather in terms of liability. See Tunc, *supra* note 16, at ch. I §12.

<sup>43</sup> See ZHANG JINFAN, *THE TRADITION AND MODERN TRANSITION OF CHINESE LAW* 23 (Law Press 2005).

<sup>44</sup> See Jerome Cohen, *Foreword to THE RULE OF LAW, PERSPECTIVES FROM THE PACIFIC RIM*, at xi (Mansfield Ctr. for Pacific Aff. 2000).

<sup>45</sup> See PING, *supra* note 15, at 60; see also ZHANG XINBAO, *STUDY ON THE LEGISLATION OF THE TORTS LIABILITY LAW* 143 (People's Univ. Press 2009). In the first draft of the Qing Civil Code, Article 945 provided that a person who unlawfully inflicts harm to other's rights, intentionally or negligently, shall be liable for compensating the damages caused thereby.

<sup>46</sup> See LIMING, *supra* note 6, at 1.

<sup>47</sup> See JIAFU & HUIXING, *supra* note 24, at 407. It has been observed that the word "tort" derives from the Latin "tortus," meaning twisted or crooked, and it has found its way into the English language as a general synonym for "wrong." See Tunc, *supra* note 16, at 7.

<sup>48</sup> See PING, *supra* note 15, at 60-62.

<sup>49</sup> LIU SHIGUO, *A STUDY IN THE MAJOR KNOTTY ISSUES OF THE TORT LIABILITY LAW* 1 (China Legal Publishing House 2009).

terests are actually the substance of rights because there would be no right without any interest. They argue further that even if there exists a difference between rights and interests, the difference is too obscure to tell.<sup>50</sup>

Second is the question of "unlawfulness," or the legal nature of tortious conduct. This issue asks whether "unlawfulness" is an element of a tort.<sup>51</sup> In other words, should a tort liability be imposed upon the fault or upon the unlawful conduct of the tortfeasor?<sup>52</sup> Under the unlawfulness approach, to hold someone liable for a tort, his harm causing conduct must also be unlawful even if he is proved to be at fault.<sup>53</sup> The fault theory takes the position that since the fault itself already infers something unlawful, there is no need to make unlawfulness an additional criteria for a tort.<sup>54</sup> On the other hand, the fault theory argues that given the complexity of civil matters, it is very difficult, if not impossible, to define what is lawful and what is unlawful.<sup>55</sup>

Both the 1986 Civil Code and the Torts Law contain no definition of tort. Article 106 of the 1986 Civil Code provides that citizens or legal persons who, through their fault, encroach state or collective property, or the property or person of other people, shall bear civil liability.<sup>56</sup> Although Article 106 is confusing with regard to the terms "citizens" and "state or collective property,"<sup>57</sup> it implies that a tort is a faulty conduct of infringing other's property or personal rights. Thus unlawfulness is not required for imposing tort liabilities.<sup>58</sup> But, it is unclear whether civil interests are included in these rights.

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<sup>50</sup> See SHENGMING, *supra* note 40, at 10.

<sup>51</sup> See PING, *supra* note 15, at 88-93.

<sup>52</sup> See WANG LIMING, STUDY IN THE PRINCIPLES OF LIABILITY IMPUTATION OF TORTS LAW 394-410 (China Univ. of Political Sci. & Law Press 1992) [hereinafter LIABILITY COMPUTATION].

<sup>53</sup> See *id.* at 400-01; see also PING, *supra* note 15, at 61. Historically, the unlawfulness as an element of torts originated from the *Lex Aquilia* in which the term "*iniuria*" meaning "unlawfully" was used to define torts. The *Lex Aquilia* was concerned with damages done from *dammum iniuria datum*, "damages unlawfully inflicted." See SMITH'S DICTIONARY, *supra* note 10, at 383; see also JEAN LIMPENS, *Liability for One's Own Act*, in XI/1 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: TORTS § 2-15, at 9.

<sup>54</sup> See LIMING, LIABILITY IMPUTATION, *supra* note 52, at 398.

<sup>55</sup> *Id.*

<sup>56</sup> See Civil Law, *supra* note 22, at art. 106.

<sup>57</sup> See *id.* The term "citizen," for example, causes confusion because it is not only a political term, but also does not include foreigners.

<sup>58</sup> See LIMING, LIABILITY COMPUTATION *supra* note 52, at 398 (Before the 1986 Civil Code was adopted, tort was commonly defined in China as "an *obligatio* relationship between actor and victim that occurred by the operation of law as a result of the actor's unlawful harm to the property right and personal right of the victim, whereby causing property damages to the latter.").

The Torts Law addresses torts in a more general fashion. Under Article 2 of the Torts Law, those who infringe upon civil rights and interests shall be subject to tort liability.<sup>59</sup> Once again, in Article 2, a tort liability is not based on the unlawfulness of the tortious conduct. In addition, pursuant to Article 2, Torts Law grants protection to not only one's civil rights but also one's civil interests. The implication of Article 2 is that a tort is a conduct that injures or damages another person's civil rights and interests and the legal consequences of a tort is the imposition of a civil liability upon the tortfeasor according to the law.

It is interesting to note that in addition to Article 2 of the Torts Law, Article 3 also provides that the victim of a tort shall be entitled to request the tortfeasor to assume tort liability.<sup>60</sup> Some regard Article 3 as a repetition of Article 2 because they believe that the two articles are basically the same.<sup>61</sup> Many, however, argue that the two articles are different because Article 2 states the liability of the tortfeasor while Article 3 emphasizes the victim's right of claim.<sup>62</sup> In civil law, the right of claim is the right to request the other person to do something or to refrain from doing something. It is the right that can only be realized by another person's action or omission.<sup>63</sup>

The provision of the right of claim under the Torts Law serves a twofold purpose. On the one hand, it differentiates the tort liabilities from the right of claim on torts.<sup>64</sup> Thus, when a tort occurs, it produces a liability on the tortfeasor and, in the meantime, creates a right for the injured to make a claim. On the other hand, it helps identify the plaintiff in a tort action because only the person whose civil rights and interests were harmed may make the claim.<sup>65</sup> Further, the holder of the right of claim may directly request the tortfeasor to stop the harm and compensate for damages, or ask a court to protect his right and interest by bringing a lawsuit.<sup>66</sup>

There is no doubt that to impose a tort liability, the conduct of a tortfeasor must be culpable under the Torts Law. In some cases, however, the tortious conduct when committed may also be in violation of another law, such as administrative law (e.g. violation of environmental protection law), or even criminal law (e.g. personal injury). In this situation, an issue of "concurrent liability" will necessarily arise.

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<sup>59</sup> Tort Liability Law, *supra* note 4, at art. 2.

<sup>60</sup> *Id.* art. 3.

<sup>61</sup> See LIXIN, *supra* note 21, at 32.

<sup>62</sup> See SHENGMING, *supra* note 40, at 28-30.

<sup>63</sup> See LIMING, *supra* note 6, at 41.

<sup>64</sup> See LIXIN, *supra* note 21, at 32.

<sup>65</sup> See SHENGMING, *supra* note 40, at 28-29.

<sup>66</sup> See *id.*

At the heart of the issue is whether the tort liability should be merged into another liability. An additional issue asks which liability takes priority if there is no merger.

The Torts Law recognizes the concurrent liability but does not allow the merger. Under Article 4 of the Torts Law, where a tortfeasor shall assume administrative liability or criminal liability for the same conduct, no prejudice shall be made to the tort liability that shall be legally assumed.<sup>67</sup> Article 4 further provides that where the assets of a tortfeasor who shall assume tort, administrative and criminal liabilities for the same conduct are not adequate for payments, the tortfeasor shall first satisfy the tort liability.<sup>68</sup>

Apparently, Article 4 of the Torts Law stands on two doctrines: Independence of tort liability and superiority of tort liability.<sup>69</sup> The independence doctrine holds that in case a tort liability co-exists with another liability, the tort liability shall remain intact.<sup>70</sup> The superiority doctrine opines that when different liabilities compete for compensation, tort liability takes priority and precedes all other liabilities by being paid first.<sup>71</sup> In fact, the superiority of tort liability is viewed in China as to originate from a civil law rule that a civil liability is of precedence over all other liabilities when compensation for damages is at issue.<sup>72</sup>

A further expression of the superiority doctrine is the protection of private rights. Some in China argue that what underlies the tort liability as opposed to the administrative liability (or criminal liability) is the idea that torts involve primarily the private interests rather than the government or state interests.<sup>73</sup> Therefore, the essence of the tort liabilities is to grant a safeguard to the compensation for civil damages, and thus effectively protect private interests.<sup>74</sup> The doctrine also implies that in civil compensation, the private interests should come first while the government interests should be considered secondary.<sup>75</sup>

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<sup>67</sup> Tort Liability Law, *supra* note 4, at art. 4.

<sup>68</sup> *Id.*

<sup>69</sup> The preference of tort liability is also termed as the priority of tort claim right. See LIXIN, *supra* note 21, at 31.

<sup>70</sup> See LIMING, *supra* note 6, at 18-23.

<sup>71</sup> See SHENGMING, *supra* note 40, at 31-32.

<sup>72</sup> *Id.* at 32-33.

<sup>73</sup> See LIXIN, *supra* note 21, at 35.

<sup>74</sup> See *id.*; see also CUI JIANYUAN, STUDY IN THE TOUGH ISSUES FACING THE LEGISLATION OF THE PROPERTY LAW OF CHINA 242 (Tsinghua Univ. Press, 2005).

<sup>75</sup> See LIXIN, *supra* note 21, at 35.

### B. Functions of the Torts Law

During the drafting of the Torts Law, a classic question emerged for debate again: what is the torts law? At one end, the torts law is categorized as the law of conduct. At the other end, however, the torts law is viewed as the law of adjudication. This question is closely related to the definitional difficulty of torts, and the answer to this question also affects the defining of the functions of the Torts Law. The reason seems to be self-evident. If the nature of the Torts Law is characterized differently, the functions that the Torts Law is supposed to serve would reflect those differences accordingly.

The theory classifying torts law as a law of conduct finds its origin from the Latin "*delictum*,"<sup>76</sup> meaning fault or wrong done to the property or person of another that does not involve breach of contract.<sup>77</sup> It is believed that since the term was introduced into China in the late Qing Dynasty (early 1900's), it had been understood to refer to those actions that violate the social and public norm of conduct.<sup>78</sup> Thus, the law of torts is considered as the law regulating and governing conduct. In that context, the law of torts is also called the law of civil wrong.<sup>79</sup>

The law of adjudication doctrine contends that the law of torts in the modern time has shifted its focus from conduct to liability and damages.<sup>80</sup> The argument is that with the vast development of technology and economy, the major source of civil harms is no longer the conduct of individuals but rather the conglomeration of industries.<sup>81</sup> It is also argued that the deletion of the requirement of unlawfulness in the contemporary legislation of torts echoes the change of torts in this regard because social responsibility and liability have become a major concern of torts.<sup>82</sup> Therefore, the law of torts should mainly deal with, or adjudicate, the liabilities and the allocation of damages.<sup>83</sup>

Between the two ends is an eclectic approach, which holds that the law of torts is both the law of conduct and the law of adjudica-

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<sup>76</sup> See LIMING, *supra* note 6, at 45.

<sup>77</sup> See *Dilectum*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW, available at <http://www.answers.com/topic/delictum>.

<sup>78</sup> See JIAFU & HUIXING, *supra* note 24, at 408.

<sup>79</sup> See LIMING, *supra* note 6, at 45.

<sup>80</sup> See BRUEGGEMEIER & ZHU YAN, DRAFT BILL FOR THE CHINESE LAW OF TORTS, TEXT AND COMMENTS 15-34 (Peking Univ. Press 2009).

<sup>81</sup> *Id.*; see also SHIGUO, *supra* note 49, at 2-3.

<sup>82</sup> See BRUEGGEMEIER & ZHU YAN, *supra* note 80, at 26-30.

<sup>83</sup> See *id.* at 34. Some scholars suggested calling the Torts Law the "Law of Tort Damages" on the ground that the tortious conduct is held liable mainly because it causes harms to others and the law of torts is designed to provide compensation for the harm in forms of damages. See LIMING, *supra* note 6, at 45.

tion.<sup>84</sup> It is also the approach that constitutes the theoretic underpinnings of the Torts Law. This can be seen in the name of the Torts Law itself. As noted, the Torts Law does not take the conventional name of the Law of Torts but rather the Law of Tort Liability. It is obvious that in addition to conducts, the Torts Law has a focus on the liabilities.<sup>85</sup> Moreover, the stated purposes of the Torts Law as provided in Article 1 explicitly indicate what the Torts Law is intended to achieve.

In accordance with Article 1, the Torts Law has four major functions: to protect the legitimate rights and interests of parties in civil relations, to specify tort liabilities, to prevent and punish tortious conduct, and to promote social harmony and stability.<sup>86</sup> Note, however, that the Torts Law's function in promoting social harmony and stability has a more political than legal meaning as it directly addresses the Communist Party's 2004 requirement to build a harmonious society,<sup>87</sup> and therefore contains little legal substance.

The function of protection is basically the function of redress.<sup>88</sup> It protects people from being harmed by anyone, and in the meantime, compensates those who suffer a loss or harm as a result of another's conduct. Redress in the form of compensation to victims is considered the core value of the Torts Law, and many provisions in the Torts Law are said to embody an idea of "protecting victim as the center piece."<sup>89</sup> To that end, it is considered important for the Torts Law to ensure that the tort victim's compensation is adequate.<sup>90</sup> On that ground, the Torts Law contains several other remedial methods in addition to the regular monetary damages.

The allocation of liability function deals with two fundamental questions: what conduct constitutes a tort and what liability should be

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<sup>84</sup> See LIMING, *supra* note 6, at 44; see also LIANG HUIXING, GENERAL PROVISIONS OF CIVIL LAW 31 (Law Press, 1995).

<sup>85</sup> See LIMING, *supra* note 6, at 44. Some try to define the Torts Law as the law consisting of legal rules regulating tortious conducts and providing liabilities arising therefrom. See LIMING, *supra*.

<sup>86</sup> Tort Liability Law, *supra* note 4, at art. 1.

<sup>87</sup> See JOSEPH FEWSMITH, *Promoting the Scientific Development Concept*, in CHINA LEADERSHIP MONITOR, [http://media.hoover.org/documents/clm11\\_jf.pdf](http://media.hoover.org/documents/clm11_jf.pdf) (last visited Oct. 28, 2011). The Central Committee of the Communist Party of China (CPC) in its Fourth Plenary Session of the 16th National Conference of the CPC in 2004 set the building of a harmonious society in China as a national policy. See Press Release, China Publishes Resolution on Building Harmonious Society, XINHUA NEWS AGENCY (Oct. 18, 2006). In 2006, the CPC passed a resolution that made it a goal to create harmonious socialist society in China in 2020, *available at* <http://english.cri.cn/2946/2006/10/18/176@152257.htm>.

<sup>88</sup> See SHENGMING, *supra* note 40, at 18; see also LIMING, *supra* note 6, at 81-82.

<sup>89</sup> See LIMING, *supra* note 6, at 53.

<sup>90</sup> *Id.*

imposed thereupon?<sup>91</sup> These questions occupy much of tort legislation and involve almost all major tort rules.<sup>92</sup> In the US, the law of torts is viewed as to be concerned with the allocation of losses arising out of human activities.<sup>93</sup> Thus, a goal of US torts law is to place the cost of the compensation on those who, in justice, are to bear it, but only on such persons.<sup>94</sup> The same idea is discernable in Chinese Torts Law as well, but is rephrased differently in the term “liability.” From the viewpoint of Chinese legislature, only when liability is clearly specified, does a tortfeasor know what he would need to do to compensate the harm caused, and only at that point is a victim able to prudently exercise his right of claim under the law.<sup>95</sup>

The function of prevention and punishment is aimed at future losses and harms. Because of the basic belief that the law of torts is designed to provide remedies, the main purpose of the Torts Law is not to punish, but to prevent tortious conduct.<sup>96</sup> The legislative consideration to make both the prevention and punishment a function of the Torts Law is that the two are complementary to each other. The reason is simple and logical: without punishment, the future harm may not be effectively prevented, and without prevention, punishment would become meaningless.<sup>97</sup>

When interpreting tort liability punishment, however, Chinese scholars tend to be cautious. On the one hand, they believe that the imposition of tort liability has a nature of punishment, particularly for mental damages.<sup>98</sup> But, on the other hand, they stress that the punishment in the sense of torts should remain compensatory and should be measured by money or property.<sup>99</sup> The underlying rationale seems to be clear: that is, unlike criminal law, the law of torts does not have a function of punishing a tortfeasor in such a way as to physically restrict him.<sup>100</sup>

### C. Coverage of the Torts Law

What rights and interests will the Torts Law protect? This question may appear elementary, but in fact involves the complicated issue of how to structure the scope of a torts law. In civil law coun-

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<sup>91</sup> See SHENGMING, *supra* note 40, at 1.

<sup>92</sup> *Id.*

<sup>93</sup> See PROSSER & KEETON ON TORTS (West, Hornbook Serial No. 6, 5th ed. 1984).

<sup>94</sup> See KIONKA, *supra* note 32, at 5.

<sup>95</sup> See SHENGMING, *supra* note 40, at 19.

<sup>96</sup> See LIMING, *supra* note 6, at 53, 81.

<sup>97</sup> *Id.*

<sup>98</sup> See LIXIN, *supra* note 21, at 27.

<sup>99</sup> *Id.*

<sup>100</sup> See LIMING, *supra* note 6, at 54, 89.

tries, there are two kinds of major tort legislation models with regard to the scope of protection. The first one is the German model, which enumerates specific rights that must be protected. This model is also called the “list” model. For example, under §823 I of the German Civil Code (Second Book), a person who, contrary to the law, deliberately or negligently causes harm to the life, person, health, liberty, property, or other right of another person must compensate that person for any damage arising there from.<sup>101</sup>

The second model is the French model or the model of general provision. Under the French model, no specific rights or interests are particularly mentioned, but instead a general scope is provided to cover all tort liabilities. According to Article 1382 of French Civil Code, for instance, any act which causes damage to another, obliges the one by whose fault it occurred, to compensate it.<sup>102</sup> Article 1383 further provides that everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.<sup>103</sup>

A majority of Chinese scholars and legislators favor the “list” model.<sup>104</sup> A widely accepted opinion is that the “list” model helps define specifically the boundary of the rights and interests to be protected by the Torts Law and, in particular, helps differentiate tort liability from contractual obligation, despite the possibility that the list may turn out to be far from complete.<sup>105</sup> Many agree that the general model is practical as it includes the necessary rights and interests that need to be covered. But the vagueness of the general model causes serious concerns about legal certainty in its application.<sup>106</sup>

As a result, the Torts Law provides as its coverage a laundry list of rights and interests, far exceeding those provided in the German Code or perhaps any other code worldwide.<sup>107</sup> Pursuant to Article 2 of the Torts Law, as many as 18 civil property and personal rights and interests are on the protection list, including “the right to life, right to health, right to name, right to reputation, right to honor, right to portrait, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to trademark use, right to discovery, equities, and right of succession.”<sup>108</sup>

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<sup>101</sup> See ZEKOLL & REIMANN, *supra* note 33, at 209.

<sup>102</sup> CODE CIVIL [C. CIV.] art. 1382 (Fr.), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=494>.

<sup>103</sup> *Id.* art. 1383.

<sup>104</sup> See SHENGMING, *supra* note 40, at 23-24.

<sup>105</sup> See LIMING, *supra* note 6, at 60.

<sup>106</sup> *Id.* at 61.

<sup>107</sup> *Id.* at 63.

<sup>108</sup> Tort Liability Law, *supra* note 4, at art. 2.



The list, though very impressive, seems a bit long-winded. It can, however, be grouped into five categories: right of personality,<sup>109</sup> right of personal status,<sup>110</sup> real right,<sup>111</sup> intellectual property right,<sup>112</sup> equities and succession. In addition, the list implicates major interests such as personal interests (also called interests of personality), property interests, business interests and other lawful interests.<sup>113</sup> The terms seem to be abstract, but are deemed by many in China to mainly include equality, personal dignity and liberty.<sup>114</sup>

Note that the Tort Liability Law does not cover the contractual liability, and thus no claim may be brought in a tort action on the basis of a breach of a contract.<sup>115</sup> But, a practical issue here is the liability of a third party for the harm caused to the contractual right. Though it is unclear whether the Torts Law should govern such third party liability, many in China regard it as a tort liability on the grounds that it falls within an economic harm.<sup>116</sup>

### III. LIABILITY IMPUTATION PRINCIPLES: THE FOUNDATION OF CHINESE TORTS SYSTEM

Tort law is considered one of the oldest areas of law in common law countries.<sup>117</sup> As it has been observed, however, common law scholars have long debated without a solution on whether there is a general principle of tort liability or whether there are only the laws of the individual torts.<sup>118</sup> This is probably because it is not easy to find a single guiding principle<sup>119</sup> and common law tort systems contain individually named torts, each with its own unique rules. Additionally, except for negligence, there has been little synthesis of categorizing torts.<sup>120</sup> The tradition followed in most standard treatises on United States tort law organizes torts beginning with the intentional torts.<sup>121</sup>

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<sup>109</sup> *Id.* (including the right to life, health, name, reputation, honor, portrait, privacy and marital autonomy).

<sup>110</sup> *Id.* (referring to guardianship as well as other family relations).

<sup>111</sup> Tort Liability Law, *supra* note 4, at art. 2 (representing real property rights which include ownership, usufruct, and security interest.).

