




Protecting the people

After eight years, China's long-awaited Tort Liability Law is primed to wholesale regulate tort liability and re-set quality standards for PRC-made products. Clarifications on product liability, punitive damages and statutes of limitation are addressed, but enforcement and integration with existing regulations, along with other vagaries, remain to be tested

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On November 26 2009, the Standing Committee of the National People's Congress (NPC) promulgated the *PRC Tort Liability Law (中华人民共和国侵权责任法)* (TLL), which will become effective on July 1 2010. The TLL is of great importance to civil legislation in China and will play a significant role in the protection of civil rights, the clarification of tort liabilities, and the prevention and sanction of tort activities.

The legislation of the TLL commenced on 2002 by the Internal and Judicial Affairs Committee of the NPC as a Chapter of tort liability in the Civil Code, and the draft of the TLL had been through review four times before it was passed as a single law by the NPC.

Before the TLL, there were less than 30 articles to regulate tort liability in the *PRC Civil Law General Principles (中华人民共和国民法通则)*. The Supreme Court had also issued several interpretations and judicial documents to further clarify tort liability, however it was not systematic and comprehensive in whole. The new TLL has constituted a complete and comprehensive system to regulate tort liability.

Overview

The purposes of the TLL are to compensate damages, punish and prevent tort activities, allocate damages and balance social benefits, and may also have the function of creating and protecting civil interests.

The legislative purposes are provided in Article 1 of the TLL, which are to protect the legitimate interests of civil parties, clarify tort liability, prevent and punish tort activities, and promote the stability of society.

There are 92 articles in the TLL which are classified into 12 chapters, and the TLL covers all types of tort activities in civil areas, including the general provisions of tort liability, the constitution of tort liability, the subject of tort liability, product liability, traffic accidents, medical malpractice, environmental pollution, internet infringement, damages caused by animals, and it further clarifies product recalls, punitive damages, and compensation for mental injury.

The TLL most impacts businesses in China on product liability, product recalls and punitive damages. The TLL firstly applies the product recall to every kind of product and introduces punitive damages to product liability.

Product liability

The TLL provides that the manufacturer shall be responsible for the tort liability if the defective products cause damage to other persons. If a product's defects are caused by the seller, the seller should be responsible for the tort liability. To enforce the product liability of the TLL, the provisions in the *PRC Product Quality Law (中华人民共和国产品质量法)* (Product Quality Law) should also be taken into consideration.

According to the definition of "product" under the Product Quality Law, a product shall mean the product processed and manufactured for the purpose of marketing. Construction projects will not be considered a product under product liability. The definition of "defect" means an imperfection in a product that may cause unreasonable danger to the safety of persons or the property of others. Or it means that the product does not conform to state requirements or to industry standards as to protect human health, or a person's safety or property.

Unreasonable Dangers

The following factors will be considered under normal circumstances when determining whether a product has unreasonable dangers:

1. **The ordinary use of the product.** If the consumer suffers damage when using the product according to the ordinary use of the product, the product will be considered as having unreasonable dangers, and is a defective product.
2. **The normal usage mode of the product.** If the consumer suffers damage when using the product according to the normal usage mode of the product, the product will be considered as having unreasonable dangers, and is a defective product.
3. **Instructions of the product.** If a product clearly indicates that it has a certain function, the product should possess such function. For example, if a shower set indicates that it has the function to prevent electrical faults, but the consumer suffers electrical shocks, the manufacturer shall be responsible for the tort liability.
4. **The structure and materials of the product.** If the structure or materials of a product in nature are not supposed to have certain features, the product will not be considered defective if it does not have such features, unless expressly indicated by the manufacturer.
5. **The normal life span of the product.** For example, if the shelf-life of a medicine expires and the consumer suffers from taking the expired medicine, the medicine cannot be considered as having defects.

Under normal circumstances, the product will not be considered as having defects if the product complies with requirements of the state or industry standards that protect human health and property, and vice versa.

Unreasonable dangers and standards

An important issue is whether the manufacturer should be responsible for personal or property damage caused by a product that complies with state or industry standards. There are opinions in practice that state the manufacturer shall no longer be responsible for the tort liability since the product complies with state or industry standards.

Some PRC legal practitioners believe that even if the product complies with state or industry standards, the manufacturer should still be responsible for the tort liability if the product has unreasonable dangers. Firstly, if the manufacturer is not responsible under such circumstances, the manufacturer will intentionally put into circulation its defective product as long as the product complies with state or industry standards. This would contradict the purpose of the TLL to protect consumers. Secondly, manufacturers have been deeply involved in the legislation of state and industry standards, many of which are actually drafted by the manufacturers themselves according to government authorisation. Thirdly, the standards are kept to a minimum, and the revision or modification of standards simply cannot keep up with the pace of technological development as new products are appearing almost every day. It would be unfair for consumers to be at risk while the manufacturers benefit from low-quality products.