<sup>112</sup> *Id.* at art. 2 (detailing that creditor rights consist of copyright, patent-rights, trademarks, and discovery).

<sup>113</sup> See LIMING, *supra* note 6, at 72-76.

<sup>114</sup> See *id.* at 74.

<sup>115</sup> See SHENGMING, *supra* note 40, at 26-27.

<sup>116</sup> *Id.* at 27; see also LIMING, *supra* note 6, at 76.

<sup>117</sup> See RICHARD A. EPSTEIN, CASES & MATERIALS ON TORTS, at xxvii (Aspen 2004).

<sup>118</sup> See KIONKA, *supra* note 32, at 1.

<sup>119</sup> See PROSSER AND KEETON ON TORTS, *supra* note 93, at 6.

<sup>120</sup> See KIONKA, *supra* note 32, at 2.

<sup>121</sup> See EPSTEIN, *supra* note 117, at 1.

Civil law countries take a different approach. First, tort laws are generally part of the law of obligations.<sup>122</sup> Thus, they are governed not only by the particular rules set forth for each type of tort but also by the general provisions of the law of obligations.<sup>123</sup> Second, there are certain rules normally provided in the general provisions to serve as guiding principles for the systematic application of the law.<sup>124</sup> Such principles are of theoretical abstraction and “contribute to the scientific purity of legal analysis.”<sup>125</sup> Third, the classification of torts is commonly made on the basis of imputable liability.<sup>126</sup>

The Torts Law in China is also a principle-based or rule-oriented legislation. Although China has pulled torts out of the general law of obligations (*obligatio*), the civil tradition remains markedly in the Torts Law. In addition to the general provisions, the Torts Law contains a special chapter (Chapter II) that provides, among others, the tort liability basis which serves as the legal ground on which a tort liability is to be imposed.<sup>127</sup> The importance of Chapter II rests with the principles it contains to govern the tort liability basis. The four major principles that are provided for the imputation of tort liability, include “fault,” “presumption of fault,” “liability without fault” and “liability on the basis of fairness.”

These four principles are the cornerstones of China’s torts system.<sup>128</sup> At first, they deal with the legal cause for imposing tort liability. Without such a cause, no tort liability would arise.<sup>129</sup> Additionally, each principle governs a different type of tort, and thus prescribes the factors that constitute the tort of the kind.<sup>130</sup> Moreover, the principles also determine the defenses available to the claim of a tort liability because certain defenses may only be asserted under a particular principle of liability imputation.<sup>131</sup>

It is worthy to note that in many civil law countries, the general tort liability is provided in the civil code, which only provides for

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<sup>122</sup> See ZEKOLL & REIMANN, *supra* note 33, at 205.

<sup>123</sup> See LIMPENS, *supra* note 53, at 5-10.

<sup>124</sup> See *id.* at 3 (observing that it is certainly easier to discover the “general rules of liability” in systems like French law, which have taken the unification of rules governing tortious liability very far, than in systems like English law, which are still happy to rely on fragmentary solution based on the traditional casuistic method).

<sup>125</sup> See ZEKOLL & REIMANN, *supra* note 33, at 10-11.

<sup>126</sup> See *id.* at 207 (noting how in Germany, for example, the types of torts are essentially characterized by the requisite degree of fault).

<sup>127</sup> Tort Liability Law, *supra* note 4, at arts. 6-25.

<sup>128</sup> See LIMING, *supra* note 6, at 121-22.

<sup>129</sup> See *id.* at 121.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* at 122.

fault-based liability.<sup>132</sup> The liability for a special type of tort, such as strict liability, are provided in special statutes and are therefore outside the thrust of the general liability rules in the civil code.<sup>133</sup> China does not yet have a comprehensive civil code and the Torts Law is intended to serve as a core statute that applies extensively to all tort liabilities.<sup>134</sup>

### A. General Principle of Fault

Under the Torts Law, the primary legal basis for imposition of tort liability is fault, and is thus the most important principle of the tort liability imputation. According to Article 6 of the Torts Law, a person who is at fault for infringement upon a civil right or interest of another shall bear the tort liability.<sup>135</sup> Therefore, no tort would be considered as committed without the requisite finding of fault. It is commonly held in China that Article 6 is the core of the Torts Law because it provides a general principle for tort liability imputation and bases the imputation mainly on the concept of fault.<sup>136</sup>

The Chinese legislative adoption of the fault principle in torts began with the 1986 Civil Code. As noted, Article 106 of the 1986 Civil Code makes fault a criterion for bearing civil liability.<sup>137</sup> Article 6 of the Torts Law is a restatement of Article 106 of the 1986 Civil Code. Compared to Article 106, however, Article 6 seems more precise in addressing the issue and more general in coverage. This is because Article 6 not only deletes the term “citizen” but also replaces the phrase of “the state, collective, and others property” with the notion of “civil rights or interests.”<sup>138</sup>

Of course, the starting point of the fault principle is the definition of fault. Unfortunately, neither the 1986 Civil Code nor the Torts Law has offered anything that will help explain what the fault is for the purpose of torts. In the general tort literature, there are two major approaches in the defining of fault. The first is known as the “objective approach” which considers fault as the breach of duty or a conduct that would not have been committed by a prudent man in the same “exter-

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<sup>132</sup> See ZEKOLL & REIMANN, *supra* note 33, at 207. For example, the German Civil Code only covers the traditional fault liability as well as the rule of presumption of fault. See LIMPENS, *supra* note 53, at 5-6. In French-based legal systems, the single-rule approach makes fault liability rule the only rule that governs all torts.

<sup>133</sup> See generally ZEKOLL & REIMANN, *supra* note 33.

<sup>134</sup> See LIMING, *supra* note 6, at 123.

<sup>135</sup> See Tort Liability Law, *supra* note 4, at art. 6.

<sup>136</sup> See LIXIN, *supra* note 21, at 6; see also LIMING, *supra* note 6, at 124-25.

<sup>137</sup> See Civil Law *supra* note 22, at art. 106.

<sup>138</sup> *Id.*; see also Tort Liability Law, *supra* note 4, at art. 6.

nal” circumstances.<sup>139</sup> The second is the “subjective approach,” under which the fault is defined as a state of mind, which, with reference to a particular kind of damage, can be blameworthy.<sup>140</sup>

It has been observed that in the civil law system, many countries favor the objective approach.<sup>141</sup> This observation also reveals that a common standard adopted in those countries to determine fault is the so-called “good family father” standard.<sup>142</sup> A good family father is a man, careful, diligent, and mindful of others.<sup>143</sup> Under this standard, a deviance from what would have been, under the same situation, the behavior of a good family father, will constitute a fault.<sup>144</sup> It is not clear yet what approach the Tort Liability Law takes. Although there are certain voices in support of the objective approach in China,<sup>145</sup> most scholars seem to advocate a mixed approach that requires a look at fault from both subjective and objective perspectives.<sup>146</sup>

Under the mixed approach, fault is both a state of mind and an overt act.<sup>147</sup> The whole idea is that the state of mind is the mentality of a person towards his own conduct, and the liability arises from the impropriety and unjustness of such mentality.<sup>148</sup> But, the law cannot regulate the state of mind, only the conduct.<sup>149</sup> Therefore, the judgment on the state of mind can only be made through the overt conduct of a person and the standard should be objective.<sup>150</sup> This is because the intolerance and blamefulness of the conduct are not decided by what the person in question would think, but rather by what a reasonable person in the same situation would do, or what society would require the person in question to do.<sup>151</sup>

Despite the lack of definition of fault, one consensus among Chinese scholars and legislators to the fault principle is that fault may occur either intentionally or negligently, though the Tort Liability Law itself does not explicitly say so.<sup>152</sup> Intentional fault directly involves

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<sup>139</sup> See LIMPENS, *supra* note 53, at 13-14.

<sup>140</sup> *Id.*

<sup>141</sup> See Tunc, *supra* note 16, at 71.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See JIAFU & HUIXING, *supra* note 24, at 457-58; see also SHENGMING, *supra* note 40, at 40.

<sup>146</sup> LIMING, *supra* note 6, at 203.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> See *id.*

<sup>152</sup> See SHENGMING, *supra* note 40, at 41.

the knowledge of the tortfeasor. The key is the intent, which is defined in Chinese tort law textbooks as “knowing and willing.”<sup>153</sup> Thus, the intent of a person occurs when the person has foreseen the consequences of his conduct and still wants to see it to happen or lets it drift. Conduct here includes both act and omission. From a Chinese viewpoint, the determination of intent focuses on the state of mind of the tortfeasor.<sup>154</sup> The decisive factors are whether the tortfeasor has foreseen the outcome of his conduct and whether the happening of the outcome is what he has either hoped for or to which he has turned a blind eye.<sup>155</sup> In judicial practices, intent is often inferred from the conduct of the tortfeasor.<sup>156</sup>

Negligence represents a vast majority of cases involving fault. But, in China, negligence is rarely used as a tort cause of action, but rather as an indication of fault. Further, negligence is understood to consist of neglect and slackness.<sup>157</sup> Neglect refers to a failure to foresee something that is or should be able to be foreseen, while slackness is an absent-minded credence or belief in the avoidance of a certain outcome that has been foreseen.<sup>158</sup> Based on this understanding, a civil negligence is viewed in China as a fault where a person should have been or is able to foresee the consequences of his conduct, or has foreseen such consequences but carelessly believes that the consequences can be avoided.<sup>159</sup>

The Tort Liability Law does not tell what would constitute negligence. A prevailing argument, however, is that negligence is a conduct that violates a duty of care that a reasonable person should normally exercise.<sup>160</sup> It is further held that the reasonable person’s duty of care is the level of care most people would have under the same circumstance.<sup>161</sup> Some suggest that the duty of care should also meet the requirements set forth by the law.<sup>162</sup> Another suggestion takes into consideration certain factors in the application of the reasonable person standard when the case involves professionals as opposed to laymen.<sup>163</sup>

Depending on the degree of seriousness, negligence can be further divided into general negligence and gross negligence. Normally, if

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<sup>153</sup> See LIMING, *supra* note 6, at 207.

<sup>154</sup> See *id.* at 41.

<sup>155</sup> See LIXIN, *supra* note 21, at 59-60.

<sup>156</sup> See SHENGMING, *supra* note 40, at 41.

<sup>157</sup> See LIXIN, *supra* note 21, at 60.

<sup>158</sup> See *id.*

<sup>159</sup> See LIMING, *supra* note 6, at 211; see also SHENGMING, *supra* note 40, at 41.

<sup>160</sup> See SHENGMING, *supra* note 40, at 41-42.

<sup>161</sup> See *id.*

<sup>162</sup> See LIMING, *supra* note 6, at 217-18.

<sup>163</sup> See *id.*

a person has not only failed to exercise the duty of care a reasonably prudent person would have exercised, but has also failed to reach the minimum level of care a regular person should have exercised, the person is found to be grossly negligent.<sup>164</sup> The Torts Law, however, limits the application of gross negligence to the situation of contributory negligence when the defendant's liability may be reduced because the fault principle is premised on general negligence.<sup>165</sup> However, the Torts Law does recognize the concept of gross negligence.<sup>166</sup>

Pursuant to the fault principle, a tort has at least four components: (a) conduct causing harm, (b) fault, (c) damage and (d) causation.<sup>167</sup> Among these factors, conduct (act or omission) is the cause, fault (intention or negligence) is the liability basis (unless otherwise provided by the law), damage is the result, and causation is the necessary nexus between the conduct and the damage.<sup>168</sup> Hence, if any of the four components are missing in a given case, no tort liability may be imposed.<sup>169</sup>

But, causation is unsettled in the Torts Law. Indeed, causation is a concept that looks simple but actually is the most confusing and controversial part of the tort.<sup>170</sup> At the early stage of the Torts Law drafting, the drafters attempted to introduce a causation clause.<sup>171</sup> For example, in the first draft of the Torts Law, there was a provision that required plaintiffs to prove the causation between the alleged tortious conduct and the injury suffered. It was also provided that if, under the law, the tortfeasor tries but fails to prove the non-existence of the causation but fails, such causation shall be deemed to exist.<sup>172</sup>

This attempt was later abandoned because it was realized that causation is too complicated to be provided in a single provision, especially in the case where there seems to have multiple causes of damage or multiple damages resulting from a single cause.<sup>173</sup> In addition, no consent could be reached with regard to the issue whether the causation means actual cause or legal cause, or whether the cause must be

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<sup>164</sup> See *id.* at 222.

<sup>165</sup> See Tort Liability Law, *supra* note 4, at art. 78. For example, under Article 78, where a domestic animal causes harm to another person, the keeper or manager of the animal shall assume the tort liability, but may assume no liability or reduced liability if it can be proved that the harm is caused by the victim intentionally or by the gross negligence of the victim.

<sup>166</sup> LIMING ET. AL, *supra* note 6, at 222-23.

<sup>167</sup> See SHENGMING, *supra* note 40, at 39-45. See also LIMING, *supra* note 6, at 183.

<sup>168</sup> See *id.*

<sup>169</sup> See LIXIN, *supra* note 21, at 53.

<sup>170</sup> KIONKA, *supra* note 32, at 29.

<sup>171</sup> See SHENGMING, *supra* note 40, at 43-44.

<sup>172</sup> See *id.* at 44.

<sup>173</sup> See *id.*

direct or proximate.<sup>174</sup> Since the Torts Law sidesteps the causation issue, it is ultimately left to the courts to decide on an *ad hoc* basis.<sup>175</sup>

It should be pointed out, however, that the Torts Law adopts a concept of presumption of existence of causation, which is applied to the liability for environmental pollution. Article 66 provides that where any dispute arises over an environmental pollution, the polluter shall assume the burden to prove that it should not be liable or its liability could be mitigated under certain circumstances as provided for by the law or to prove that there is no causation between its conduct and the harm.<sup>176</sup>

### B. *Presumption of Fault*

In certain cases, fault may be presumed as prescribed by law. This presumption of fault was first provided in the 1986 Civil Code. Under Article 106 of the 1986 Civil Code, civil liability shall be assumed even in the absence of fault if the law so stipulates.<sup>177</sup> This presumption becomes a principle of liability imputation in torts through Article 6 of the Torts Law, and constitutes a supplement to the general principle of fault.

According to Article 6, a person who is presumed to be at fault according to the law and cannot prove otherwise shall be subject to tort liability.<sup>178</sup> It is not difficult to see that under the Torts Law, the presumption of fault has several distinctions. First, it is a statutory fault. The presumption may only be made on the basis of law. Second, the presumption is rebuttable. The defendant may offer evidence to prove that he committed no fault. Third, the presumption is still considered fault-based liability because the underlying legal cause for the imposition of liability is fault. Again, without fault, there would be no liability.<sup>179</sup>

A major difference between fault and presumption of fault is the burden of proof. In the case of fault, the burden of proof falls on the plaintiff. Under the presumption of fault, however, the burden of proof is reversed and the defendant must rebut the presumed fault with evidence to avoid liability.<sup>180</sup> The very purpose of this presumption of fault is to protect the tort victim by shifting the burden of proof over to

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<sup>174</sup> See LIMING, *supra* note 6, at 240-52; see also JIAFU & HUIXING, *supra* note 24, at 475-91.

<sup>175</sup> See SHENGMING, *supra* note 40, at 44.

<sup>176</sup> Tort Liability Law, *supra* note 4, at art. 106.

<sup>177</sup> See Civil Law, *supra* note 22, at art. 106.

<sup>178</sup> See Tort Liability Law, *supra* note 4, at art. 6.

<sup>179</sup> See LIMING, *supra* note 6, at 140-43.

<sup>180</sup> *Id.* at 141-42.

the defendant.<sup>181</sup> Under the Torts Law, the presumption of fault applies mostly to cases where the victim is in a weak position.<sup>182</sup>

A practical issue relating to the presumption of fault is whether a court has the discretion to make the presumption in cases where the law is not clear. In China, the courts do not have the power to interpret law. Under the Chinese Constitution, the authority of interpretation of law rests with the Standing Committee of the NPC.<sup>183</sup> But, the Supreme People's Court is empowered to interpret the application of law.<sup>184</sup> Although the line between interpretation of law and interpretation of application of law is never clearly drawn,<sup>185</sup> courts in China in their adjudicative work all follow the judicial interpretations of the Supreme Peoples Court's form of explanations, provisions, replies or periodically issued decisions.<sup>186</sup>

In 2002, the Supreme People's Court adopted the Several Provisions of Evidence Concerning Civil Litigation Rules (Civil Evidence Rules).<sup>187</sup> Under the Civil Evidence Rules, absent clear provision of law or applicable judicial interpretation, the courts may make a determination of burden of proof according to the principle of fairness and

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<sup>181</sup> See SHENGMING, *supra* note 40, at 45.

<sup>182</sup> See Tort Liability Law, *supra* note 4, at arts. 38, 58, 85. The cases in which presumption of fault applies involves, for example, the liability of educational institutes to the person who is lack of civil capacity, liability of certain medical malpractice, or liability arising from the falling object.

<sup>183</sup> See XIANFA, *supra* note 5, at art. 67 (1982). Under Article 67 (4) of the Constitution of China, the Standing Committee of the National People's Congress exercises the power to interpret laws. (China), available at [http://www.gov.cn/gongbao/content/2004/content\\_62714.htm](http://www.gov.cn/gongbao/content/2004/content_62714.htm), translated in Constitution of the People's Republic of China (1982, as amended 2004), available at <http://www.usconstitution.net/china.html>.

<sup>184</sup> See Organic Law of People's Court of China (as amended 2006) (China), available at [www.novexc.cn/organc-law.html](http://www.novexc.cn/organc-law.html). Article 33 of the Organic Law provides that the Supreme People's Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceedings.

<sup>185</sup> *Id.* Literally, the Standing Committee's interpretation is called legislative interpretation, and the Supreme People's Court interpretation is labeled as judicial interpretation.

<sup>186</sup> See Provisions of the Supreme People's Court Concerning the Judicial Interpretation (promulgated by Sup. People's Ct. Mar. 23, 2007, effective Apr. 1, 2007) (China), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=5970>.

<sup>187</sup> See Several Provisions of Evidence Concerning Civil Litigation Rules (promulgated by Sup. People's Ct.) (China), available at [http://www.law-lib.com/law/law\\_view.asp?id=16829](http://www.law-lib.com/law/law_view.asp?id=16829) [hereinafter Civil Evidence Rules]. See generally MO ZHANG & PAUL ZWIER, *Burden of Proof: Developments in Modern Chinese Evidence Rules*, 10 TULSA J. COMP. & INT'L L. 419 (2003) (providing a general discussion on the Civil Evidence Rules).



good faith, taking into account the party's ability to prove.<sup>188</sup> Relying on the Civil Evidence Rules, some argue that, notwithstanding the statutory nature of the presumption of fault, the courts under certain circumstances should have discretionary power to expand its application to particular cases, especially when the law leaves a loophole.<sup>189</sup>

Opponents, however, regard the provision in the Civil Evidence Rules to be applicable to the determination of causation rather than of fault.<sup>190</sup> Two reasons are offered. First, since presumption of fault aggravates defendant's burden of proof that he would otherwise not bear, to allow the court to discretionally decide may result in an unwanted expansion of the use of presumption of fault, potentially rendering it immeasurable.<sup>191</sup> Second, the Torts Law intends to make the presumption of fault strictly statutory by specifying the situations when the fault may be presumed. Therefore, in this regard, the Torts Law leaves no room for the courts to exercise their discretionary power.<sup>192</sup>

A related issue that attributes to the above debate is the effect of judicial interpretation. In China, only the Supreme People's Court, the top judicial body of the country, may make judicial interpretation.<sup>193</sup> Although the interpretation is limited to the application of law, it has legal effect.<sup>194</sup> While the substance of this legal effect may be questioned, it is binding on all courts and may be relied upon as legal authority when issuing a judgment.<sup>195</sup> Therefore, until the Supreme People's Court further interprets this matter, the confusion caused by the provision of the Civil Evidence Rules pertaining to the judicial expansion of the application of presumption of fault will remain.

### C. *Liability Without Fault*

The third liability imputation principle provided in the Torts law is the principle of non-fault liability. In accordance with Article 7 of the Torts Law, a person who causes harm to a civil right or interest of another person, whether at fault or not, shall bear civil liability if so provided for by law.<sup>196</sup> The thrust of Article 7 is liability without fault. Thus, in an Article 7 case, if the tortfeasor's conduct injures the personal or property rights or interests of another person, the tortfeasor is

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<sup>188</sup> See Civil Evidence Rules, *supra* note 187, at art. 7.

<sup>189</sup> See LIMING, *supra* note 6, at 150.

<sup>190</sup> See *id.* at 151.

<sup>191</sup> See *id.* at 150-51.

<sup>192</sup> *Id.*

<sup>193</sup> See Organic Law of People's Court of China (as amended 2006), art. 2 (China), available at [www.novexcn.com/organc-law.html](http://www.novexcn.com/organc-law.html).

<sup>194</sup> *Id.* art. 5.

<sup>195</sup> *Id.* art. 27.

<sup>196</sup> Tort Liability Law, *supra* note 4, at art. 7.

tortiously liable regardless of fault, if no exception under the law applies.

This liability without fault is well received in China as a special tort liability principle outside fault. Obviously, this principle places a much heavier burden on the tortfeasor. Its focus is on the risk or danger the tortfeasor creates and it is aimed at making the tortfeasor readily liable for the source of such risk or danger that generates harm to others, especially to the public in general.<sup>197</sup> While many countries term this kind of liability as strict liability,<sup>198</sup> Chinese scholars prefer to call it liability without fault or non-fault liability.<sup>199</sup>

Except for terminology differences, no major difference exists between strict liability and liability without fault. In fact, these two terms are often used interchangeably to mean the same thing.<sup>200</sup> Since it was first adopted in Article 106 of the Civil Code in 1986, the liability without fault principle has been applied to a particular type of tort case, e.g. the highly dangerous activities cases.<sup>201</sup> But Article 106 is criticized to have caused confusion because it fails to reflect the essence of the liability without fault principle. Under Article 106, a civil liability shall still be borne, even in the absence of fault, if the law so stipulates.

Critics argue that the gist of liability without fault is the burden of proof.<sup>202</sup> To be more specific, liability without fault is not simply to mean that the tortfeasor assumes liability in the absence of fault. Rather it means that for the determination of the tortfeasor's liability, the plaintiff does not need to prove the tortfeasor's fault no matter whether the tortfeasor is at fault or not.<sup>203</sup> The whole point is that if the focus is on the absence of fault, the liability without fault may be misunderstood to imply that it applies only when the tortfeasor has no fault. According to the critics, the "without fault" principle is purposed to hold the tortfeasor liable without inquiring as to the tortfeasor's fault, but not to impose liability on someone who acts without fault.<sup>204</sup>

Under this circumstance, Article 7 of the Torts Law revises Article 106 of the 1986 Civil Code. But the application of Article 7 is subject to certain exceptions. For example, in accordance with Article 81 of the Torts Law, a zoo is presumed to be at fault when a zoo animal

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<sup>197</sup> See SHENGMING, *supra* note 40, at 46-47.

<sup>198</sup> See KIONKA, *supra* note 32, at 37-39.

<sup>199</sup> See SHENGMING, *supra* note 40, at 46-47; see also LIXIN, *supra* note 21, at 49-52.

<sup>200</sup> See LIXIN, *supra* note 21, at 49-52.

<sup>201</sup> See Civil Law *supra* note 22, at art. 106.

<sup>202</sup> See SHENGMING, *supra* note 40, at 47-48.

<sup>203</sup> *Id.* at 48.

<sup>204</sup> See *id.*

causes harm to another person.<sup>205</sup> But, if it is proved that the zoo has fulfilled its duty of management, no liability shall be imposed.<sup>206</sup> Thus, in imposition of the tort liability without fault, four elements must be present: conduct, injury, causation and no legal ground for exemption. Because of the availability of the exemptions provided in the Torts Law, many in China do not regard the liability without fault as an absolute liability.<sup>207</sup>

Note again that liability without fault in China is imposed on the basis of the statute. First, the imposition of liability without fault must be made within the provision of law. Under the Torts Law, the liability without fault mainly applies to product liability, liability for environmental pollution, and liability for ultra-hazardous activity.<sup>208</sup> Second, courts are given no power to expand the scope of such liability without authorization of law.<sup>209</sup> Third, in the determination of the liability without fault, a court must take into account any applicable statutory exemption.<sup>210</sup>

#### D. Fairness Principle

The fairness principle is the rule of thumb for proper damages allocation in those cases where injury or damage occurs, yet none of the parties involved are found to be at fault. The Torts Law states this principle in Article 24, which provides that if neither the victim nor the actor is at fault for the occurrence of damages, both may share the damages based on the actual situations.<sup>211</sup> Most cases in which the fairness principle may apply involve damages that are caused by the person who lacks civil capacity (e.g. minors or the mentally retarded), or by an object falling down from a building, for which no one may be found responsible.<sup>212</sup> Other cases where the fairness principle becomes applicable concern the damages caused by a conduct of necessity in an emergency situation.<sup>213</sup>

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<sup>205</sup> See Tort Liability Law, *supra* note 4, at art. 81.

<sup>206</sup> See *id.*

<sup>207</sup> See SHENGMING, *supra* note 40, at 49. Liability without fault is sometimes called absolute liability. See KIONKA, *supra* note 32, at 38-39.

<sup>208</sup> See Tort Liability Law, *supra* note 4, at arts. 41, 65, 69.

<sup>209</sup> See SHENGMING, *supra* note 40, at 50.

<sup>210</sup> See LIMING, *supra* note 6, at 166.

<sup>211</sup> Tort Liability Law, *supra* note 4, at art. 24. Article 24 of the Torts Law is based on Article 123 of the 1986 Civil Code, under which the parties may share civil liability according to the actual circumstance if none of them is at fault in causing damage. See, e.g., Civil Law, *supra* note 22, at arts. 24, 123, available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1165> (noting that Article 24 changes "share civil liability" to "share the damage.").

<sup>212</sup> See SHENGMING, *supra* note 40, at 116.

<sup>213</sup> See LIMING, *supra* note 6, at 167.

The trigger of the fairness principle is the damage resulting from the fault for which no one can be blamed. The purpose is to determine tort liability in a way that damage may be fairly allocated, because even though it is impossible to identify who is at fault, damage indeed occurred and the victim needs to be compensated.<sup>214</sup> Since the fairness principle is applied to handle certain damages that regular torts may not necessarily cover and compensate, it is deemed as a gap-filler for the purpose of achieving social justice.<sup>215</sup> For the same reason, the fairness principle is considered supplementary in nature.<sup>216</sup>

The determination of damage under the fairness principle is entirely discretionary. Article 24 authorizes courts to determine the fair share of damages on a case-by-case basis. Factors the courts consider include the type of conduct, circumstance of occurrence, degree of damage, relation of the parties, knowledge of the parties, social impacts, as well as financial status of the parties.<sup>217</sup> In some cases, courts also take into consideration the benefit done to one party or two parties.<sup>218</sup> One typical example is that a person volunteers to help his friend do some yard work and is injured during the work. In an action for damage, the court may order the friend to pay a fair amount, although the damage was not caused by the friend's conduct or fault, because the friend benefited from the person's work.<sup>219</sup>

There are three issues concerning the fairness principle and each of them is debatable. All three issues are related to the nature of Article 24, and pose a question to which an answer may affect how the fairness principle is addressed in court proceedings and applied to particular cases. The question is whether the fairness principle set forth in Article 24 is a principle of tort liability imputation?

The first issue is whether the Article 24 liability is a legal liability.<sup>220</sup> One argument is that Article 24 stresses a moral obligation because it applies to a situation where no one is supposed to compensate another for anything. Therefore, sharing the damage is no more than an offer of moral support. Although the court decides the amount of sharing, it actually reflects the good will of the party involved.<sup>221</sup> Many, however, characterize Article 24 liability as a morality-based legal liability. They argue that Article 24 is designed to require the

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<sup>214</sup> *Id.*

<sup>215</sup> See LIXIN, *supra* note 21, at 96.

<sup>216</sup> See LIMING, *supra* note 6, at 125.

<sup>217</sup> See *id.* at 167-70; see also LIXIN, *supra* note 21, at 97-98.

<sup>218</sup> SHENGMING, *supra* note 40, at 116.

<sup>219</sup> See Opinions on Several Questions Concerning Implementation of the General Principles of Civil Law of the People's Republic of China (1988), art. 157 (China), available at <http://www.dffy.com/faguixiazai/msf/200311/20031110212524-6.htm>.

<sup>220</sup> See LIMING, *supra* note 6, at 167.

<sup>221</sup> See *id.* at 167-68.

defendant to pay for certain damages that he otherwise would not have to pay, and that it creates a cause of action on which the victim may bring an action against the defendant for compensation.<sup>222</sup> More importantly, unlike a voluntarily performed moral obligation, Article 24 liability is legally enforceable.<sup>223</sup>

The second issue is whether the fairness principle is a rule of equity. Equity is not a Chinese concept nor is it a common practice in Chinese judicial proceedings. Derived from common law tradition, equity is a court created mechanism to mitigate the vigor of common law, which allows courts to use their discretion to provide fairness.<sup>224</sup> In the U.S., equity is a court fashioned relief, which is, “not a matter absolute right to either party” but, “a matter resting in the discretion of the court to be exercised upon a consideration of all the circumstances of each particular case.”<sup>225</sup> In many cases, the equitable relief will only be available when legal remedies are inadequate.<sup>226</sup>

In China, ever since the enactment of the 1986 Civil Code in which the fairness principle was adopted for civil liability, there has been the assertion that fairness and equity are the same.<sup>227</sup> Many, however, have shown their disagreement by attempting to draw a line between fairness and equity.<sup>228</sup> The major argument is that fairness as a legal principle deals with liability, while equity as a remedy is concerned with compensation. Thus, in some Chinese torts law books, the fairness principle is discussed as a liability rule while equity is viewed as a rule of compensation.<sup>229</sup>

With regard to Article 24 of the Torts Law, the practical importance of the debate on fairness *vis-à-vis* equity is directly related to whether Article 24 is a rule of liability or rule of compensation. If it is the former, fairness constitutes a principle of tort liability imputation despite the fact that the Torts Law does not include it in the liability provisions. If it is the latter, Article 24 will lose its status as a rule of

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> See GERALD N. HILL & K. T. HILL, REAL LIFE DICTIONARY OF THE LAW 157 (GPG, 1997); see also MARY ANN GLENDON, COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 161-62 (West 3d ed., 2008).

<sup>225</sup> See *Willard v. Tayloe*, 75 U.S. 557, 565 (1869).

<sup>226</sup> See generally JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS 550-556, at §16.1-16.4 (West 6th ed. 2009) (demonstrating that specific performance in contract cases will not be granted if legal remedies are adequate).

<sup>227</sup> See LIMING, LIABILITY IMPUTATION, *supra* note 50, at 94-101.

<sup>228</sup> See Mi Jian, *Rethinking of Fairness as the Principle of Liability Imputation*, 1 China-Foreign Jurisprudence, 1997, available at <http://www.jurist.org.cn/doc/lawyer200601/lawyer20060101.pdf>; see also LIXIN, *supra* note 21, at 96.

<sup>229</sup> See SHIGUO, *supra* note 49, at 15-16.

imputation. Presently, many in China are in favor of making the fairness principle a liability imputation principle.<sup>230</sup>

The third issue is whether the fairness principle also applies to situations other than the Torts Law. As noted, the fairness principle is within the realm of the court's discretion. But, the question remains about how far a court may go in the application of the fairness principle. Some argue that the application of the fairness principle in torts is limited to cases specified in the law, because the application of the principle is confined within certain special types of torts.<sup>231</sup> The opposite view is that as a principle, fairness is a standard applicable to all cases, and therefore, Article 24 is not a special provision but instead one of general application.<sup>232</sup> Between these two extremes is the opinion that fairness, as employed in torts, supplements other liability rules with judicial discretion to allocate damages. Therefore, though Article 24 is a special provision, its application should not be restricted to the cases as provided by law.<sup>233</sup>

#### IV. MULTIPLE DEFENDANTS AND PECULIAR TORTFEASORS: A CHINESE CLASSIFICATION

In a tort action, a plaintiff may have claims against more than one tortfeasor. Tort liability may arise from joint tortfeasors who have either together or individually contributed to causing the plaintiff injury.<sup>234</sup> In the U.S., a tort where multiple defendants are involved is also called a joint tort.<sup>235</sup> A joint tort may occur in different ways. The actors can agree to engage in a course of tortious conduct or the independent conduct of two or more actors may combine to injure the plaintiff.<sup>236</sup> The joint tort also includes the case in which vicarious liability is imposed.<sup>237</sup>

In China, the 1986 Civil Code describes the joint tort as two or more persons jointly infringing upon another person's rights and causing him damage.<sup>238</sup> But, the Civil Code does not specify what would constitute a joint tort. A clearer definition of joint tort became available in 2003 when the Supreme People's Court issued an interpreta-

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<sup>230</sup> See LIMING, *supra* note 6, at 170-72.

<sup>231</sup> See LIMING, LIABILITY IMPUTATION, *supra* note 50, at 120.

<sup>232</sup> See Jiang Songping, *Liability Based on Fairness Shall Become the Principle of Liability Imputation*, 7 People's Justice 2-25 (1989).

<sup>233</sup> See LIMING, *supra* note 6, at 172-73.

<sup>234</sup> See JOSEPH GLENNON, THE LAW OF TORTS 357 (Aspen 2d ed., 2000).

<sup>235</sup> See KEETON, *supra* note 93, at 322.

<sup>236</sup> See GLENNON, *supra* note 234, at 357-58.

<sup>237</sup> See EPSTEIN, *supra* note 117, at 221.

<sup>238</sup> See Civil Law, *supra* note 22, at art. 30.

tion.<sup>239</sup> According to the Supreme People's Court, a joint tort exists when two or more persons with a joint intention or joint negligence cause injury to another person, or the harmful conduct of two or more persons together causes injury to another person even though no joint intention or negligence existed.<sup>240</sup>

Developed from the 1986 Civil Code and the 2003 Supreme People's Court's interpretation, the Torts Law divides the joint tort into three categories: joint conduct, joint danger, and joint cause. In addition to the imposition of different liabilities upon the joint tortfeasors, the Torts Law also contains special provisions that govern those who are in the special position when a tort occurs. The special position person in a tort case is classified in the Torts Law as the peculiar tortfeasor.

### A. *Joint Torts*

The first category of joint torts under Chinese Torts Law is the joint commission of a civil wrong. In this category, the joint conduct of the tortfeasors is crucial. From the definitional respect, the Torts Law follows both the 1986 Civil Code and the 2003 Supreme People's Court's interpretation in holding that a joint tort is committed when two or more people act together to cause injury to another person.<sup>241</sup> But under the Torts Law, the joint conduct also includes the act of abetting or assisting another person in committing a tort.<sup>242</sup> Additionally, the Torts Law allows for action against a guardian who fails to fulfill his duties when a person under his guardianship, who is without civil capacity or with limited capacity, commits the tort.<sup>243</sup>

The joint conduct involves multiple defendants, and a typical feature in a joint conduct case is that the defendants take action together in committing the tort.<sup>244</sup> But the difficulty in determining joint conduct is how to define and identify the "joint" action. The Torts Law is evasive in this regard, partly because there is no credible answer. Chinese legislation is often deliberately vague if there is anything in a provision of the law that is subject to more debate. The "joint" issue is a perfect example of this problem.

In Chinese torts law, at least four different theories attempt to address the "joint" issue. The first is the "joint mind" theory, which

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<sup>239</sup> See Interpretation to Several Questions on the Application of Law in Adjudicating Personal Injury Damage Cases (Sup. People's Ct. 2003), available at [http://www.law-lib.com/law/law\\_view.asp?id=81918](http://www.law-lib.com/law/law_view.asp?id=81918) [hereinafter Interpretations].

<sup>240</sup> *Id.* art. 3.

<sup>241</sup> See Tort Liability Law, *supra* note 4, at art. 8.

<sup>242</sup> *Id.* art. 9.

<sup>243</sup> *Id.*

<sup>244</sup> See SHENGMING, *supra* note 40, at 51.

opines that the prerequisite condition for the joint tort is the concerted desire or motive of the multiple tortfeasors.<sup>245</sup> Under the joint mind theory, because two or more tortfeasors agree to engage in a course of tortious action, they are regarded as having joint intent to commit a wrong and to injure another person. Therefore, in the view of the joint mind theory, the term “joint” means thinking and acting together.<sup>246</sup> Since the joint mind theory bases the joint torts on the tortfeasors’ motion in concert, it is considered a subjective theory.<sup>247</sup>

The second theory is also subjective, but views joint torts in the light of fault other than the mental status of the tortfeasors, and is therefore called joint fault approach.<sup>248</sup> According to the joint fault approach, the joint mind theory is lopsided because it fails to include the joint tort in negligence.<sup>249</sup> In contrast to the joint mind theory, the joint fault approach argues that the commission of a joint tort can take place either intentionally or negligently.<sup>250</sup> A joint tort by negligence occurs when an injury is caused by the joint conduct of tortfeasors who should have known but failed to know or predict the consequences of their conduct.<sup>251</sup> Joint tort negligence also includes a case in which no joint intent of the tortfeasors can be ascertained with respect to their joint conduct causing injury to the other person.<sup>252</sup>

The third theory is the doctrine of conduct in concert. It holds that neither the joint mind nor joint fault is a prerequisite for a joint tort because the standard on which the joint tort is based should be objective.<sup>253</sup> Thus, as long as the tortfeasors act together to cause injury to the other person, a joint tort is committed, leaving it unnecessary to inquire into the tortfeasor’s state of mind.<sup>254</sup> This objective doctrine rests with a belief that it is difficult to prove that the multiple tortfeasors in a joint tort share a common intent because each may pursue a different motive.<sup>255</sup> Hence, under the objective theory, to constitute a joint tort, the decisive factor is whether the conduct of the alleged tortfeasors, viewed objectively, is in concert.

The fourth theory does not have a particular name but is an approach that combines both subjective and objective theories. To the extent that a joint tort is formed, this combined theory advocates that

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<sup>245</sup> See *id.* at 55.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See LIMING, *supra* note 6, at 354.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 355.

<sup>251</sup> See SHENGMING, *supra* note 40, at 55.

<sup>252</sup> *Id.* at 56.

<sup>253</sup> See *id.*; see also LIMING, *supra* note 6, at 354.

<sup>254</sup> LIMING, *supra* note 6, at 354.

<sup>255</sup> See *id.*



the court consider not only the internal mind of the alleged tortfeasors but also their external conduct.<sup>256</sup> Internally, there should be a fault, either in intention or in negligence; externally, the tortfeasors' conduct should be concerted, and of an interrelated nature.<sup>257</sup> The Supreme People's Court endorsed this approach in its 2003 interpretation.<sup>258</sup>

As noted, it is unclear on what doctrinal basis the Torts Law stands in determining the joint tort. Many scholars disagree with the Supreme People's Courts' 2003 interpretation approach. They suggest that the joint tort under the Torts Law means a tort of joint fault.<sup>259</sup> But, the term "joint" should be construed to imply three things: joint intent, joint negligence and concerted conduct.<sup>260</sup> In any case, this debate and its surrounding confusion is expected to continue. But as many hope, the Supreme People's Court may help clarify this issue when the time becomes ripe.<sup>261</sup>

Another joint tort category in the Torts Law is joint danger. Joint danger refers to the conduct of two or more persons engaged in an action that endangers the personal or property safety of another person and where an injury occurs. However, there is no meaningful way to determine who actually causes the injury.<sup>262</sup> In China, this is also called *quasi* joint conduct.<sup>263</sup> As compared with joint conduct, which targets the action of the multiple tortfeasors, joint danger focuses on the source of the danger that causes the injury. This is because the circumstances may make it impossible to identify the connection between the injury and the tortfeasor's particular conduct.

For the purpose of the Torts Law, a joint tort arising from joint danger should have the following four elements: (a) two or more persons, (b) engagement in a dangerous conduct, (c) injury to a victim caused by the conduct of some of the persons, and (d) inability to identify the person whose conduct actually results in the injury.<sup>264</sup> The distinction of joint danger is that there is no joint intent to commit a tort but the conduct of two or more persons creates a danger that may cause injury to another person, and when injury is caused, liability cannot be assigned to an individual person.<sup>265</sup>

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<sup>256</sup> *Id.* at 355; see also SHENGMING, *supra* note 40, at 55.

<sup>257</sup> LIMING, *supra* note 6, at 355.

<sup>258</sup> See Interpretations, *supra* note 239.

<sup>259</sup> See SHENGMING, *supra* note 40, at 57-58.

<sup>260</sup> See *id.*

<sup>261</sup> See LIXIN, *supra* note 21, at 25; see also LIMING, *supra* note 6, at 7.

<sup>262</sup> Tort Liability Law, *supra* note 4, at art.10.

<sup>263</sup> See LIMING, *supra* note 6, at 378; see also LIXIN, *supra* note 21, at 65.

<sup>264</sup> See SHENGMING, *supra* note 40, at 65.

<sup>265</sup> See LIMING, *supra* note 6, at 382. An example often used to illustrate the joint danger situation is the case where a group of four went to hunting, at the time they all opened fire at the same target in the bushes, a person at the other side of

It should be noted that in a joint danger case, joint fault is not a required element under the Torts Law. This omission is based on two considerations. First, the joint danger rule's purpose is to prevent the frustration of the plaintiff's claim when the plaintiff who suffered injury from a joint dangerous conduct of multiple defendants is unable to tell who injured him.<sup>266</sup> Second, the joint danger rule may also apply to cases where liability is imposed on presumption of fault or even without fault.<sup>267</sup>

Also worth noting is that the term "joint" in joint danger, essentially means "the same." To apply the joint danger rule in a tort case requires that the dangerous conduct of multiple defendants happen at the same time and in the same location.<sup>268</sup> Thus, if defendants each act at a different time or in a different place, no joint danger is present. One last point is the proof of causation. Given the particularity of joint danger, the Supreme People's Court requires a reversed burden of proof; that is, the defendant must prove that the causation between his conduct and plaintiff's injury does not exist.<sup>269</sup>

The third category of joint torts is joint causes. Under the Torts Law, a joint tort arising from joint causes occurs when two or more persons commit torts, respectively, causing the same harm.<sup>270</sup> The major distinction of joint causes, as compared with other joint tort categories, is that the injury in joint causes is caused by the independent conduct of each tortfeasor. Additionally, among the tortfeasors involved, there must be no common plan or joint fault, nor may they be related to each other in terms of tortious conduct. In other words, joint causes deal with the same injury caused by multiple, unrelated conducts.

Another distinction of joint causes is that the harm caused may be either divisible or indivisible. Divisible harm is concerned with cases where the attribution of each conduct to the injury is measurable and each tortfeasor's liability may be proportionally ascertained. Indivisible harm involves the situation in which each tortious conduct is sufficient to cause the entire harm. The only difference between the divisible harm and indivisible harm is the type of liability imposed on defendants.