However, "unreasonable dangers" is a subjective criterion deciding the defects of a product, and it should be determined under specific circumstances.

Product recall

Product recall obligations under PRC law

The TLL provides that the manufacturers have the obligation to recall defective products and that they should assume responsibility for tort liabilities if they don't take effective remedial measures immediately. In China, there are several other laws and regulations related to product recalls such as the *PRC Food Safety Law (中华人民共和国食品安全法)*, the *Provisions on the Administration of Children Toy's Recall (儿童玩具召回管理规定)*, the *Provisions on the Administration of Recall of Defective Auto Products (缺陷汽车产品召回管理规定)* and the *Measures for the Administration of Recall of Pharmaceuticals (药品召回管理办法)*.

According to these various independent provisions, the related manufacturers have an obligation to recall the products when they are found to be defective. If the manufacturers do not conduct voluntary product recalls, the authorities will order them. However, the applicable scopes of these laws and regulations are limited to certain specific products.

Product recall obligations under the TLL

Article 46 of the TLL stipulates that:

The manufacturer or seller shall take measures in time such as provide a warning and order a recall if the products are found defective after they are put into circulation. The manufacturer or seller shall bear the tort liability if it does not or not effectively take remedial measures and damages are caused thereby.

The obligation to recall defective products under the TLL and the product recall regulations is not limited to certain specific products, such as children toys under the children toy's recall provisions. Therefore, when the TLL becomes effective, any product can and will be recalled if the product is found to be defective. If

the manufacturers do not conduct a voluntary product recall, the authorities will order the manufacturers to recall them. The manufacturers will also be liable for not or not effectively taking remedial measures.

Based on the above, theoretically all manufacturers will have an obligation to recall defective products after the TLL becomes effective. According to legal practice in the PRC, detailed rules on the criteria and procedures to recall a specific product will be needed in order for various authorities to effectively enforce the TLL.

Statute of limitation

The TLL does not specify the statute of limitation on the manufacturer's obligation to recall the defective products. The TLL requires further clarification on this issue, which will hopefully be addressed in further legislation or interpretations by the Supreme Court. The statute of limitation provided in Article 45 of the Product Quality Law should apply under such circumstances.

Statute of limitation under Product Quality Law

The Product Quality Law does not provide for product recalls directly, however it provides a statute of limitation for tort liabilities caused by defective products.

Article 45 of the Product Quality Law stipulates that:

The statute of limitation for the claim for compensation of damages caused by defects in the products will be two years calculated from the date on which the parties know that they suffer from such damages. The right to claim for damages caused by defective products will expire after 10 years from the date the defective products were delivered to the first consumer with the exception if the products are still within the safe use period as expressly indicated.

According to the above provision, the obligation of the manufacturers to assume the tort liability arising from defective products will expire after 10 years from the date the defective products are delivered to the first consumer. Or they will expire after the safe use period as expressly indicated on the product or its packaging. Therefore, it is likely that the standard the TLL will return to in defective product recalls will be very similar to the statute of limitation provision found in the Product Quality Law. In that, the obligation of manufacturers to recall the defective products will also expire after 10 years and the expressly indicated safe use period.

Statute of limitation under auto recall provisions

Article 7 of the auto recall provisions stipulates that:

The term for recall of the defective auto products, in case of assembly, shall be the safe use period as expressly indicated by the auto manufacturer from the date of delivery to the first owner of the vehicle. If the auto manufacturer fails to clarify the safe use period, or the safe use period is less than 10 years, the term shall be 10 years after the date when the seller delivers the auto product to the first owner of the vehicle. For the easily damaged parts of safety parts of the auto products, the expressly indicated use term shall be the term for recall; and the term for recall of the auto tire will be three years from the date of delivery to the first auto owner.

The statute of limitation of 10 years on the obligation to recall defective auto products under the auto recall provisions is consistent with the statute of limitation on tort liability under the Product Quality Law.

However, the auto recall provisions are much clearer and enforceable than those of the Product Quality Law and the TLL. It's worth noting that the statute of limitation to recall defective products is different based on the nature of the products, such as auto, food or drugs.

Punitive Damages

The punitive damage was first introduced into the legal system in the *PRC Protection of the Rights and Interests of Consumers Law (中华人民共和国消费者权益保护法)* in 1993, and was confirmed by the *PRC Contract Law (中华人民共和国合同法)* in 1999 and the interpretations related to commodity housing by the Supreme Court. The PRC Food Safety Law also provides punitive damages to the amount of 10 times the money paid by the consumer for foods that are not in compliance with food safety standards. The TLL provides punitive damages for defective products in the first instance the defect is discovered.

Punitive Damages under the TLL

Article 47 of the TLL stipulates that:

If the manufacturer or seller, knowing that the product has defects, manufactures or sells such defective products and the defective products cause death or serious damage to the health of another person, the victim shall be entitled to claim the corresponding punitive damages.