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the bushes was hit by one bullet and injured. Another example is the case where several played fireworks together and one firework fell on the roof of the neighbor's house and damaged it.

<sup>266</sup> See SHENGMING, *supra* note 40, at 65.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Several Provisions of Evidence Concerning Civil Litigation Rules (promulgated by Sup. People's Ct.), art. 4 (China), *available at* [http://www.law-lib.com/law/law\\_view.asp?id=16829](http://www.law-lib.com/law/law_view.asp?id=16829).

<sup>270</sup> Tort Liability Law, *supra* note 4, at art. 11.

### B. Joint Tort Liability

In joint tort cases, the Torts Law imposes two different liabilities upon tortfeasors. The most common one is joint and several liability. This liability makes each of the multiple defendants accountable for the entire result. This liability was first provided in the 1986 Civil Code to protect creditor's rights. Under Article 87 of the 1986 Civil Code, when joint and several liability is imposed in accordance with the law or agreement of the parties, each of the joint creditors are entitled to demand that the debtor fulfill his obligations, and that each of the joint debtors is obliged to perform the entire debt.<sup>271</sup>

The Torts Law appears to focus more on the liability of the tortfeasors. Article 13 of the Torts Law explicitly provides that when tortfeasors establish joint and several liability, the victim is entitled to require some or all of the tortfeasors to assume liability.<sup>272</sup> It is understood that some of the tortfeasors in Article 13 also means any of the tortfeasors.<sup>273</sup> Although joint and several liability may apply in contractual obligations by agreement of the parties, such a liability in tort may only be imposed under the provision of law. Therefore, joint and several liability, once applicable, is compulsory and may not be modified or changed by any agreement among the tortfeasors.<sup>274</sup>

Because of its compulsory nature, the imposition of joint and several liability is limited to such cases as specified in the Torts Law. With regard to joint tort, it applies to (a) the joint conduct case,<sup>275</sup> including one who abets or assists another person in committing a tort,<sup>276</sup> (b) the joint danger case if the particular tortfeasor cannot be identified,<sup>277</sup> and (c) a joint causes case if each tort is sufficient to cause the entire harm.<sup>278</sup> In addition, joint and several liability also applies to certain special tort cases which will be discussed later in this article.

Since joint and several liability in a joint tort results in payment by a single defendant for the full amount of the plaintiff's damages, there exists the issue of indemnity, or reimbursement of proportionate shares from other defendants. To deal with this issue, the Torts Law provides a rule of contribution, and in the meantime, grants the tortfeasor who has over paid a right of recourse. Both the contribution rule and the right of recourse are aimed at ensuring a fair

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<sup>271</sup> See Civil Law, *supra* note 22, at art. 87.

<sup>272</sup> Tort Liability Law, *supra* note 4, at art. 13.

<sup>273</sup> See LIMING, *supra* note 6, at 404.

<sup>274</sup> See *id.*

<sup>275</sup> Tort Liability Law, *supra* note 4, at art. 8.

<sup>276</sup> *Id.* art. 9.

<sup>277</sup> *Id.* art. 10.

<sup>278</sup> *Id.* art. 11.

contribution and avoiding unjust enrichment among the liable tortfeasors. Under Article 14 of the Torts Law, the amount contributed by each of the tortfeasors who are jointly and severally liable shall be determined proportionally according to the seriousness of liability of each tortfeasor, or evenly if the seriousness of liability is difficult to differentiate.<sup>279</sup> Article 14 also provides that a tortfeasor whose payment for the compensation exceeds his share of contribution shall be entitled to be reimbursed by other jointly and severally liable tortfeasors.<sup>280</sup>

Generally, the primary standard to determine the seriousness of a tortfeasor's liability is the degree of his fault.<sup>281</sup> Likewise, although joint and several liability may only be imposed by the operation of law, the contribution may be made under the agreement reached among the tortfeasors to bypass the seriousness standard.<sup>282</sup> Moreover, there is a consensus that the right of recourse will be vested with a tortfeasor on two conditions: (a) the tortfeasor has paid in whole or in part the amount of compensation and (b) the payment is in excess of the contribution he is supposed to bear.<sup>283</sup>

The second kind of joint tort liability is proportionate liability or the liability according to the degree of fault. The general rule of proportionate liability is provided in Article 12 of the Torts Law, which applies to the case of joint causes. The rule states that when two or more persons commit torts respectively, causing the same harm, if the seriousness of the liability can each be determined, the tortfeasors shall assume the corresponding liability respectively. If the seriousness of the liability of each tortfeasor is hard to determine, then the tortfeasors shall evenly assume the liability for compensation.<sup>284</sup>

The thrust of the proportionate liability rule is that each tortfeasor is liable only for the portion of damage caused to the other person and the portion is dependent on the seriousness of liability the tortfeasor should bear. In cases in which the proportionate liability rule applies, the plaintiff may not sue a specific defendant for the entire amount of the damage, but only for the amount proportionate to the liability of such defendant. Under Article 12, the portion of damage allocated to each tortfeasor could be either an identified amount or an equal amount.

Again, the seriousness is basically the degree of fault. But, many in China suggest that in addition to the degree of fault, courts

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<sup>279</sup> *Id.* art. 14.

<sup>280</sup> *Id.*

<sup>281</sup> See SHENGMING, *supra* note 40, at 75.

<sup>282</sup> See Wang LIMING, *supra* note 6, at 407.

<sup>283</sup> See *id.* at 408.

<sup>284</sup> Tort Liability Law, *supra* note 4, at art. 12.

should consider the scale of cause to the damage.<sup>285</sup> The idea is that since the joint tort on the basis of joint causes heavily depends on the source leading to the damage, the stronger the cause appears to be the higher the portion of damage should be shared.<sup>286</sup> It is further suggested that if both the degree of fault and scale of cause are unidentifiable, the determination of seriousness shall be made in consideration to market share liability before the equal share is imposed under the Torts Law.<sup>287</sup>

### C. *Peculiar Tortfeasors*

The Torts Law contains special provisions that regulate peculiar tortfeasors. In most cases, a peculiar tortfeasor is the person who has a special relationship with the actor directly causing the injury to another person or with the victim, and is liable for the injury under the law on the basis of such relationship. The peculiar tortfeasor under the Torts Law may also be someone who has a full civil capacity but limited ability to apprehend the consequences of his conduct when committing a tort. In short, there are two major kinds of peculiar tortfeasor: the special relationship tortfeasor and the limited capacity tortfeasor. In addition, the Torts Law categorizes the person committing Internet related tort as a peculiar tortfeasor.

#### 1. *Special Relationship Tortfeasors*

A special relationship tortfeasor involves such a person as a guardian, employer, public facility manager, mass activity organizer, and educational institute. Given the distinction of each type of the special relationship tortfeasors, the Torts Law imposes the tort liability on two different grounds. In respect with guardian and employer, the liability arises from the doctrine of *respondeat superior*, under which the guardian or employer is held vicariously liable for the injury to a third person. For example, under Article 32 of the Torts Law, where a person without civil capacity or limited civil capacity causes harm to another person, the guardian assumes the tort liability. Even if the guardian has fulfilled his duties of guardianship, his tort liability remains but may be reduced.<sup>288</sup>

The employer, as used in the Torts Law, consists of an employing unit, labor dispatcher, and individual labor service recipients. Individual labor service refers to a labor relationship created by two individuals and is characterized as individually based private hir-

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<sup>285</sup> See LIMING, *supra* note 6, at 411.

<sup>286</sup> See SHENGMING, *supra* note 40, at 70.

<sup>287</sup> See LIMING, *supra* note 6, at 411.

<sup>288</sup> Tort Liability Law, *supra* note 4, at art. 32.

ing.<sup>289</sup> According to Article 35 of the Torts Law, when a labor relationship forms between individuals, if the party providing labor services causes harm to another person as the result of such services, then the party receiving labor services shall assume the tort liability. If the labor services provider injures himself during the services, both parties shall each assume the liability corresponding to their respective faults.<sup>290</sup>

The other liability ground is failure to act, which can be further divided into failure to exercise the duty of safety protection and failure to perform the duty of education and management. The safety protection duty is imposed on public facility managers and the mass activity organizers. Under Article 37 of the Torts Law, the manager of such a public facility as a hotel, shopping center, bank, station, or entertainment place, or the organizer of a mass activity is liable for the harm caused to another person resulting from his failure to fulfill the safety protection duty.<sup>291</sup> Pursuant to Article 37, in the case where the injury is caused by a third party, the manager or organizer, if violating the duty of safety protection, bears the corresponding complementary liability.<sup>292</sup>

A literal interpretation of the public facility also includes airport, port, park, and restaurant facilities.<sup>293</sup> Article 37 is self-evident that the duty of safety protection is intended to avoid any injury caused to another person by the conduct of the peculiar tortfeasor itself, and also to protect another person from being harmed by a third party. The difference between the two is that when a breach of the duty to safeguard against a third party tortfeasor results in an injury to another person, the peculiar tortfeasor's liability to compensate is complementary, which means that the liability will be assumed only when the third party tortfeasor cannot be found or is unable to pay for the damage.<sup>294</sup>

The duty of education and management concerns the educational entity such as a kindergarten, school or any other educational institution. Three articles in the Torts Law govern tortious injury to school kids. Article 38 deals with personal injury sustained by a person without civil act capacity during the period of studying or living in an educational entity, for which the educational entity is liable unless it can prove that it has fulfilled the duties of education and manage-

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<sup>289</sup> See LIXIN, *supra* note 21, at 159.

<sup>290</sup> Tort Liability Law, *supra* note 4, at art. 35.

<sup>291</sup> *Id.* art. 37.

<sup>292</sup> *Id.*

<sup>293</sup> See SHENGMING, *supra* note 40, at 201.

<sup>294</sup> See *id.* at 201-02.

ment.<sup>295</sup> Article 39 handles the personal injury to a person with limited civil act capacity and tort liability is imposed on the educational entity if it fails to meet its duties of education and management.<sup>296</sup> Article 40 covers the injury caused by a third party to a person with or without limited civil act capacity, but the liability imposed is complementary when the educational entity has failed to perform its duties of education and management.<sup>297</sup>

In China, a person 18 or above is an adult and has full capacity for civil conduct. A person who is over 10 but under 18 has limited capacity for civil conduct, and anyone under 10 has no capacity for civil conduct. But, a person who is between 16 and 18 and lives mainly on his own work income is regarded as a person with full capacity for civil conduct. Also, a mentally ill person is considered to have no capacity for civil conduct if he is unable to realize his own conduct, or is deemed to have limited capacity if he cannot fully account for his own conduct.<sup>298</sup>

The imposition of the duty of education and management upon the educational entity under the Torts Law is a direct response to recent incidences of school violence and the spiraling number of in school accidents that cause children personal injury.<sup>299</sup> However, the duty of education and management appears broad and ill defined. There are actually two duties: duty of education and duty of management. One

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<sup>295</sup> *Id.* Article 38 provides that where a person without civil act capacity sustains a personal injury during the period of studying or living in a kindergarten, school or any other educational institution, the kindergarten, school or other educational institution shall be liable unless it can prove that it has fulfilled its duty of education and management. *See also* Tort Liability Law, *supra* note 4, at art. 38.

<sup>296</sup> SHENGMING, *supra* note 40, at 201-02. Under Article 39, where a person with limited civil act capacity sustains a personal injury during the period of studying or living in a school or other educational institution, the school or other educational institution shall be liable if failing to fulfill its duty of education and management. *See also* Tort Liability Law, *supra* note 4, at art. 39.

<sup>297</sup> *See* SHENGMING, *supra* note 40, at 201-02. It is provided in Article 40 that if during the period of studying or living in a kindergarten, school or other educational institution, a person without civil act capacity or with limited civil conduct capacity sustains a personal injury caused by any person other than those of the kindergarten, school or other educational institution, the person causing the harm shall assume the tort liability; and the kindergarten, school or other educational institution shall assume the corresponding complementary liability if failing to fulfill its duty of education and management. *See also* Tort Liability Law, *supra* note 4, at art. 40.

<sup>298</sup> *See* Civil Law, *supra* note 22, at art.11-13.

<sup>299</sup> *See* SHENGMING, *supra* note 40, at 205; Edward Wang, *Fifth Deadly Attack in a School Haunts China*, N.Y. TIMES, May 12, 2010, available at [http://www.nytimes.com/2010/05/13/world/asia/13china.html?pagewanted=1&r=1&ref=school\\_shootings](http://www.nytimes.com/2010/05/13/world/asia/13china.html?pagewanted=1&r=1&ref=school_shootings) (reporting on Chinese school violence).

interpretation is that the duty of education is the duty to educate and supervise students. Thus, if one student injures another student in school, the school is presumably negligent and is therefore liable.<sup>300</sup> But, no one seems clear about the distinction and interplay between education and supervision.

The duty of management includes the school facility maintenance, student activity guides, school safety measures, and other preventive means.<sup>301</sup> For example, food poisoning at school renders the school liable for the harm caused to the poisoned students. Likewise, a school is liable for injury caused to students by an intruder. In that case, the victim has a cause of action on tort against the school for damage if the school is found to have failed to exercise its duty of management.

Others favor a more general term "duty of care" in describing the duty of education and management. They argue that one determinative element to the educational entity's liability for the student injury is the educational entity's fault. Thus, in determining whether the educational entity is at fault it becomes necessary to determine whether it has fulfilled its duty of care. Questions essential for the determination include (a) whether it owed a duty of care, (b) whether it has fulfilled the duty of care, and (c) whether it was able to or should be able to exercise the duty of care?<sup>302</sup>

## 2. *Limited Capacity Tortfeasor*

Limited capacity tortfeasor is a type of tort frequently seen in practice, but for the first time provided in the Torts Law.<sup>303</sup> It relates to a tort liability of someone who is fully capable for civil conduct but temporarily loses his consciousness or control and causes harm to another person. The lack of applicable rules both in the legislation and in the judicial interpretation is largely due to the unsolved issue of whether a person who suffers a temporary loss of consciousness or control should be held liable for his tortious conduct.

With regard to limited capacity tortfeasor, when his civil liability is based on fault, a dilemma may appear: if a person loses his consciousness, he cannot be blamed for any fault because he has no mind; but if no liability is sought, then the damage the victim sustains will go uncompensated, which will ultimately be unfair and unjust.<sup>304</sup> To deal with this dilemma, the Torts Law adopts a fault-in-advance ap-

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<sup>300</sup> See LIMING, *supra* note 6, at 447-48.

<sup>301</sup> See *id.*

<sup>302</sup> See LIXIN, *supra* note 21, at 183-84.

<sup>303</sup> See *id.* at 147.

<sup>304</sup> See SHENGMING, *supra* note 40, at 163.



proach and compensation-on-fairness method to determine the liability and allocate the victim's losses.

The fault-in-advance approach goes to the cause of loss of consciousness or control. Under this approach, if the loss of consciousness or control was caused by the fault of the tortfeasor, he is liable for the tortious conduct he committed during that period of loss. The Torts Law states three causes for the loss of consciousness or control: general fault, intoxication, and under the influence of drugs. Under Article 33 of the Torts Law, if a person with full civil act capacity causes harm to another person as a result of his temporary loss of consciousness or control, he shall assume the tort liability if he is at fault. A tort liability will also be imposed if the loss is due to alcohol intoxication or abusive use of narcotic or psychoactive drug.<sup>305</sup>

The phrase "at fault" in Article 33 seems awkward or even confusing, but it refers to the neglect or negligence that leads to the loss of consciousness or control.<sup>306</sup> Often, the neglect is associated with the tortfeasor's health situation or mental condition. To illustrate, if a person takes medication for a muscular problem with his arm and causes injury to another because he forgot his medication, Article 33 holds him liable.

The referred to intoxication is mainly concerned with drunk driving. In China, driving under the influence is punishable under the traffic safety law and may become a criminal offense as well if it causes injury.<sup>307</sup> But, a civil claim for compensation accompanies most traffic accidents caused by drunk driving that injure another person. Although there is no law to apply, it is a common court practice to order the defendant in an intoxication case to compensate the plaintiff.<sup>308</sup> Article 33 is new in making intoxication a cause of action for a tort claim.

Under the Torts Law, to find tort liability in the drug related loss of consciousness or control requires two conditions. First, the drug used must be a narcotic or psychoactive drug, which directly affects the central nervous system. Second, the use of such drug must be abusive. Since abuse of narcotic or psychoactive drugs is illegal in China, a person who loses his consciousness or control due to the abuse of narcotic or psychoactive drugs is deemed to have committed double

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<sup>305</sup> Tort Liability Law, *supra* note 4, at art. 33.

<sup>306</sup> See SHENGMING, *supra* note 40, at 164.

<sup>307</sup> See Law on Road Traffic Safety of China, art. 91 (adopted on Oct. 28, 2003, effective May 1, 2004) 8 P.R.C. LAWS & REGS, available at <http://www.gov.cn/english/laws/2005-09/07content.29966.htm>; see also Criminal Law of China (as amended 2009) art. 133, available at <http://www.dffg.com/faguixiazhai/xngfa/200311/200311102.13247-6.htm> [hereinafter Criminal Law].

<sup>308</sup> See SHENGMING, *supra* note 40, at 166.

wrongs of fault and illegality. His conduct is considered even more dangerous.<sup>309</sup>

The compensation-on-fairness method is a mechanism to compensate the victim for damage sustained in a no-fault case. Article 33 provides that when a person with full civil conduct capacity causes harm to another person because of his temporary loss of consciousness or control, if not at fault, he should compensate the victim appropriately according to his economic condition.<sup>310</sup> In this regard, Article 33 is viewed as an implementing clause of the fairness principle.

Note, however, that the compensation in a nobody-at-fault case under Article 33 actually means “making-up.”<sup>311</sup> Since the very purpose of compensation is to restore the victim to be pre-injury condition,<sup>312</sup> the defendant is required to pay as much damages as the plaintiff sustained. But, the making-up is merely a partial to full-damage payment made on the basis of the defendant’s financial ability. More importantly, under Article 33 the making-up is made on the principle of fairness, not per legal obligation.

### 3. *Internet Related Tortfeasor*

China now has the largest number of Internet users in the world. As of June 30, 2010, there are over 420 million netizens in China.<sup>313</sup> In the meantime, Internet related tort cases have increased dramatically in recent years. In Shanghai, for example, courts in 2009 adjudicated a total of 534 Internet related tort cases, and more than 31 percent of all cases involved infringement of intellectual property rights.<sup>314</sup>

The Internet related tort is a new area and differs from the conventional tort. The Internet related tort hardly has any physical place and the tortfeasor’s identity is often invisible. Thus, the Torts Law classifies the Internet related tortfeasor as a peculiar tortfeasor and provides a special legal recourse for tort liability under Article 36. This special legal recourse contains one general rule and two sub rules. The general rule is the rule of liability, which applies to both the Internet user and the Internet service provider (ISP). According to Ar-

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<sup>309</sup> See *id.* at 166-67.

<sup>310</sup> Tort Liability Law, *supra* note 4, at art. 33.

<sup>311</sup> See SHENGMING, *supra* note 40, at 165.

<sup>312</sup> See KIONKA, *supra* note 32, at 346.

<sup>313</sup> See The Chinese CNNIC, *The 26th Statistical Report on Internet Development in China*, July 15, 2010, available at [http://www.gov.cn/english/laws/2005-09/07/content\\_29966.htm](http://www.gov.cn/english/laws/2005-09/07/content_29966.htm).

<sup>314</sup> See Report on Shanghai High People’s Court’s, *White Paper on the Judicial Protection of Intellectual Property Rights*, April 22, 2010, available at [http://www.ce.cn/tech/07hlw/guonei/201004/22/t20100422\\_20371428.shtml](http://www.ce.cn/tech/07hlw/guonei/201004/22/t20100422_20371428.shtml).

ticle 36 of the Torts Law, an Internet user or service provider who infringes upon the civil rights or interests of another person through the Internet bears tort liability.<sup>315</sup> The Internet user is commonly called a netizen, including both a natural person and a legal person.

The Torts Law classifies a tort committed by netizens on the Internet as an infringement of another person's right of personality, property interests or intellectual property rights. The infringement of the right of personality covers such conducts as unauthorized use of another person's name or portrait, dissemination of defamatory materials, or invasion of privacy by illegally hacking and downloading another person's personal information. Property interest infringement concerns the conduct of compromising bank accounts and stealing funds. Damage to intellectual property mostly relates to copyrights and trademarks.<sup>316</sup> For the purposes of Article 36, Internet service consists of Internet technical support and Internet contents supply.<sup>317</sup> Technical support is meant to provide Internet access, cache memory, information storage space, search, or link, etc., while contents supply is the service that makes the Internet's materials and information available and accessible to the Internet user. Under the general rule of liability, a tort liability will arise when the civil rights or interests of another person are harmed by the Internet activity of either the Internet user or the ISP.

The two sub rules are the notice rule and the knowledge rule. The notice rule operates as a warning to the ISP about the occurrence of infringement and as a demand for the ISP to take certain actions. Under Article 33, when an Internet user commits a tort through Internet services, the victim shall be entitled to notify the ISP to take such necessary measures as deletion, block or disconnection. If, after being notified, however, the ISP fails to take the necessary measures in a timely manner, it is jointly and severally liable with the Internet user for any additional harm.<sup>318</sup>

In fact, the notice rule has a double-faceted function. First, it serves as a safe harbor to shelter the ISP from liability when the ISP has taken the necessary measures at the victim's request. Second, it provides a legal ground for the victim to hold the ISP jointly and severally liable if the ISP ignores the victim's request. But, the ISP's liability, though joint and several, is limited to the additional harm that was caused by the ISP's failure to take action after notice.

In the application of the notice rule, there is a presumption that the ISP has no knowledge of the infringing activities in which the

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<sup>315</sup> Tort Liability Law, *supra* note 4, at art. 36.

<sup>316</sup> See SHENGMING, *supra* note 40, at 189.

<sup>317</sup> See *id.* at 189-90.

<sup>318</sup> See Tort Liability Law, *supra* note 4, at art. 33.

Internet user has engaged. Otherwise, the knowledge rule will kick in. Article 33 further provides that if the ISP has the knowledge that an Internet user is infringing upon a civil right or interest of another person through its Internet services, and fails to take necessary measures, it shall be jointly and severally liable with the Internet user.<sup>319</sup> Here, the term “knowledge” is intended to refer to both “know” and “should know.” But, due to the complexity of the activities on the Internet, the Torts Law provides no standard to determine the knowledge and leaves it to the court to decide on an individual case basis.<sup>320</sup> Nonetheless, it should be noted that under the knowledge rule, the ISP may be liable jointly and severally for the entire damage caused to the victim if it has knowledge about the infringement, not just the “additional harm” as is the case under the notice rule.

## V. DEFENSES TO TORT LIABILITY: ON-GOING DEBATES

Like many other civil law countries, China does not separate intentional tort from negligence. The fault-based tort liability essentially comprises both of them. The same is true with regard to the defenses to the tort liability. They are not associated particularly with either intentional torts or negligence as is the case in the United States, but rather, they apply to the tort liability in general.

The defenses, as provided in the Torts Law, are termed as the circumstances under which no liability will be imposed or liability is to be reduced. In some other countries, the defenses are also called justifications.<sup>321</sup> There has been an attempt to distinguish justification from the extraneous cause because they differ fundamentally in concept though they often produce the same result of a tortious claim dismissal.<sup>322</sup> Partly due to the confusion that the term “defense” may cause, the Torts Law adopts a more generic term, “circumstance,” which is deemed to have a broader range of coverage.<sup>323</sup>

The Torts Law prescribes several circumstances. Each of them serves as a legal ground on which a defendant may rely to assert a defense. These possible defenses include the plaintiff's concurrent fault, the plaintiff's intentional conduct, third-party conduct, *force*

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<sup>319</sup> *Id.*

<sup>320</sup> See SHENGMING, *supra* note 40, at 195.

<sup>321</sup> See LIMPENS, *supra* note 53, at 81.

<sup>322</sup> *Id.* The distinction is said to be that, “if the damage is due to an extraneous cause, it has been caused not by the (alleged) behavior of the defendant, but by an independent cause unconnected with him, such as an accident, *force majeure*, the act of a third party or act of the victim. Where there is a justification, the damage is the direct result of the defendant's behavior, but this behavior is justified by recognized lawful excuse. . .”

<sup>323</sup> See SHENGMING, *supra* note 40, at 124-25.

*majeure*, self-defense, and necessity. These defenses are the statutory excuses and are applicable in general to all tort claims. The legal result from these defenses is either an extinction or reduction of tort liability. But, because the defenses either appear to be abstract or are subject to different interpretation, further debates are expected.

#### A. *Concurrent Fault of Plaintiff – Fault Offset Rule*

The concurrent fault of the plaintiff is the circumstance in which a plaintiff is also at fault as to the injury caused by the defendant's tortious conduct. Since the plaintiff's fault also contributes to the injury, it is unfair to require the defendant to pay for the entire compensation. On this ground, Article 26 of the Torts Law provides that where the victim of a tort is also at fault with respect to the occurrence of harm, the liability of the tortfeasor may be mitigated.<sup>324</sup>

Here, the mitigation is purposed to offset the defendant's liability with the plaintiff's concurrent fault, so that the defendant's liability will be reduced proportionally to the level of the plaintiff's fault. In this sense, Article 26 is also called the rule of fault offset.<sup>325</sup> The offset concept is similar to the comparative negligence concept as used in the United States.<sup>326</sup> These concepts differ from each other in that the comparative negligence is a defense to the negligence liability while the offset is applicable to both negligence and intentional torts.<sup>327</sup>

Does the fault-offset rule apply only to fault liability, or may it also apply to non-fault tort liability? One argument is that the rule has no application to non-fault liability. This argument is premised on the word "also" used in Article 26. It is believed that the Article 26 expression implies that the tortfeasor is at fault first because if the tortfeasor's fault were irrelevant, there would be no need to describe the victim's fault as "also."<sup>328</sup>

The counter argument rebuts that although the imposition of non-fault liability is made without considering whether or not the tortfeasor is at fault, nothing supports not taking the plaintiff's fault into account. Therefore, the reduction of the defendant's tort liability according to the degree of the plaintiff's fault does not contradict the fundamental notion of the non-fault liability. It is asserted that application of the offset rule to the non-fault liability case, the same as in

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<sup>324</sup> Tort Liability Law, *supra* note 4, at art. 26.

<sup>325</sup> See LIXIN, *supra* note 21, at 107.

<sup>326</sup> See KIONKA, *supra* note 32, at 125-26. Under comparative negligence, a plaintiff's damages are calculated and then reduced by the proportion which his fault bears to the total causative fault of his harm.

<sup>327</sup> See SHENGMING, *supra* note 40, at 139-40.

<sup>328</sup> See *id.* at 138.

the fault liability case, is in fact to simply offset defendant's liability with plaintiff's fault.<sup>329</sup>

*B. Intentional Conduct of Plaintiff – Liability Exemption Rule*

In a tort case, if the harm or injury to the plaintiff was caused by the plaintiff's intentional conduct, then there is an issue as to whether the defendant remains liable. Article 27 of the Torts Law explicitly provides that the actor is not liable for any harm that the victim causes intentionally.<sup>330</sup> In addition, there are several cross provisions in the Torts Law that exempts the defendant from any tort liability. Under Article 71, for example, when a civil aircraft causes harm to another person, the operator of the civil aircraft assumes the tort liability unless it can prove that the victim intentionally caused the harm.<sup>331</sup>

Article 27, however, appears to cause confusion. One such confusion is its relationship with Article 26. It is believed that the plaintiff's fault that constitutes a ground for reduction of defendant's tort liability under Article 26 could be an intentional wrong or negligence.<sup>332</sup> The confusion arises when the damage is related to plaintiff's intentional conduct. The issue is how to differentiate Article 27 from Article 26 with regard to defendant's liability, since Article 27 exempts the defendant from tort liability while Article 26 only reduces the defendant's liability.

The Torts Law makes no distinction in this regard. Many, however, argue that the application of Article 26 or Article 27 depends on whether the plaintiff's wrong is the sole cause to the damage.<sup>333</sup> That is, if the wrong causing damage is associated with the defendant's fault, Article 26 applies and the defendant remains liable though the liability may be reduced. If, however, the damage was caused solely by the plaintiff's intentional conduct, then it is an Article 27 case and the defendant's liability is extinguished.<sup>334</sup>

A difficult case exists when the plaintiff acts intentionally and causes damage, but the defendant is also found to have a minor fault. Some suggest that Article 27 should apply in this case. They argue that the emphasis of Article 27 is on the plaintiff's intentional conduct and the defendant's negligence, if not material, should not trigger the application of Article 26.<sup>335</sup> Others, however, insist that the applica-

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<sup>329</sup> See SHENGMING, *supra* note 40, at 138.

<sup>330</sup> Tort Liability Law, *supra* note 4, at art. 27.

<sup>331</sup> *Id.* art. 71.

<sup>332</sup> SHENGMING, *supra* note 40, at 139-40; *see also* LIXIN, *supra* note 21, at 111.

<sup>333</sup> See SHENGMING, *supra* note 40, at 141.

<sup>334</sup> See *id.* at 139-40.

<sup>335</sup> See LIXIN, *supra* note 21, at 118.

tion of Article 27 is on a presumption that plaintiff's intentional conduct is the only source causing damage.<sup>336</sup>

Further confusion is created with the issue of whether the plaintiff's intentional conduct may be interpreted extensively to also include the plaintiff's gross negligence? This is an issue because there is a concern that the damage could be caused by the plaintiff's gross negligence, without any fault of the defendant.<sup>337</sup> In China, intentional conduct is often divided into direct or willful conduct and indirect or wanton conduct.<sup>338</sup> Since it can hardly draw a line between wanton misconduct and gross negligence, many consider them equivalent to each other, and thus view gross negligence as *quasi-intentional* conduct.<sup>339</sup>

Opponents insist that no matter how gross the negligence, it is still not an intentional conduct. They argue that Article 27 should not cover plaintiff's gross negligence because the Torts Law tends to treat negligence differently from intentional torts.<sup>340</sup> Under this argument, plaintiff's gross negligence may only be used to mitigate the defendant's liability, and should not become an excuse to exempt the defendant from liability. The third source of confusion is more related to the definitional scope of the plaintiff's intentional conduct. Since the Torts Law makes no reference to the assumption of risk and consent of victim, which are the common defenses to tort liability in many other countries,<sup>341</sup> it becomes questionable whether the plaintiff's intentional conduct may be inferred by his assumption of risk or consent. The concern is that since the assumption of risk in many cases may be involuntarily, though intentional, when assuming the risk, the plaintiff may not know of the consequences or may not even want to see its occurrence.<sup>342</sup> With regard to the plaintiff's consent, some argue that consent may lead to no liability or non-formation of liability, but is not the legal ground for the extinction or exemption of liability.<sup>343</sup>

### C. Conduct of Third Party – Non Joint Tortfeasor Rule

The tort liability of a defendant may become extinct if the plaintiff's injury resulted from the conduct of a third party. According

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<sup>336</sup> See SHENGMING, *supra* note 40, at 141.

<sup>337</sup> LIXIN, *supra* note 21, at 117-18.

<sup>338</sup> See SHENGMING, *supra* note 40, at 140-41.

<sup>339</sup> See LIMING, *supra* note 6, at 223.

<sup>340</sup> *Id.* at 224.

<sup>341</sup> See KIONKA, *supra* note 32, at 131, 180. In the United States for example, presumption is a defense to negligence and consent of victim constitutes a defense to an intentional tort.

<sup>342</sup> See LIMING, *supra* note 6, at 273-74.

<sup>343</sup> See *id.* at 272-73.

to Article 28 of the Torts Law, if a third party causes the harm, then the third party shall assume the tort liability.<sup>344</sup> It was generally understood in China that Article 28 refers to the fault of the third party that caused injury to the plaintiff either an intentional misconduct or negligence.<sup>345</sup> The burden of proof of the third party's fault is on the defendant.

But, the assertion of Article 28 as a defense is restricted to the case in which the fault of the third party was the only cause to the plaintiff's injury. In other words, Article 28 is applicable only if defendant is not a joint tortfeasor.<sup>346</sup> Thus, if the third party is at fault and the fault is only a partial cause to the plaintiff's injury, the third party will become a joint tortfeasor and the defendant will remain liable.

It is obvious that Article 28 holds the third party liable for its fault causing injury to the plaintiff. In both fault and presumption of fault situations, the defendant bears no liability as long as he can prove that the plaintiff's injury was exclusively the fault of a third party. In the non-fault situation, however, the law furnishes the plaintiff with different compensation options based on the nature of the case. The first option is to have the defendant pay first, even if the injury is solely due to the third party's fault.<sup>347</sup> The second option is to allow the plaintiff to choose to get paid first by the defendant or the third party.<sup>348</sup>

There is one issue left open in the Torts Law. The issue is whether the third party's conduct should be unpredictable and unforeseeable in order to become a valid defense for the defendant. One argument is that since Article 28 applies to the case where the third party's fault is the only cause of the plaintiff's injury, the fault should be unpredictable and unforeseeable to the defendant. Otherwise the defendant, to a certain extent, will be deemed at fault as well.<sup>349</sup> The other argument weighs more on causation between the plaintiff's injury and the third party's conduct. The underlying reason is that since the main theme of Article 28 is to determine whether or not the third party is fully liable as this decides whether or not the defendant can be dis-

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<sup>344</sup> Tort Liability Law, *supra* note 4, at art. 28.

<sup>345</sup> See LIXIN, *supra* note 21, at 119.

<sup>346</sup> *Id.* at 120.

<sup>347</sup> It applies to the damage caused by extraordinary incident such as a nuclear accident.

<sup>348</sup> See, e.g., Tort Liability Law, *supra* note 4, at arts. 68, 83 (concerning damage as a result of environmental pollution and injury caused by domestic animals, respectively).

<sup>349</sup> See LIXIN, *supra* note 21, at 120.



charged,<sup>350</sup> the foremost concern is what actually causes the plaintiff's injury.<sup>351</sup>

#### D. Force Majeure and Self-Defense – Statutory Excuses

Similar to torts legislation in many other countries, China's Torts Law recognizes both *force majeure* and self-defense as statutory excuses for the defendant to assume no tort liability. The former is related to an act of nature and the latter refers to an act of the defendant. The extent to which these defenses may be asserted often becomes troublesome. Under Article 29 of the Torts Law, if the harm to another person is caused by a *force majeure*, the tortfeasor shall not be liable, except as otherwise provided for by law.<sup>352</sup> Thus the default rule is that the tortfeasor shall bear no liability for damages or injuries caused to the other person in case of *force majeure*. If, however, the law does not allow any exception, the rule does not apply. But, it is critical that to claim *force majeure* as a tort liability defense, the defendant should have played no role in causing or aggravating harm to the plaintiff.<sup>353</sup>

The Torts Law contains no definition of *force majeure*. The authoritative source is Article 153 of the 1986 Civil Code, where *force majeure* is defined as an objective circumstance that is unforeseeable, unavoidable and insurmountable.<sup>354</sup> This definition, however, is vague and invites much debate. For example, may incidents like war, riots, and strikes be construed as unforeseeable and insurmountable circumstances to assert *force majeure* as a defense?<sup>355</sup> Some believe that because the war, riot, or strike is a social force beyond the control of the will of the party, it should fall within *force majeure*.<sup>356</sup> Others, however, believe *force majeure* covers only natural forces, excluding social force. This rationale doubts that social force is unforeseeable and insurmountable.<sup>357</sup>

A more controversial issue is whether a defendant may assert the government's order or action as a defense under *force majeure*? Some argue that, given China's governmental authority, certain governmental actions or orders are unforeseeable, unavoidable and insurmountable to the defendant, and in these situations the defendant

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<sup>350</sup> See LIMING, *supra* note 6, at 276.

<sup>351</sup> See *id.*

<sup>352</sup> Tort Liability Law, *supra* note 4, at art. 29.

<sup>353</sup> See LIMING, *supra* note 6, at 282; see also LIXIN, *supra* note 21, at 124.

<sup>354</sup> See Civil Law, *supra* note 22, at art. 153.

<sup>355</sup> See LIMING, *supra* note 6, at 282.

<sup>356</sup> *Id.* at 282.

<sup>357</sup> See SHENGMING, *supra* note 40, at 148.

should have recourse to the *force majeure* defense.<sup>358</sup> Many, however, seem to be cautiously reluctant to broaden the coverage of *force majeure*.<sup>359</sup>

Self-defense, commonly called legitimate-defense in China, is a legal justification of the defendant's tortious conduct. Under Article 30 of the Torts Law, if the harm is caused by self-defense, no liability should be imposed.<sup>360</sup> Thus, when facing the imminent threat of harm inflicted by an aggressor, the defendant is privileged to take defensive actions that otherwise would be a tort. But such an action must not be excessive. If the self-defense exceeds the necessary limit, causing undue harm, the defendant shall bear proper civil liability.<sup>361</sup> Here, the proper liability means the additional damage caused by the excessive force.

Interestingly, self-defense is a criminal law concept and is analogically used here in civil defense. Taken from Article 20 of the Criminal Law (as amended in 2009),<sup>362</sup> civil self-defense is generally construed as a protective measure the defendant uses to defend and protect public interest, others' or his personal rights against ongoing unlawful conduct.<sup>363</sup>

Thus, self-defense in China involves the defense for three interests, namely public interest, self-interest, and the interest of other persons. Except for public interest defense, defense of self and other person's interests include both personal and property interests. Public interest defense is often problematic because of the ambiguity of what may form or become the public interest. In reality, public interest defense has never been clearly defined and is abused in many cases.<sup>364</sup>

Another problem is the indiscrimination between the harm to person and the harm to property, in the defense of self and defense of others. In the United States, the privilege of defense against personal harm is more limited than the defense against harm to property because the bodily integrity of human beings is considered more valuable

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<sup>358</sup> See *id.*

<sup>359</sup> See *id.*

<sup>360</sup> Tort Liability Law, *supra* note 4, at art. 30.

<sup>361</sup> See *id.*

<sup>362</sup> Criminal Law, *supra* note 307, at art. 20 (providing that no criminal responsibility is to be borne for an act of legitimate defense undertaken to stop present unlawful infringement of the state and public interest or the personal, property or other rights of the actor or of another person, causing harm to the unlawful infringer).

<sup>363</sup> See LIMING, *supra* note 6, at 284.

<sup>364</sup> See generally Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 361 (2008) (discussing the public interest issue).

than property.<sup>365</sup> In China, however, no such a difference is discernable, both in theory and in practice. On the contrary, it is encouraged to be brave in protecting the interests of others, particularly when the public interest is at stake. This dynamic has a direct impact on determining whether certain defensive force is excessive.

There is also a lack of authority as to whether the defendant remains privileged when he makes a mistake in judging the threat of harm or real danger while using the defensive force that causes harm to the alleged aggressor. Chinese torts law literature rarely discusses the defendant's reasonable belief in respect to the required elements for a legitimate self-defense. Nevertheless, one suggestion is that the mistaken judgment of the threat of harm or real danger should be deemed as a fault to which the general tort liability would apply.<sup>366</sup>

#### *E. Necessity – Rule of Emergency*

Another defense under the Torts Law is the necessity or action in emergency to avoid danger defense. But, the Torts Law does not tell what constitutes necessity. Instead, it only states what the consequences of the necessity defense. According to Article 31 of the Torts Law, when the harm is caused by a conduct of necessity, the person causing the occurrence of danger is liable. If the danger is the result of a natural cause, the person causing the harm for necessity is not liable or shall make proper compensation.<sup>367</sup>

What can be inferred from Article 31 is that necessity involves the danger not only from forces of nature but also from other causes. It is also clear that Article 31 does not entirely release the defendant's liability, even if the danger is caused by an act of nature. The purpose is to compensate under the fairness principle for the loss of the innocent plaintiff who sacrificed his interest for a good reason.<sup>368</sup> Moreover, under Article 31, if improper measures of necessity are taken or a necessity limit is exceeded, causing undue harm, the defendant shall bear proper liability.<sup>369</sup>

Similar to the concept of self-defense, Chinese criminal law addresses the concept of necessity as an action of urgent danger prevention that must be undertaken to avert the occurrence of present danger to the state or public interest, or to personal, property, or to other rights of the actor or of other people.<sup>370</sup> Borrowed from criminal law, the necessity defense, as applied to civil cases, remains un-

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<sup>365</sup> See PROSSER AND KEETON ON TORTS, *supra* note 93, at 132-33.

<sup>366</sup> See LIMING, *supra* note 6, at 287.

<sup>367</sup> Tort Liability Law, *supra* note 4, at art. 31.

<sup>368</sup> See LIMING, *supra* note 6, at 290-91.

<sup>369</sup> See Tort Liability Law, *supra* note 4, at art. 31.

<sup>370</sup> See Criminal Law, *supra* note 307, at art. 31.

changed in substance. The only procedural difference is that the state interest plays a lesser role in the civil case than in the criminal one.

In China, no emphasis is ever made on the clean-hand of the plaintiff to the danger for which the necessity measure is taken. In the United States, for example, it is required that necessity arises from some independent cause not connected with the plaintiff.<sup>371</sup> The decisive factor of necessity in China is whether there is a need for the protection of the public interest or the interest of the defendant or of some other person. Nevertheless, under Article 31 of the Torts Law, the person who causes harm for necessity must also pay for the associated costs.

## VI. MECHANISM OF REMEDIES AND DETERMINATION OF DAMAGES: UNFINISHED BUSINESS

The consequences of tort liability give rise to the remedies that are available as a matter of law. The purpose of legal redress is both to compensate the plaintiff and to prevent wrongdoing. In the common law system, the primary remedy in tort is compensation.<sup>372</sup> In civil law countries, in addition to compensation, monetary or in kind, another common remedy is restitution. The notion is that compensation repairs harm through delivery of an equivalent, while restitution restores a state of affairs that has been wrongfully altered.<sup>373</sup>

The redress for tort liability in China takes a more diverse approach. First, liabilities are provided separately from damages. The former is considered the legal consequence that the defendant may face while the latter deals with the compensation the plaintiff may obtain.<sup>374</sup> Second, the plaintiff is given different options, depending on the type of grievance, which comprise personal, property, mental, and other sufferings. This poly-folded way of redress helps tackle the complexity of tort liability development, and, more importantly offers certain more appropriate protections for, such rights as the right of personality and the intellectual property right.<sup>375</sup>

Some, however, challenge the approach of diversity and call for a return to the civil law tradition, namely compensation and restitution, with two major arguments. One argument is that it is illogical to make liabilities independent from damages because damages should not be narrowly understood to only mean the monetary compensation or property compensation. The other argument is that compensation

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<sup>371</sup> See KIONKA, *supra* note 32, at 194.

<sup>372</sup> See *id.* at 346.

<sup>373</sup> See Hans Stoll, *Consequences of Liability: Remedies*, in XI/2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: TORTS § 8-8, at 8 (1983).