According to the above provisions, there are strict conditions to enforce the punitive damages in the TLL. Firstly, the punitive damages in the TLL will only apply to product liability cases rather than all tort liability cases because the legislature believes that product liability issues are prominent and urgent in practice. Secondly, a premise to apply punitive damages is if the defective products had caused death or serious damage to the health of a victim. Punitive damages will not apply to property damage torts. Thirdly, another premise for the application of punitive damages is if the manufacturer or seller knew that the product had defects.

Determination of punitive damages amount

The TLL does not clarify the amount of punitive damages, such as two or three times the actual losses incurred by the infringed person, and cedes the issue to the discretion of the court. Usually, the court will take into consideration the following factors: the motive of the tort activity, the lasting period of tort activity and the intention to hide the tort activity, the response of the infringer to the opinions of the consumer or social society, the financial status of the infringer, the infringer having been punished by administrative authority and/or criminal authority, the benefits the infringer obtained from the tort activity, the possibility of damages caused by product defects, the actual damages suffered by the infringed person, and the social influence of the case.

The amount of punitive damages may be a multiplication of the actual damages suffered by the infringed person, or a certain ratio or multiplication of the illegal benefits of the infringer. However, the amount should not be determined according to product price.

Burden of proof of intention

Generally, product liability is a strict liability and the defendant may prove that it has lawful defence. In this case, neither the plaintiff nor the defendant needs to prove whether the manufacturer or seller had ill intentions. However, when applying punitive damages, the defendant's intention to harm must be proven for the defendant to assume the liability of punitive damages. Accordingly, the plaintiff will bear the burden of proof to prove the defendant's intent.

The TLL does not clarify that either the plaintiff or the defendant should bear the burden of proof to prove "serious damage to health", which would need to be clarified by other laws, regulations or judicial interpretations.

Recourse claims under the TLL

Recourse claims between manufacturer and seller

The TLL additionally provides that the person who is caused harm by the defective product may claim damages against the manufacturer or seller. If the manufacturer has assumed the tort liability for the defective product but the defects are caused by the seller, the manufacturer has recourse claims against the seller, and accordingly, if the seller has assumed the tort liability for the defective product but the defects are caused by the manufacturer, the seller will have recourse claims against the manufacturer.

Recourse claims against a third party

The TLL further provides that if the product defects are the fault of a third party, such as a transporter or storage provider, and they cause damages to another person, the manufacturer and/or seller will have recourse claims against the third party after the manufacturer and/or seller has assumed tort liability for the defective product.

Burden of proof

Unlike the strict liability that the manufacturer and seller assume to the victim, the compensation liability of the third party to the manufacturer and seller is a type of liability for fault. This means that the third party will assume the liability only under the circumstances that it has been found to be at fault. Therefore, based on the burden of proof's fundamental doctrine of "whoever claims shall prove", the manufacturer and seller bear the burden of proof to prove that the products had no defects when delivered to the third party, and that the third party, such as the transporter or storage provider had the intention of causing defects or was negligent during the period of transportation or storage.

However, the people's court may collect related evidence by authority on a case-by-case basis, and may also designate a specialised institution to conduct an evaluation or appraisal research on the facts. These facts can be the cause of the product defects and the calculation of the damages caused by the defective

products.

Other issues under the TLL

Besides the product liability as mentioned above, there are many other important provisions in the TLL that need to be further discussed. For example, the new law has provisions of compensation for mental injury and the tort liability for damages caused by environmental pollution.

Compensation for mental injury

Article 22 of the TLL provides that the victim may claim for mental injury compensation if the victim suffers serious mental damage from the tort of personal interests. This is the first time that compensation for mental injury has been established at the law level in China.

The TLL also clarifies that the compensation for mental injury will be limited to the tort of personal interests, including life, health, reputation and privacy, but property torts will not be included. Additionally, the victim can claim compensation for mental damage only under the circumstance that the victim suffers serious mental damage, and the compensation for mental injury will not apply to insignificant mental damage. However, the definition of "serious mental damage" needs to be further clarified by judicial interpretation or determined on the case-by-case basis.

Tort liability for environmental pollution

The TLL provides that the polluter shall assume the tort liability for damage caused by environmental pollution. If there are disputes arising from this, the polluter shall bear the burden of proof to prove the legal defence of not taking liability or mitigating the liability, and proving there is no causation between its activity and the damage. The TLL further provides that the polluter has recourse claims against third parties if they cause environmental pollution.

Overall, the TLL offers us a full legal framework for tort law in China and comprehensively covers a range of liability aspects. There remain numerous vague provisions in the TLL, but it is expected that in time future judicial interpretations and rules of implementation will provide more clarity. Another ambiguity is how the new TLL will work with existing legislation that addresses tort liability, for example the Product Quality Law and Civil Law General Principles. It is unclear which regulations would prevail should conflicts arise between different laws, so it will be very interesting when this is tested in the future.

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