<sup>374</sup> See LIXIN, *supra* note 21, at 73; see also LIMING, *supra* note 6, at 324.

<sup>375</sup> See SHENGMING, *supra* note 40, at 78.

and restitution actually cover different kinds of liability and particularly fit the very concept of the *obligatio* in that they both involve the right of one party to request the other party to fulfill particular obligations.<sup>376</sup>

These challenges, however persuasive, may not change anything. Modern China has developed a strong appetite politically, socially and economically for Chinese characteristics. Although the term Chinese characteristics may sound both illusory and mysterious, it generally means localization or distinction. The term has also become an ideology that dominates almost every piece of legislation in China. In the civil law arena, a long existing ambition is to create conceptions anew that belong to China, though many have warned that it is impossible.<sup>377</sup>

#### A. *Liability Forms and Remedies*

Under the Torts Law, when a tort is committed, the defendant may be required to take particular forms of liability based on the nature of the tortious conduct as a remedy to satisfy the plaintiff's claim. Article 15 of the Torts Law characterizes how the defendant may assume liability in one of eight different forms. These liability forms are: (a) cessation of infringement, (b) removal of obstruction, (c) elimination of danger, (d) return of property, (e) restoration of original status, (f) compensation for losses, (g) apology, and (h) elimination of ill effect and rehabilitation of reputation.<sup>378</sup>

The Torts Law did not invent these liability forms. These forms are provided in the 1986 Civil Code as methods for bearing civil liabilities in general. These liability methods apply equally to contract claims as well.<sup>379</sup> But the Torts Law does not follow the 1986 Civil Code to provide such civil penalties as admonitions, ordered pledges of repentance, confiscation of property used in carrying out illegal activities, and confiscation of income illegally obtained.<sup>380</sup> These civil penalties as provided in the 1986 Civil Code have been criticized for violating judicial justice in their application because of the lack of process of proper notice and hearing. Consequently, the demand to repeal of such penalties has increased.<sup>381</sup>

Indeed, the liability forms are the remedies the defendant may be required to make. But for the plaintiff, they are actually the dispos-

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<sup>376</sup> See LIMING, *supra* note 6, at 318-19.

<sup>377</sup> See 1 SU YONGXIN, *THE CIVIL LAW IN THE PAST SEVENTY YEARS: LOOKING BACK AND FORWARD* 48 (China Univ. of Political Sci. & Law Press 2002).

<sup>378</sup> Tort Liability Law, *supra* note 4, at art. 15.

<sup>379</sup> *Id.*; see Civil Law, *supra* note 22, at art. 134.

<sup>380</sup> *Id.*

<sup>381</sup> See LIMING, *supra* note 6, at 314-15.

able rights of claim. This means that the plaintiff may not ask for more than what he is entitled, but may voluntarily give up any of the rights to which he is entitled. The practical significance of the concept of disposability is that when a right holder waives such a right, the court should honor it and no decision *ex officio* should be made to enforce the right.

Despite the critique against the diverse approach of liability forms, each of these forms is viewed as having particular meaning and specific application. In fact, proponents claim that since the adoption of the 1986 Civil Code, these forms have proven to be effective and easily measurable in practice.<sup>382</sup> In their application, the liability forms are independent to each other, but not mutually exclusive. Under Article 15 of the Torts Law, the liability forms may be employed individually or concurrently.<sup>383</sup>

Topping the list of liability forms is the cessation of infringement. This applies to on-going infringing conduct. Upon a plaintiff's request, a court may order the defendant to stop infringing on the plaintiff's rights. The court order may be issued before or in the process of the case hearing, and it may also become part of the court judgment. The purpose of this remedy is to put a timely end to infringement to prevent further potential damages.<sup>384</sup>

Next on the list is the removal of obstruction. When the improper conduct of the defendant obstructs the plaintiff from normally exercising his right with regard to his person and property, the plaintiff may seek a court order to remove the obstruction. For example, the plaintiff may ask for the removal of a shed placed by the defendant that blocks the plaintiff's window. This removal may be made by the defendant or by the plaintiff at defendant's cost. But, for the plaintiff to have a valid claim, he must prove the defendant's legally unjustifiable conduct is unreasonably restricting the plaintiff's normal exercise of personal or property rights.

The third liability form is the elimination of danger. If the defendant's conduct or anything under the defendant's control constitutes a threat to the personal or property safety of the plaintiff, a danger is deemed to exist and the plaintiff has the right to request that the defendant takes necessary actions to eliminate that danger. The existence of the danger becomes actionable if the defendant refuses to do anything to dispel it upon the plaintiff's request.

A commonality present in the application of the foregoing three liability forms is that the defendant's conduct constitutes a threat to the safety of the plaintiff's person or property. Hence, under Article 21

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<sup>382</sup> See XINBAO, *supra* note 45, at 118.

<sup>383</sup> Tort Liability Law, *supra* note 4, at art. 15.

<sup>384</sup> See LIXIN, *supra* note 40, at 75.

of the Torts Law, when a tort endangers the personal or property safety of another person, the victim of the tort may request the tortfeasor to assume such tort liabilities as cessation of infringement, removal of obstruction, and elimination of danger.<sup>385</sup>

The return of property is the fourth liability form and takes place when the defendant unlawfully possesses the plaintiff's property. Unlawfulness, here, means without the right to possess. Agreement, or the operation of law, may create the right of possession. Therefore, a possession of another person's property by any means other than as recognized by law may incur a tort cause of action, and the possessor is liable for returning the property. The liability form of the return of property overlaps with Article 34 of the 2007 Property Law of China, which provides that if the real property or chattel is under unauthorized possession, the property's rightful holder is entitled to request a return of the original property.<sup>386</sup>

The overlapping reflects a trend in modern Chinese civil legislation that no clear distinction is made between property rights and creditor rights (*obligatio*),<sup>387</sup> especially in the protection of civil law rights. But, those who oppose the multiple liability forms and advocate going back to the tradition seriously doubt that obscuring the difference between the two rights is a good approach.<sup>388</sup> A general agreement, however, is that the return of property under the Torts Law is presupposed to the availability of the property possessed. Otherwise, monetary damages in lieu of the property are considered sufficient.<sup>389</sup>

The fifth liability form is the restoration of original status. The return of property and restoration of original status is basically restitution, because both are designed to help bring the plaintiff back to the position he would have been in if not for the defendant's improper action. In the context of the Torts Law, the restoration of original status is equivalent to reparation or repair, meaning to fix the damage. In making an order for restoration, courts normally need to consider (a) whether the damage is reparable and (b) whether the cost for the reparation is reasonable.<sup>390</sup>

Next is the compensation of loss, the most common liability form. Compensation is the monetary liability the defendant has to bear for the damage he caused to the plaintiff. It is a common form

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<sup>385</sup> Tort Liability Law, *supra* note 4, at art. 21.

<sup>386</sup> See Property Law, *supra* note 39, at 34.

<sup>387</sup> In civil law tradition, an *obligatio* implies two persons in principle, a creditor who has the right and a debtor who owes the duty. See SMITH'S DICTIONARY, *supra* note 10.

<sup>388</sup> See LIMING, *supra* note 6, at 317-18.

<sup>389</sup> See SHENGMING, *supra* note 40, at 80.

<sup>390</sup> See *id.* at 80-81.

because it may be applied to all kinds of damages, and is available to replace any other liability form that appears to be inapplicable (e.g. loss of property in a return of property case).<sup>391</sup> As it is discussed *infra*, the Torts Law contains several detailed provisions that deal with compensation issues.

The seventh liability form requires the defendant to extend an apology to the plaintiff, a sort of face-saving device to comfort the plaintiff. The Torts Law makes it a liability form because it is a social and cultural tradition in China that saving face, in certain cases, matters more than anything else. Often, the plaintiff is not satisfied without an apology from the defendant. The cases in which an apology is frequently sought are those that damage the right or interest of personality, i.e. the infringement of the right of honor, privacy, name or portrait of the plaintiff.<sup>392</sup>

A court-ordered apology may be, at the plaintiff's choice, oral, written, private, or public. A public apology may be published in an agreed upon or comparable newspaper, or by posting it in a designated area. The defendant bears any relevant costs.<sup>393</sup> The defendant's refusal to comply with an ordered apology may result in a more serious penalty.

The last liability form is the elimination of ill effect and rehabilitation of reputation. Similar to the apology, this liability form also concerns the plaintiff's personality and reputation. The difference is that the elimination of ill effect and rehabilitation of reputation applies mainly when the plaintiff's reputation is damaged, and therefore requires more than a mere apology from the defendant. Normally, at the plaintiff's request, the court will order the defendant to do certain things such as remove damaging materials, make a correction, or issue a public notice.<sup>394</sup>

### *B. Damages and Rules of Compensation*

The ultimate goal of compensation is to remedy damages. The Torts Law is not keen on the use of the jargons of pecuniary and non-pecuniary damages. Instead, it divides damages into three major categories: personal damages, property damages and mental damages. For each of these, the Torts Law provides the rules by which compensation is to be made.

The rules, which are intended to govern compensation against tortious conduct, are complicated by the need to balance the interests between private parties and between a private party and the general

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<sup>391</sup> See LIXIN, *supra* note 21, at 75.

<sup>392</sup> See SHENGMING, *supra* note 40, at 81.

<sup>393</sup> *Id.* at 82.

<sup>394</sup> *Id.*



public.<sup>395</sup> In China, the major issues in this regard, over which an incredible amount of debate was generated in drafting the Torts Law, involve the target, scope and standard of compensation.<sup>396</sup> In other words the issues concern who should be compensated, what compensation should be made, and how to make the compensation.

The Torts Law aims to deal with the compensation uniformly and extensively. That being said, certain compensation provisions in the Torts Law appear abstract and overly generalized. Some criticize this lack of detail and point to the consequence that these provisions may not work as well in practice as intended.<sup>397</sup> Some hope the Supreme People's Court will provide gap-fillers through its judicial interpretation function.

### 1. *Personal Damages*

The subject of personal damages is the most controversial area of the Torts Law because opinions are so divided over who is entitled to compensation and how much. By definition, it is generally agreed that personal damages are an infringement of the right or interests of the life or health of another person, causing injury, disability, or death.<sup>398</sup> But, the actual amount of compensation differs substantially depending on the particular type of personal damage, especially in cases concerning disability or death.

The Torts Law attempts to scale in equilibrium by adopting a three-level format of compensation for personal damages. Under Article 16 of the Torts Law, the first level compensates for personal damages in general. It includes reasonable costs and expenses for treatment and rehabilitation, such as medical treatment expenses, nurse fees, travel expenses, and lost wages. The second level concerns the victim's disabilities, for which the costs of disability life assistance equipment and disability indemnity are paid in addition to first level compensation. The third level compensates for the victim's death, and includes funeral costs and death damages.<sup>399</sup>

This three-level format is clear about the types of compensation, but is not very helpful, in practice, because it lacks operational guidance. The compensation at the first level seems less controversial because most of the costs at this level are measurable. The issue that may generate disputes in particular cases is whether the costs are reasonable, and this is left to the court to decide. Normally, the court will rely on the costs or expenses that were actually incurred. Whoever

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<sup>395</sup> See Stoll, *supra* note 373, at 3-4.

<sup>396</sup> See SHENGMING, *supra* note 40, at 13-16.

<sup>397</sup> See LIXIN, *supra* note 21, at 23-24.

<sup>398</sup> See SHENGMING, *supra* note 40, at 8.

<sup>399</sup> Tort Liability Law, *supra* note 4, at art. 16.

challenges the reasonableness of costs or the need for certain treatment bears the burden of proof.<sup>400</sup>

Compensation for disability encounters certain difficulties. The cost for disability life assistance equipment may only be a matter of reasonableness, but disability indemnity is considerably knotty. First, what constitutes disability is still highly disputable. Second, what the disability indemnity should cover is also disputed. Third, the appropriate standard to determine the amount of disability indemnity remains questionable. One crucial issue is whether the same standard should apply to a city resident and a farmer, given the wide disparity of living conditions between the city and the countryside.

Scholars are also troubled about whether there should even be a standard. Some tend to treat the disability indemnity as a compensation for mental suffering as a result of being disabled. They argue that there is no need to set any standard, and that the actual amount of the indemnity shall be decided by the court on an individual basis. Others deem the disability indemnity as necessary to make up for the loss of anticipated future income, and believe that there should be a standard for the courts to follow.<sup>401</sup>

In the middle is the view that the disability indemnity is a compensation for both the loss of future income and for mental suffering. But, this view struggles with how to determine the appropriate amount of compensation. In practice, courts are inclined to apply the approach of "loss of ability to work" to ascertain the indemnity amount. Under this approach, the indemnity compensates the loss of ability to work because when the plaintiff is disabled, his ability to work is impaired. Thus, compensation is assessed on the degree of the impairment that the plaintiff has suffered, regardless of his loss of future income. Some, however, criticize this approach as being unfair on the ground that the approach is blind about such important factors as the plaintiff's education, age, and salary level.<sup>402</sup>

Compensation for the victim's death is one of the most debated topics within the Torts Law. All disputes in this regard are about death damages. Two fundamental issues exist. The first issue is who, the decedent or his survivors, is to be compensated? This issue asks about the nature of the death damages. One argument is that since death is a fatal injury to the decedent, damages that would be made to the decedent become an inheritance for the decedent's survivors. The other argument holds that the decedent's death is in fact the damage to the survivors because the civil actor status of the deceased does not

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<sup>400</sup> See SHENGMING, *supra* note 40, at 85.

<sup>401</sup> See *id.* at 87.

<sup>402</sup> See *id.* at 88.

survive death, and therefore the compensation can only be made to the survivors.<sup>403</sup>

Under the Torts Law, survivors, for the purpose of death damages, are the close relatives of the decedent. In China, the term “close relative” has a broad meaning and is used differently in different cases. In criminal cases, close relatives refer to the spouse, father, mother, sons, daughters, and siblings born of the same parents.<sup>404</sup> In civil cases, however, close relatives refer to spouses, sons and daughters, father and mother, brothers and sisters, grandparents, and grandchildren.<sup>405</sup> Grandparents and grandchildren include both the paternal and maternal sides.

The Torts Law does not address the nature of the death damages. Nevertheless, it grants the close relatives of the decedent the right to make a claim against the tortfeasor. According to Article 18, where a tort causes the victim’s death, the victim’s close relatives are entitled to require the tortfeasor to assume the tort liability. Article 18 also provides that in case of the victim’s death, those who have paid for the victim’s medical treatment, funeral services, and other reasonable expenses have the right to demand reimbursement from the tortfeasor.<sup>406</sup>

The second issue is how to determine the amount of the death damages. For many years, death damages in tort were calculated under a formula adopted by the Supreme People’s Court in 2003. Under that formula, the calculation for death damages in a personal injury case was based on the previous year’s average annual disposable income per capita in the city, or the previous year’s average net income per capita in the countryside in the locale of the forum. That figure was then multiplied by 20 years. For each year the decedent was 60 years or older, one year was subtracted from the 20 year maximum. If the decedent was over 75 years of age, the multiplier was reduced to 5 years.<sup>407</sup>

The Supreme People’s Court formula has faced intense criticism since its adoption. The formula bases death damages on residence, location, and age of the deceased, and is denounced as unjust because it results in “the same life but different prices.”<sup>408</sup> During the drafting of the Torts Law, some attempted to bring into place a de-

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<sup>403</sup> See XINBAO, *supra* note 45, at 386.

<sup>404</sup> Criminal Law, *supra* note 307, at art. 82.

<sup>405</sup> Opinions on the Issues of Implementation and Application of the General Principle of Civil Law of China (adopted by Judicial Comm. of Sup. People’s Ct., Jan. 26, 1988), art. 12.

<sup>406</sup> See Tort Liability Law, *supra* note 4, at art. 18.

<sup>407</sup> See Interpretations, *supra* note 239, at art. 29.

<sup>408</sup> See XINBAO, *supra* note 45, at 383.

tailed provision to replace the Supreme People's Court formula for the death damages.<sup>409</sup> But the attempt was ultimately abandoned due to an inability to reach any consensus, which left the determination of death damages highly uncertain.

The Torts Law, however, does clarify cases when the tortious conduct causes multiple deaths. Under Article 17 of the Torts Law, if the same tort causes the deaths of several persons, death damages may be determined on equal amount for each of the deaths.<sup>410</sup> Article 17's rationale is that, to be fair, no matter what standard is to be used to determine death damages, the amount of the damages each decedent's close relatives receives should be the same.

## 2. *Property Damages*

Compensation for property damages in torts mainly involves the value of the property damaged. Under Torts Law, there are two kinds of property damages: general property damages and personal right related property damages. General property damages are the damages to the property only. Personal right related property damages are the economic losses associated with the infringement upon the personal right and interest. An example is the loss of commercial income as a result of damage to the plaintiff's reputation.

In regards to general property damages, Article 19 of the Torts Law requires that the amount of loss be determined as per the market price at the time the loss occurred, or by other means.<sup>411</sup> These other means refer to situations when no market price is available, or when the market price is not fair given the victim's unique condition. In the former situation, damages may be assessed by expert appraisal or evaluation. In the latter situation, the court may determine the amount on the basis of fairness.<sup>412</sup>

It is commonly held that property damages include damages to both tangible and intangible property. Intangible property primarily consists of intellectual property rights.<sup>413</sup> Since the laws governing intellectual property rights have special provisions for damages, courts normally look for these provisions when making a judgment.<sup>414</sup> In addition, the infringement of the equity rights or interests of another person will also give rise to a tort liability for property damages.

One problem with property damages is whether the damages should include indirect damages, meaning the loss of future interest.

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<sup>409</sup> See SHENGMING, *supra* note 40, at 89-91.

<sup>410</sup> Tort Liability Law, *supra* note 4, at art. 17.

<sup>411</sup> *Id.* art. 19.

<sup>412</sup> See LIMING, *supra* note 6, at 334.

<sup>413</sup> See LIXIN, *supra* note 21, at 83.

<sup>414</sup> See SHENGMING, *supra* note 40, at 99-101.

Scholars disagree regarding what exactly is the future interest and how to compensate the future interest. To define the future interest, some suggest that it should be limited to one that is reasonably predictable and expected. Others, however, assert that this limitation is unnecessary because as soon as the future interest is retainable, it should all be compensated.<sup>415</sup> With regard to future interest compensation, one opinion supports complete compensation, while the other opinion stands for reasonable compensation.<sup>416</sup> The Torts Law takes no position as to how this problem should be resolved.

In certain cases, a tort victim is not a natural person. A commonly and collectively used synonym in China for a non-natural person is “unit,” referring to a legal person or other organization or entity. The Torts Law has a special rule for the unit, which applies to tort liability allocation in case of the unit’s structural change. Under Article 18 of the Torts Law, if the unit tort victim is split or merged, the new unit that succeeds the rights of the victim is entitled to require the tortfeasor to assume tort liability.<sup>417</sup>

Property damages related to personal right are compensated under three different rules. The first rule is the rule of actual damages. Article 20 provides that if a tort that causes harm to a personal right or interest of another gives rise to any loss to the tort victim’s property, then the tortfeasor shall compensate according to the victim’s loss.<sup>418</sup> Under this rule, compensation is made on the basis of the plaintiff’s actual loss.

The second rule is the tortfeasor’s benefit rule. This rule applies when there is difficulty in determining the tort victim’s actual loss. Under Article 20, if the victim’s loss is difficult to ascertain, but the tortfeasor obtains benefit from the tort, then the tortfeasor shall compensate corresponding to the benefit he obtained.<sup>419</sup> In this situation, the plaintiff’s compensation is determined according to the benefit the defendant received from his tortious conduct. The Supreme People Court first applied the tortfeasor’s benefit concept in 2001 to help determine a plaintiff’s mental damages.<sup>420</sup> The Torts Law escalates it to a rule that is applied when the actual loss rule is not practically applicable.

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<sup>415</sup> See *id.* at 97-98.

<sup>416</sup> See LIXIN, *supra* note 21, at 86.

<sup>417</sup> See Tort Liability Law, *supra* note 4, at art. 18.

<sup>418</sup> *Id.* art. 20.

<sup>419</sup> *Id.*

<sup>420</sup> See Explanations to Several Questions Concerning the Determination of the Amount of Compensation for Mental Damages Caused by the Civil Torts (adopted by Sup. People’s Ct., Mar. 8, 2001), art. 10, available at [http://www.law-lib.com/law/law\\_view.asp?id=589](http://www.law-lib.com/law/law_view.asp?id=589) [hereinafter Compensation for Mental Damages].

The third rule is the rule of adjudication. Pursuant to Article 20 of the Torts Law, if the benefit obtained by the tortfeasor is difficult to identify, and the tortfeasor consults but fails to reach an agreement with the victim regarding appropriate compensation, then the plaintiff may bring a court action. The court then determines appropriate compensation based on the circumstances of the case.<sup>421</sup> Evidently, the adjudication rule provides the victim with the last resort for a determination of compensation.

The tortfeasor will also be held liable for damages in one other situation. Under Article 23 of the Torts Law, when a person sustains harm as a result of preventing or stopping an infringement upon the civil law right or interest of another person, the tortfeasor bears liability for the harm. This provision aims to protect and encourage Good Samaritan activity. For that purpose, Article 23 also provides that if the tortfeasor flees or is unable to assume liability, the beneficiary shall make proper compensation upon the victim's request.<sup>422</sup>

### 3. *Mental Damages*

Compensation for mental damages in China is new in law, though it has been recognized in judicial practice for many years. For the first time in Chinese legislation, the Torts Law makes mental damages a major form of damages in tort. Under Article 22 of the Torts Law, when the harm inflicted upon the personal rights or interests of another person causes serious mental suffering, the tort victim may require compensation for mental damages.<sup>423</sup>

One inference from Article 22 is that mental damages are the monetary awards for the serious mental suffering caused by harm done to the personal rights or interests of another person. Article 22 also implies that three elements are required to award mental damages: (a) there must be mental suffering, (b), the mental suffering must result from the harm to personal right or interest, and (c) the mental suffering must be serious. Unfortunately, however, as the only provision in the Torts Law to deal with mental damages, Article 22 provides nothing more than a general rule that states a general cause of action for mental damages. The highly principled provision of Article 22 casts great doubt on the effectiveness of its application because several major issues that affect the determination of mental damages are not addressed. Perhaps for this reason, Article 22 is deemed considerably conservative.<sup>424</sup>

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<sup>421</sup> Tort Liability Law, *supra* note 4, at art. 20.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* art. 22.

<sup>424</sup> See LIXIN, *supra* note 21, at 88.

One issue is the scope of mental damages. Article 22 is too broad in referring to the mental suffering related to the harm to personal rights or interests. As a result, it is difficult to make a meaningful determination of the mental damages pertaining to the particular right or interest that is being damaged.<sup>425</sup> Practically, in an attempt to guide courts in their dealings with cases concerning mental damages caused by tortious conduct, the Supreme People's Court issued an opinion in 2001 on compensation for mental damages in torts.

The Supreme People's Court's 2001 opinion offers a detailed coverage of mental damages. In the meantime, it expands coverage to include emotional distress inflicted by illegal use of or harm to the body or remains of the deceased, and by the tortious conduct causing permanent loss of or damage to the unique memento of personally symbolic significance.<sup>426</sup> The opinion has met strong criticism because, at least in part, it is considered to have confused the harm to personal rights or interests with the damage to property with regard to mental suffering because the personal memento belongs to a property, not a personal, right.<sup>427</sup>

A logic implication from Article 22 is that mental damages include both the damages in conjunction with actual physical harm and the damages for emotional distress without physical contact. In fact, a significant number of mental damage cases under Article 22 are those in which there is no physical harm, mainly because the personal rights and interests are, to a great extent, concerned only with the right to name, reputation, honor, portrait, and privacy.

A related issue is whether the mental damages are to be awarded to the tort victim only, or whether they may be made to a third party. More precisely, the issue is whether a family member of the tort victim may claim mental damages. One practical example is the death of the victim. It is unclear if a husband who loses his wife, or *vice versa*, as a result of the tort may claim against the tortfeasor for mental damages on grounds of loss of consortium or companion. The other issue is the by-stander situation and whether the so-called "nervous shock" experienced by a by-stander from witnessing serious physical injury to a family member may be actionable for mental damages.<sup>428</sup> The Torts Law does not provide an answer.

Another issue is the seriousness of mental suffering or distress. The Torts Law and judicial interpretation contain no guidance on this matter. One scholarly suggestion is the "social tolerance" theory under

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<sup>425</sup> A question for an example is whether the right personality should be included as well. See LIXIN, *supra* note 21, at 90.

<sup>426</sup> Compensation for Mental Damages, *supra* note 420, at art. 3.

<sup>427</sup> See LIMING, *supra* note 6, at 347.

<sup>428</sup> See *id.*; see also LIXIN, *supra* note 40, at 91.

which the seriousness depends on whether the suffering or distress exceeds the minimum levels of societal tolerance.<sup>429</sup> Some propose an exclusion method, requiring that the serious mental suffering not extend to occasional pain or sadness.<sup>430</sup> Another view endorses a reasonable person standard by which the seriousness is to be judged under the degree of pain and suffering that a reasonable person could have endured in the same or similar situation.<sup>431</sup>

Since mental suffering or distress is largely immeasurable, determining appropriate compensation is always an issue. The Torts Law takes no initiative in this regard, making the issue a matter of court discretion. In practice, the Supreme People's Court has adopted a factor analysis approach that requires courts to consider several factors when determining compensation.<sup>432</sup> In addition, some provinces and major cities have imposed limitations on the total amount of compensation. The present cap ranges from RMB 50,000 to RMB 100,000.<sup>433</sup>

## VII. SPECIAL TORTS AND LIABILITIES: PARTICULAR TARGETS OF THE TORTS LAW

It is typical in China and in civil law countries in general that a statute normally consists of two major parts: general provisions and special provisions. The same is true for the Torts Law, which contains the rules that regulate the special torts, or the torts with particularities. Although structurally, the Torts Law does not exactly follow the "two major parts" pattern, the rules of special torts are in fact the special provisions of the Torts Law.<sup>434</sup> For some seven special torts, these particular rules are applied. Those special torts include product liability, liability for motor vehicle traffic accident, liability for medical malpractice, liability for environmental pollution, liability for ultra-hazardous activity, liability for harm caused by domestic animals, and liability for injury caused by an object.<sup>435</sup>

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<sup>429</sup> See LIMING, *supra* note 6, at 346.

<sup>430</sup> See SHENGMING, *supra* note 40, at 111.

<sup>431</sup> See WU GAOHENG & XING BAOJUM, EXPLANATIONS TO THE TORT LIABILITY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 61 (China Univ. of Political Sci. & Law Press 2010).

<sup>432</sup> See Compensation for Mental Damages, *supra* note 420, at art. 10. The factors are (a) the degree of fault of the tortfeasor; (b) the means, place and method of the tort committed; (c) the consequences of the tortious conduct; (d) the benefit the tortfeasor obtained; (e) the financial ability of the tortfeasor to assume liability; and (f) the average living standard of the place of the court. *Id.*

<sup>433</sup> See *id.* at 112 (noting that the exchange rate between US dollar and Chinese RMB is 1:6.78).

<sup>434</sup> See LIMING, *supra* note 6, at 4.

<sup>435</sup> See Tort Liability Law, *supra* note 4, at art. 41-91.



It is naive to assume that the Torts Law governs only seven special types of torts. On the contrary, as noted, the Torts Law has an extensive coverage of tortious conducts and liabilities. The special torts are those that possess certain uniqueness. First, special torts either cause serious concern in the society or have a highly frequent occurrence.<sup>436</sup> Second, each special tort is subject to particular liability imputation rules.<sup>437</sup> Third, given a significant number of existing rules and regulations that govern the special torts, uniformity is being called for because many of the rules and regulations either overlap or contradict one another.<sup>438</sup> Lastly, a majority of the provisions dealing with the special torts reflect the recent development of the law of torts.<sup>439</sup>

For example, consider motor vehicle traffic accidents. Three decades ago, China was a country full of bicycles. Today, the city roads in China are jammed with cars.<sup>440</sup> The direct consequence of the fast growth of motor vehicles, especially private cars, is the increasing number of traffic accidents. In 2004, traffic related deaths peaked at 110,000. Since the Road Traffic Safety Law (RTS Law) took effect in May of 2004,<sup>441</sup> the death toll declined to 89,000 in 2006 and then to 73,000 in 2008.<sup>442</sup> But, traffic accident cases in recent years accounted for over one third of the total torts cases, and in some local courts, the number jumped to nearly fifty percent.<sup>443</sup>

Obviously, the 2004 RTS Law played a significant role in reducing motor vehicles fatalities, but the RTS Law is an administrative law of traffic safety, and thus does not directly regulate traffic-related civil liabilities. In addition, although the RTS Law makes the presumption of liability the basic principle for liability determination, it

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<sup>436</sup> See LIXIN, *supra* note 21, at 16-18; see also SHENGMING, *supra* note 40, at 469.

<sup>437</sup> See LIMING, *supra* note 6, at 4-5.

<sup>438</sup> See LIXIN, *supra* note 21, at 19-21.

<sup>439</sup> See LIMING, *supra* note 6, at 509; see also LIXIN, *supra* note 40, at 14-15.

<sup>440</sup> By the end of 2010, it is estimated that the number of vehicles in China will exceed 70 million. In 2003, the total of privately owned cars was 4.89 million, and by the end of 2009, it reached 26.05 million. See State Bureau of Statistics of the People's Republic of China, February 25, 2010, available at [http://www.yx.xinhua.net.com/auto/2010-02/26/content\\_19106084.htm](http://www.yx.xinhua.net.com/auto/2010-02/26/content_19106084.htm). In Beijing alone, as of February, 2010, there were a total of over 4.132 million vehicles, of which 3.291 million were private cars. See Beijing Report, available at <http://cppcc.people.com/cn/GB/11832680.html>.

<sup>441</sup> See Law on Road Traffic Safety of China (promulgated on Oct. 28, 2003, effective May 1, 2004) 8 P.R.C. LAWS & REGS, art. 91, available at <http://www.gov.cn/english/laws/2005-09/07content.29966.htm>.

<sup>442</sup> See SHENGMING, *supra* note 40, at 9.

<sup>443</sup> See *id.* at 246.

misses the particular type of liability arising from the harm caused by leased, borrowed, stolen, or illegally assembled vehicles.

Facing the ever pressing demand for a civil liability mechanism to deal with disputes over traffic accidents and compensation, the Torts Law singles out the motor vehicle traffic accidents as a special type of tort and intends to establish a compensation system under which claims for auto accident damages may be fairly handled. This system is expected to help both maintain traffic safety through a legal deterrence and reduce disputes by a fair allocation of liability between the parties involved and a reasonable compensation to the victim.

Among the seven special torts provided in the Torts Law, each faces challenges not only from the legislative point of view but also from a practical standpoint. One such challenge, which may be characteristic of all the special torts, is determining who is liable for what. A detailed analysis of all of the special torts will help in understanding the categorical function of the legal provisions for each of them and in appreciating how these legal provisions are to be applied. But, for the purpose of this discussion, the concentration is on such special torts as product liability, liability for medical malpractice and liability for environmental pollution. These three special torts are believed to have significant impact on the development of torts law in China.

#### A. *Product Liability*

Product quality has been a long-standing issue in China, and many heartbreaking stories, ranging from tainted baby formula to toys and toothpastes that contain dangerous chemicals, have astonishingly drawn international attention. These incidents outraged the public and generated overwhelming outcry for stronger government oversight and harsher punishments for wrongdoers.<sup>444</sup> Against this background, the Torts Law aims to establish more effective legal mechanisms through the means of special torts to cope with the harm caused by defective products, and to ensure liability for compensation.

Several provisions in the Torts Law govern product liability. Many of the provisions evolved from the 1993 Product Quality Law (PQL). The Torts Law provisions revise the PQL by adding new rules and appear to be more consumer-friendly.<sup>445</sup> With a focus on liability and legal recourse for compensation, the Torts Law is designed to provide extensive coverage of products liability, and to ensure a prompt

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<sup>444</sup> See Peter Neumann & Calvin Ding, *China's New Tort Law: Dawn of the Product Liability Era*, CHINA BUS. REV. (Mar./Apr. 2010), available at <http://www.china-businessreview.com/public/1003/neumann.html>.

<sup>445</sup> Product Quality Law of the People's Republic of China (promulgated by the Standing Comm., Nat'l People's Cong., Feb. 22, 1993, effective Sept. 1, 1993) (China) [hereinafter Product Quality Law].

and just compensation for the victim. Likewise, the Torts Law provides manufacturers certain leeway so that their liability burden is not excessive.

### 1. *Non-Fault Liability*

Under Article 41 of the Torts Law, if a defective product causes harm to another person, the manufacturer shall assume tort liability. It is all but certain that Article 41 imposes a non-fault liability on the manufacturer. Therefore, in a products liability case, as long as the harm was caused by the defect of the product, the manufacturer is liable. Note that “the other person” in Article 41 could be anyone who suffers damages resulting from the product’s defect, and is not necessarily limited to the buyer.

The Torts Law does not define the term “defect.” It is generally agreed, however, that a reference should be made to Article 46 of the PQL when the product defect unreasonably endangers another person’s personal or property safety, or does not conform with available national or industry standards safeguarding health and personal or property safety.<sup>446</sup> Based on Article 46 of the PQL, the law employs two standards to determine product defects: a reasonable danger standard and a national or industry standard.<sup>447</sup> The former is called the “general standard” and the latter is deemed the professional standard.<sup>448</sup>

But confusion emerges about which standard should be applied in a given case.<sup>449</sup> In addition, unlike the national or industry standard that normally sets a benchmark to follow, reasonable danger has a loose meaning. Some then suggest that reasonable danger be judged from the following four aspects: (a) defect in design, (b) defect in manufacture, (c) defect in warning or specification, and (d) defect in management of distribution.<sup>450</sup>

Keep in mind, however, that the liability imposed on the manufacturer is not absolute. The Torts Law does not specify any exemp-

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<sup>446</sup> See *id.* art. 46.

<sup>447</sup> *Id.*

<sup>448</sup> See GAOHENG & BAOJUN, *supra* note 431, at 130.

<sup>449</sup> See SHENGMING, *supra* note 40, at 224.

<sup>450</sup> To be more specific, the defect in design involves existence of reasonable danger in the structure as well as contents of the product; defect in manufacture refers to the unreasonable danger in the process of production due to the errors made in raw materials, parts, technology and process; defect in warning or specification concerns the reasonable danger resulting from a failure to provide adequate warning and user instructions; defect in management of distribution relates to the reasonable danger caused by violation of the duty of care in transportation, storage or sales that adversely affects the quality and function of the product. See GAOHENG & BAOJUN, *supra* note 431, at 130-31; see also LIXIN, *supra* note 21, at 189-90.

tions for the manufacturer mainly because opinions are so widely divided. But, it is believed that the exemptions provided in the PQL remain applicable. Under Article 41 of the PQL, the manufacturer is not liable if it is proven that (a) the product is not placed into the stream of commerce, (b) the defect causing the damage did not exist at the time when the product was placed into the stream of commerce, or (c) the science and technology at the time when the product was placed into the stream of commerce was at a level incapable of detecting the defect.<sup>451</sup>

## 2. *Extended Liability*

In addition to manufacturer liability, the Torts Law extends liability to the seller (wholesaler or retailer), the carrier, and the warehouseman. The purpose is to ensure that in each segment during the product's production and circulation, someone remains responsible for damage caused by product defects. Here, the innocent consumer or end-user's protection is undoubtedly underscored.

The seller's liability is provided in Article 42 of the Torts Law. Under Article 42, if a product defect occurs due to the fault of a seller and causes damage to another person, the seller bears tort liability.<sup>452</sup> The seller's fault may be found in its action or omission. An example of a seller's action is that the seller alters the product or removes the product label without authorization. The seller's omission may be a failure to use proper caution to preserve product quality.

It is possible in product liability cases that the actual product manufacturer is unidentifiable. To avoid a situation where the plaintiff's claim might become frustrated because of the unidentifiable manufacturer, Article 42 further provides that if the seller can specify neither the manufacturer nor supplier of the defective product, it bears the tort liability.<sup>453</sup> In a product liability case therefore, if no one can be blamed, the seller is held accountable so that the victim's claim is not left in limbo.

If, however, the defect that causes damage to another person results from the fault of such third party as the transportation carrier or storage warehouseman, under Article 44 of the Torts Law, the manufacturer or seller is entitled to reimbursement from the third party after compensating the victim.<sup>454</sup> This provision actually grants the manufacturer or seller a right of recourse for indemnity from a third party if it is proved that the third party's fault attributed to the defect.

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<sup>451</sup> See Product Quality Law, *supra* note 445, at art. 41.

<sup>452</sup> Tort Liability Law, *supra* note 4, at art. 42.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.* art. 44.

In terms of assumption of liability arising from a defective product, the major difference between the manufacturer and the seller or third party is the liability base. As noted, the law imposes non-fault liability for a manufacturer. However, with respect to the seller or third party, fault is required to impose liability. Although some scholars in China disagree, both Articles 42 and 44 are clear in this regard.<sup>455</sup> Therefore, when making a claim against a seller or a third party, the plaintiff bears the burden to prove that the defendant was at fault.

Despite the difference in liability imputation, Article 43 of the Torts Law allows the plaintiff to sue either the manufacturer or seller for damages.<sup>456</sup> As between the manufacturer and the seller, there is a matter of compensation under Article 43 depending on who causes the defect. But, no matter how the plaintiff wants to proceed, the burden of proof is different if a different defendant is sued. Inevitably, a more complicated situation is present if the plaintiff wants to sue both the manufacturer and the seller.

### 3. *Punitive Damages*

A significant change the Torts Law makes to the 1986 Civil Code is the provision of punitive damages. It is true that punitive damages were not new in China, but their application was previously limited to narrowly defined cases.<sup>457</sup> The Torts Law reinforces the legislative recognition of punitive damages and incorporates them into the tort system. Under Article 47 of the Torts Law, if a manufacturer or seller knowingly produces or sells a defective product that causes death or serious injury to another person, the victim is entitled to corresponding punitive damages.<sup>458</sup> The word “knowingly” means that the manufacturer or seller had knowledge about the defect of the product.

In China, punitive damages are considered to have a combined function of compensation, punishment, and deterrence. Because of its nature as punishment, the imposition of punitive damages must meet statutory requirements. In accordance with Article 47, the require-

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<sup>455</sup> One argument is that the seller's liability is the same as that of the manufacturer. See LIMING, *supra* note 6, at 517.

<sup>456</sup> Tort Liability Law, *supra* note 4, at art. 43.

<sup>457</sup> Prior to the adoption of the Torts Law, there were few legal provisions allowing for punitive damages, including Article 49 of the 1994 Law of Protection of the Rights and Interests of the Consumers (fraudulent conduct in providing goods and services) and Article 96 of the 2009 Food Safety Law (production or sale of foods in violation of food safety standards). In 2003, the Supreme Court also applied punitive damages to a developer's breach of residence real estate contract.

<sup>458</sup> Tort Liability Law, *supra* note 4, at art. 47.

ments for punitive damages in a product liability case are (a) the defendant's ill mind, (b) plaintiff's death or serious health problem caused by the defective product, and (c) causation.<sup>459</sup> Therefore, an injury caused by a defective product that is not deemed serious would not qualify for a punitive damages award.

A key issue left unsolved in the Torts Law is the amount of punitive damages to award in any given case. Currently, the punitive damages award is based on the contract or purchase price, which ranges from the lowest of one times the price (Consumer Protection Law) to the highest of 10 times the price (Food Safety Law).<sup>460</sup> In torts, however, there is no base price. Since the Torts Law requires that the punitive damages be "corresponding,"<sup>461</sup> one suggestion is to use a format of two to three times actual damages. The other suggestion advocates a factor-oriented formula on the ground that the punitive damages should be corresponding to the level of the defendant's ill mind and the degree of the plaintiff's injury.<sup>462</sup> But, at present, it is entirely at the court's discretion to assess the punitive damages.<sup>463</sup>

#### 4. *Mandatory Warning and Recall System*

It is mandated in Article 46 of the Torts Law that the manufacturer or seller take remedial measures, such as warning and recall, in a timely manner when, after the product is placed into the stream of commerce, a defect is discovered.<sup>464</sup> Prior to the adoption of the Torts Law, China's recall rule was scattered in administrative regulations and applied only to certain products. The significance of Article 46 is that it establishes a unified nationwide recall system for defective products in general. In addition, Article 46 imposes a duty of timely warning after the sale and upon the finding of the product defect.

Warning and recall apply when the product defect was not detected during the production and sale but was found after the product was put into circulation. The warning is actually an after-sales notice

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<sup>459</sup> *Id.*

<sup>460</sup> Law of The People's Republic of China on Protection of Consumer Rights and Interests (promulgated by the Standing Comm., Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), art. 44 (China), *available at* [http://www.nbaic.gov.cn/art/2008/10/20/art\\_865\\_8527.html](http://www.nbaic.gov.cn/art/2008/10/20/art_865_8527.html) (describing fraudulent conduct in providing goods or services); Food Safety Law of the People's Republic of China (promulgated by the Standing Comm., Nat'l People's Cong., July 20, 2009, effective immediately), art. 96 (China), *available at* [http://www.chinaacc.com/new/63\\_73\\_/2009\\_3\\_4\\_wa8132639439002714.shtml](http://www.chinaacc.com/new/63_73_/2009_3_4_wa8132639439002714.shtml) (describing the production or sale of foods in violation of food safety standards).

<sup>461</sup> See Tort Liability Law, *supra* note 4, at art. 47.

<sup>462</sup> See LIMING, *supra* note 6, at 548.

<sup>463</sup> See SHENGMING, *supra* note 40, at 245.

<sup>464</sup> Tort Liability Law, *supra* note 4, at art. 46.

and serves a two-fold purpose. First, it informs the consumers of the potential danger the product may cause. Second, it equips consumers with the necessary knowledge to prevent danger and minimize risk in their normal product use.

Recall is a second step used to handle defective products. It is a process under which the defective product is replaced or returned at no cost to consumers. In China, the recall may be made by the manufacturer's product initiative or by the relevant administrative agency's order.<sup>465</sup> The Torts Law makes it imperative that the manufacturer or seller assumes the tort liability if he or she fails to take remedial measures in due course, or if the measures taken are insufficient and ineffective to prevent damage.<sup>466</sup>

An ambiguity in Article 46 is whether the Torts Law requires the manufacturer to enact a product tracking system to monitor possible defects. Some believe that the underlying notion of Article 46 is that the manufacturer is obligated to establish a scheme to enable it to timely track any defect that may appear in the product.<sup>467</sup> Others believe that Article 46 is all about remedial measures, to be taken when the defect is found after sale, and hence does not require the manufacturer to undertake an active tracking effort.<sup>468</sup>

### 5. *Preventive Measures*

In addition to warning and recall, the Torts Law also requires that the manufacturer or seller take certain precautionary or preventive measures in particular product liability cases. Article 45 of the Torts Law provides that if a product defect endangers the personal or property safety of another person, that person is entitled to require the manufacturer or seller to bear such tort liability as to remove the defect and eliminate the danger.<sup>469</sup> The goal obviously is to prevent the defective product from inflicting harm or injury on consumers.

Article 47 of the Torts Law defines preventive measures as tort liabilities imposed on the manufacturer or seller. It is mandatory that the proper measures be put in place upon plaintiff's request when the product defect exists but has not yet caused harm. When making such requests, however, the plaintiff needs to prove the likelihood that the defect endangers his personal or property safety. This is because the existence of danger is the prerequisite for preventive measures in a product liability case.

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<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> See SHENGMING, *supra* note 40, at 241.

<sup>468</sup> See LIMING, *supra* note 6, at 537.

<sup>469</sup> Tort Liability Law, *supra* note 4, at art. 45.

### *B. Liability for Environmental Pollution*

China's growth has been rapid in the past few decades, with the unfortunate side effect of environmental pollution and ecological deterioration in the country. Although constantly denied by China, it has overtaken the U.S. in energy consumption and become the world's top energy consumer.<sup>470</sup> This raises serious concerns about China's impact on the environment as it is turning into the world's biggest source of climate-changing greenhouse gases.<sup>471</sup>

Within the country, the escalated environmental or ecological damages have also become a striking problem, which directly threaten the sustainability of the nation's development. From a legal perspective, since the promulgation of the Environmental Protection Law in 1989, there have been nearly thirty different laws and regulations related to the environment. But, given the complexity of the environmental issues and the often heated economic drive for development, environmental protection in China has not yet reached the level that it should. There have been several attempts to amend the 1989 Environmental Protection Law, which is widely considered obsolete in many respects, but each has failed due to the imbalance between economic and environmental interests, and between different government agencies fighting for control over particular matters.<sup>472</sup>

The Torts Law does not seem to be intended to solve the debates on environmental protection but rather to provide general rules governing civil liability for damages caused by environmental pollution. There are four articles in the Torts Law, and all of them are concerned with liability determination and allocation. Therefore, in the application of the Torts Law provisions on the liability for environmental pollution, a cross-reference is made to the relevant provisions in specific laws and regulations on the environment.

#### *1. Liability without Fault*

Like product liability, liability for environmental pollution requires no fault on the part of the tortfeasor. According to Article 65 of the Torts Law, when environmental pollution causes harm, the pol-

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<sup>470</sup> See Spencer Swartz & Shai Oster, *China Tops U.S. in Energy Use*, WALL ST. J. (July 18, 2010), <http://online.wsj.com/article/SB10001424052748703720504575376712353150310.html>.

<sup>471</sup> See Jenny Barchfield, *China Surpasses US as World's Top Energy Consumer*, WASH. TIMES (July 20, 2010), <http://www.washingtontimes.com/news/2010/jul/20/china-surpasses-us-top-energy-consumer/>.

<sup>472</sup> See Wang Hongru, *Debates over the Fate of the Environmental Protection Law*, CHINA ECON. WEEKLY (June 15, 2010), <http://news.sohu.com/20100615/n272809670.shtml>.



luter shall assume the tort liability.<sup>473</sup> The elements essential to impose tort liability on the polluter include (a) pollution, (b) damages, and (c) causation.<sup>474</sup> Here, the polluter's mental status is irrelevant. Liability may be exempted or reduced on certain statutory grounds.<sup>475</sup>

Article 65 is based on Article 124 of the 1986 Civil Code. The former, however, alters the latter by repealing the requirement that the polluter's conduct must be illegal. Under Article 124 of the 1986 Civil Code, any person who pollutes the environment and causes damages to others in violation of state provisions for environmental protection and the prevention of pollution bears civil liability in accordance with the law.<sup>476</sup> Pursuant to Article 65 of the Torts Law, pollution that causes damage, standing alone, will suffice to hold the polluter for tort liability.

Likewise, the term "environment" in the Torts Law has a broader meaning than that in the 1986 Civil Code. Under the Torts Law, the environment includes both the living environment and the ecological environment.<sup>477</sup> Article 2 of the Environmental Protection Law defines the environment to mean the total body of all natural elements and artificially transformed natural elements affecting human existence and development, which includes the atmosphere, water, seas, land, minerals, forests grasslands, wildlife, natural and human remains, nature reserves, historic sites and scenic spots, and urban and rural areas.<sup>478</sup> However, this definition apparently is not inclusive of the ecological environment or sustainable development since it does not include ecological balance or biodiversity.

## 2. *Reversed Burden of Proof*

The most difficult aspect of tort liability for environmental pollution is proving the connection between the harm and the pollution. In many cases, the harm is not readily seen or even discernable, because it may not be diagnosed until several years after exposure. On the other hand, to trace the source of the pollution that caused the harm often requires sophisticated devices and technology. Therefore, it would be too burdensome and unfair for the plaintiff to prove causation.

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<sup>473</sup> Tort Liability Law, *supra* note 4, at art. 65.

<sup>474</sup> *Id.*

<sup>475</sup> In environmental pollution cases the tort liability of the polluter may be exempted on the ground of force majeure or plaintiff's intentional fault, or may be reduced for the plaintiff's gross negligence.

<sup>476</sup> See General Principles, *supra* note 22, at art. 124.

<sup>477</sup> See LIXIN, *supra* note 21, at 254-55.

<sup>478</sup> Environmental Protection Law (adopted on Dec. 26, 1989), art. 2 (China), available at <http://www.china.org.cn/english/environment/34356.htm>.

In dealing with this issue, a common practice in China is to place the burden of proof on the defendant. Under Article 87 of the Water Pollution Prevention and Control Law, for example, in a water pollution damages case, the polluter has the burden of proof to show a lack of causation.<sup>479</sup> Similarly, the Supreme People's Court, in both the Evidence Rules and Opinions on the Implementation of the Civil Procedure Law, requires that the defendant bear the burden of proof in litigation involving environmental damage.<sup>480</sup>

The Torts Law imposes non-fault liability on the polluter and thus adopts, as a unified rule, a reverse burden of proof that applies to all environmental tort liability cases. According to Article 66 of the Torts Law, if a dispute arises over environmental pollution, a polluter shall bear the burden to prove that it should not be liable, its liability could be mitigated under certain circumstances as provided for by law, or there is no causation between its conduct and the harm.<sup>481</sup>

### 3. *Pollution Share Rule*

What likely happens in any given case is that two or more polluters cause the environmental damage. Thus, the polluters are a joint source of pollution. A practical question, then, is how to allocate liability among the polluters. Unquestionably, all the polluters involved are liable. The issue is, however, what liability each of the polluters should bear. Are the polluters jointly and severally liable for the damages or independently liable for their part of the damages?

Under Article 67 of the Torts Law, when two or more pollutants cause environmental pollution, the seriousness of each polluter's liability is determined according to the type of pollutant, the volume of emission, and other factors.<sup>482</sup> The Torts Law does not impose joint and several liability upon joint polluters, but instead, divides liability among the polluters according to the share each has in the pollution. Article 67 stands on the presumption that the polluters do not have joint intent and the pollution is caused by independent conduct. This suggests that if the polluters collaborated in causing the pollution,

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<sup>479</sup> Law of Prevention and Control of Water Pollution (adopted 1984, as amended 2008), art. 85 (China), *available at* <http://www.chinaenvironmentallaw.com/wp-content/uploads/2008/03/water-pollution-prevention-and-control-law.pdf>.

<sup>480</sup> Civil Evidence Rules, *supra* note 187, at art. 4(3); *see also* Supreme People's Court: Opinions on the Several Questions Concerning the Application of the Civil Procedure Law China (July 24, 1992), art. 4 (China), *available at* <http://www.dffy.com/faguixiazai/ssf/20031109201407.htm> (describing the burden of proof concerning environmental damages).

<sup>481</sup> Tort Liability Law, *supra* note 4, at art. 66.

<sup>482</sup> *Id.* art. 67.

they would be jointly and severally liable under the joint tortfeasors provision of the Torts Law.

Another presumption is that the seriousness of each polluter's liability is identifiable and determinable through various means. The reality is that in certain cases, the seriousness may not be determinable. In this situation, Article 67 is not helpful. One possible solution is that the polluters share liability equally. At any rate, for the plaintiff, the pollution share rule would mean it has to sue all polluters in order to achieve full compensation because the polluters are not jointly and severally liable as a matter of law.

#### 4. *Third Party's Action*

The liability of a third party in an environmental pollution case occurs when the third party's action is the "but for" intervening force that caused the pollution. Under Article 68 of the Torts Law, if the harm is caused by environmental pollution as the result of the fault of a third party, the victim may require compensation from either the polluter or the third party.<sup>483</sup> After paying compensation, the polluter is entitled to reimbursement from the third party.<sup>484</sup>

Thus, to hold the third party liable, in addition to his conduct attributive to the pollution, the third party must be at fault. The third party's liability may be taken in two different ways: directly compensate the victim, or reimburse the polluter for compensation paid to the victim. Once again, as between the polluter and the third party, the liability is not joint and several but independent.

#### C. *Liability for Medical Damages*

Medical damages are not well regulated in China. One reason is that medical malpractice is a relatively new type of civil liability.<sup>485</sup> In the past, medical accidents were generally addressed via administrative means.<sup>486</sup> In reality, however, the overly crowded hospitals and deficiency of professional ethics rendered the medical services so poor that patients were often left with no good care. Likewise, there was a lack of effective legal mechanisms to fairly handle the grievances of the victims. As a result, medical disputes frequently became violent, and in many cases, the disputes ultimately led to patients and

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<sup>483</sup> *Id.* art. 68.

<sup>484</sup> *Id.*

<sup>485</sup> Ren Rong-ming & Wan Man-tian, *On the Legal System of Medical Malpractice Management in China and Its Impact on Medical Ethics*, 12 INT'L J. OF THE COMPUTER, THE INTERNET & MGMT. 73, 74-77 (Sept.-Dec. 2004), available at [http://www.journal.au.edu/ijcim/2004/sep04/ijcimv3n1\\_article7.pdf](http://www.journal.au.edu/ijcim/2004/sep04/ijcimv3n1_article7.pdf).

<sup>486</sup> *Id.*

their families personally attacking doctors and other healthcare workers.<sup>487</sup>

The second reason is the drive for the balance between patient and hospital interests. For decades, under the planned economy, the government budget fully covered hospitals. The economic reform broke the “iron bowl” of all publicly owned entities, including hospitals. Suddenly, hospitals could not sit idle and had to generate enough revenue to pay salaries and operating expenses. The government then became concerned with how to protect patients’ rights through malpractice regulation without negatively affecting the legitimate interests of medical professionals and the development and improvement of medical research.<sup>488</sup>

Before adoption of the Torts Law, medical damage claims were governed mainly by the Regulation on the Handling of Medical Accidents issued by the State Council in 2002.<sup>489</sup> A year later, and in response to the application of the Regulation, the Supreme People’s Court issued a Notice on the Adjudication of the Civil Case Concerning Medical Damages Disputes. In that notice, the Supreme Court limited the application of the Regulation to medical accident cases and required that all non-medical accident cases be governed by the 1986 Civil Code.<sup>490</sup> In the same year, the Supreme People’s Court issued the damage award calculation formula for wrongful death, including for death from medical accidents.<sup>491</sup>

Some believed the State Council Regulation improperly protected the interests of medical service entities because it overly emphasized their specialty and particularity.<sup>492</sup> The Supreme People’s Court’s attention, however, was on the civil liability of medical accidents as well as other medical malpractice disputes. Consequently, the Regulation and the Supreme People’s Court opinions created a so-called two-track medical liability system. With regard to the cause of action, there were two different liabilities: medical accident liability

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<sup>487</sup> See Dean M. Harris & Chien-Chang Wu, *Medical Malpractice in the People’s Republic of China: the 2002 Regulation on the Handling of Medical Accidents*, J.L. MED. & ETHICS 463 (2005), available at <http://www.allbusiness.com/legal/3587269-1.html>.

<sup>488</sup> See SHENGMING, *supra* note 40, at 277.

<sup>489</sup> Regulation on the Handling of Medical Accidents (promulgated by the State Council, Apr. 4, 2002, effective Sept. 1, 2002) (China), available at [http://www.gov.cn/english/laws/2005-07/25/content\\_16885.htm](http://www.gov.cn/english/laws/2005-07/25/content_16885.htm) (last visited May 18, 2011).

<sup>490</sup> See Notice of the Supreme People’s Court on Adjudication of Civil Cases Concerning Medical Disputes with a Reference to the Regulation on the Handling of Medical Accidents (Jan. 6, 2003), LAWINFOCHINA, <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=45919>.

<sup>491</sup> See Compensation for Mental Damages, *supra* note 420.

<sup>492</sup> See LIXIN, *supra* note 21, at 226-27.

and non-medical accident liability. As far as the damage award is concerned, under the Regulation, the award for damages caused by the medical accident was much lower than the amount determined by the Supreme Court's formula for medical liability.

The more confusing and controversial practice under the two-track system is the appraisal of a medical accident. Experts selected by the National Association of Medical Science (NAMS), a semi-governmental organization, appraise the medical accident, while a judicial appraisal entity appraises any other medical liability. Thus, if a case involved both medical accident and other medical liability, the plaintiff would have to obtain two appraisals from different sources, and the two appraisals often conflicted. In many medical accident cases, plaintiffs instead asked for the medical accident's judicial appraisal as well because the NAMS' appraisal was considered biased in favor of the medical institution.<sup>493</sup>

The Torts Law was drafted in the midst of increasing demand for medical liability reform to clean up the mess resulting from the two-track scheme. One task for the Torts Law drafters was to form a single medical liability system to the extent that all medical treatment related disputes could be handled uniformly. The Torts Law now contains 11 articles under the title *Liability for Medical Damages*. But, many prefer to call it liability for medical malpractice since it mainly deals with the conduct of medical professionals. Hope remains that the Torts Law will help bring medical malpractice into a well-regulated mechanism.

### 1. *Medical Damages Categorization*

The Torts Law classifies medical damages into three categories: general medical damage, damage by conduct in violation of medical ethics, and damage resulting from defective medical products.<sup>494</sup> General medical damage is the harm a patient suffers during diagnosis and treatment.<sup>495</sup> It also includes the harm caused by the failure of medical staff members to fulfill their diagnosis and treatment obligations under the proper standard at the time of such diagnosis and treatments.<sup>496</sup>

Damage by a medical ethics violation refers primarily to the harm caused to a patient by disclosing his privacy or releasing his medical records without his consent.<sup>497</sup> Medical ethics violations also include the breach of the duty to inform the patient of his illness, con-

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<sup>493</sup> See SHENGMING, *supra* note 40, at 276.

<sup>494</sup> Tort Liability Law, *supra* note 4.

<sup>495</sup> *Id.* art. 54.

<sup>496</sup> *Id.* art. 57.

<sup>497</sup> *Id.* art. 62.

dition, and relevant medical measures, as well as of possible medical risks if an operation, special examination, or special treatment is needed.<sup>498</sup> There is, however, an exception. In an emergency situation, upon approval by the medical person in charge, certain medical measures may be taken without obtaining consent from the patient or his close relatives.<sup>499</sup>

Damage resulting from defective medical products is the injury a patient suffers from the defect of a drug, medical disinfectant, medical instrument, or by a substandard blood transfusion.<sup>500</sup> In recent years, the number of cases involving harm caused by substandard blood transfusions has dramatically increased, especially in rural areas. The Torts Law aims to limit risky transfusions by imposing stringent tort liability on medical institutions. Its effectiveness is unknown.

## 2. *Multiple Liability Basis*

Under the Torts Law, tort liability imputes differently in respect to different categories of medical damages. The general liability rule for medical malpractice is fault-based liability. As provided in Article 54, when a patient sustains harm during diagnosis and treatment, the medical institution is liable for compensation if the institution or any of its medical staff is at fault.<sup>501</sup> This fault liability equally applies to medical damages caused by ethical violations.

However, in accordance with Article 58 of the Torts Law, fault will be presumed for the harm caused to a patient if a medical institution (a) violates a law, administrative regulation or rule, or any other provision on the procedures and standards for diagnosis and treatment, (b) conceals or refuses to provide the medical records related to the dispute, or (c) forges, tampers or destroys any medical record or data.<sup>502</sup> Hence, under any of the aforementioned circumstances, the medical institution must prove it was not at fault.

With regard to medical damages caused by defective medical products or by contaminated blood, the Torts Law turns away from liability but permits the patient to request compensation from the manufacturer or entity providing the blood, or from the medical institution.<sup>503</sup> The Torts Law also provides that if the medical institution pays compensation upon the patient's request, it is entitled to reimbursement by the liable manufacturer or blood-providing entity.<sup>504</sup>

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<sup>498</sup> *Id.* art. 55

<sup>499</sup> *Id.* art. 56.

<sup>500</sup> Tort Liability Law, *supra* note 4, at art. 59.

<sup>501</sup> *Id.* art. 54.

<sup>502</sup> *Id.* art. 58.

<sup>503</sup> *Id.* art. 59.

<sup>504</sup> *Id.*

Nevertheless, many believe that the implied liability base in the case of defective medical products is non-fault liability because liability for defective medical products is analogous to product liability.<sup>505</sup>

### 3. *Special Grounds for Liability Exemption*

As noted above, a number of defenses are available to the defendant under the Torts Law. Medical institutions may also employ these defenses, if applicable, in a medical damages lawsuit. Given the distinctive nature of medical damages, however, medical institutions may be exempt under certain special provisions in the Torts Law.

Pursuant to Article 60 of the Torts Law, a medical institution shall not be held liable for compensating the harm caused to a patient under any of the following circumstances: (a) the patient or his close relative did not cooperate with the medical institution in the diagnosis, and the treatment met the required procedures and standards, (b) the medical staff fulfilled the duty of reasonable diagnosis and treatment in an emergency such as the rescue of a patient in critical condition, or (c) diagnosis and treatment of the patient were difficult due to the medical limits at the time.<sup>506</sup>

When a patient refuses to cooperate, the tort liability of a medical institution may not be fully exempted if the medical institution or any of its medical staff is found to be at fault as well. In this situation, Article 60 requires the medical institution to assume liability to compensate the patient involved, in accordance with its fault.<sup>507</sup>

### 4. *Legal Restraint on Patients*

As an echo to China's frequent medical treatment related violence, the Torts Law has a provision intended to discipline patients. Article 64 of the Torts Law emphasizes that the legitimate rights and interests of a medical institution, and its member staff, are protected by law.<sup>508</sup> It mandates that anyone who interrupts the order of the medical system or obstructs the work or life of the medical staff will be subject to legal liability.<sup>509</sup>

The Torts Law requires the medical institution to keep and maintain its medical records including admission logs, medical treatment order slips, test reports, operation and anesthesia records, pathology records, nurse care records, medical expenses sheets, and

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<sup>505</sup> See LIXIN, *supra* note 21, at 238-39; see also SHENGMING, *supra* note 40, at 291-98.

<sup>506</sup> Tort Liability Law, *supra* note 4, at art. 60.

<sup>507</sup> *Id.*

<sup>508</sup> *Id.* art. 64.

<sup>509</sup> *Id.*

other medical data.<sup>510</sup> The medical institution is also required to give patients an opportunity to review or obtain copies of medical records.<sup>511</sup>

Additionally, the Torts Law prohibits a medical institution and its staff from conducting unnecessary examinations in violation of the procedures and standards for diagnosis and treatment.<sup>512</sup> This prohibition aims to avoid over or unreasonable charges to patients. What examination is and is not necessary may, however, become highly questionable. The Torts Law suggests that an examination is necessary as long as it meets the procedures and standards for diagnosis and treatment.

## VIII. CONCLUSION

Adoption of the Torts Law is a significant step toward building a civil law infrastructure in China. As a hybrid of civil law tradition, common law concepts, and Chinese reality, the Torts Law establishes a legal framework under which civil wrongs are addressed and civil damages are compensated. In this regard, the Torts Law represents China's effort to develop the rule of law and to establish a sound legal mechanism to resolve civil disputes.

It is fair to say that the Torts Law is an ambitious piece of legislation. It is equally fair to conclude that the Torts Law is an incomplete statute to regulate torts because it leaves many important questions unanswered. For example, it is unclear if the Torts Law should govern administrative torts, state agency torts, or government personnel torts committed in connection with the exercise of official duty. Additionally, the broad coverage of the Torts Law, in terms of rights and interests, creates many ambiguities that require more legislative interpretations or judicial explanations, especially when determining damages and calculating damage awards.

A more practical issue concerns reconciliation of the differences between the Torts Law and the 1986 Civil Code. It is unclear which law controls if there is a conflict between the two. Theoretically, the rule of "later in time" or the rule of "special law superior to general law" may play a role, but there are many hidden conflicts that cause confusion. The same issue arises with regard to the relationship between the Torts Law and other tort related regulations and rules.

The biggest challenge facing the Torts Law is how to effectively and strictly enforce the law. This remains an issue straining the Chinese legal system. The real test to Chinese courts is how to handle civil damages fairly when the damage award would particularly affect vari-

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<sup>510</sup> *Id.* art. 61.

<sup>511</sup> *Id.*

<sup>512</sup> Tort Liability Law, *supra* note 4, at art. 63.



ous local, economic, and business interests. In short, the critical issue is how to transform the Torts Law from “law on the paper” into “law in action.”<sup>513</sup>

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<sup>513</sup> See LIMING, *supra* note 6, at 7.

