

If you have questions or would like additional information on the material covered in this Alert, please contact:

Mao Rong

Of Counsel, Beijing
+86 10 6535 9500
rmao@reedsmith.com

Michael H. Dardzinski

Of Counsel, Beijing
+86 10 6535 9530
mdardzinski@reedsmith.com

Joyce Sun

Consultant, Beijing
+86 10 6535 9547
jsun@reedsmith.com

Christopher Howse

Partner, Hong Kong
+1 852 2507 9888
chowse@rsrbhk.com

...or the Chair of the Life Sciences Health Industry Group,

Michael K. Brown

Partner, Los Angeles
+1 213 457 8018
mkbrown@reedsmith.com

China's New Tort Liability Law

I. Introduction

After nine years of drafting, discussion and debate, the long-awaited Tort Liability Law (the "Law") was passed on December 26, 2009 by the Standing Committee of the National People's Congress of China. The Law will take effect as of July 1, 2010. Prior to the passage of the Law, provisions on tort-related liabilities were covered in more than 40 different pieces of legislation, across a fairly wide spectrum of social and business regulation. The Law was drafted, in part, as an attempt to integrate these different tort-related rules, and provide a more solid basis for the development of tort law and practice in China. The Law, as drafted, provides normative guidance on issues ranging from product liability, environmental pollution, medical malpractice, to employee-related liabilities. We have provided below a brief summary of the Law's provisions on the following issues: (i) product liability (including a summary of provisions on remedies and punitive damages); (ii) environmental pollution; and (iii) medical-related damages.

II. Product Liability

A. Strict Liability for Manufacturer/Seller

The Law restates the general rule established under the Product Quality Law that the manufacturer is liable for personal or property damages caused by a defective product on a no-fault basis.^{1/}

Article 42 of the Law further provides for the seller's strict liability in cases where the seller is unable to identify the manufacturer or the supplier of the defective product. This addresses situations in which the seller is selling counterfeit and/or defective products of unknown origin, which also would constitute a violation of the Product Quality Law.^{2/}

The Law does not provide for any defenses for manufacturers or sellers; however, the Product Quality Law does. Pursuant to the Product Quality Law, manufacturers are not to be liable if (i) the products have not been put into circulation; (ii) the product defects do not exist at the time of circulation; or (iii) the defects cannot be found at the time of circulation due to scientific and technological limitations.^{3/} There is some debate in China at the moment with respect to the continued availability of these defenses given the lack of acknowledgement in the Law.

B. Remedies

The Law sets out the remedies permitted when a product is found to be defective. When a product is discovered to be defective after it has been put into circulation, the manufacturer and the seller must promptly issue warnings and recall the product, as necessary. If the manufacturer or the seller fails to undertake such actions in a timely manner, or the remedies are insufficient and damages occur, the manufacturer and the seller will be found liable.^{4/} Prior to the promulgation of the Law, defective product recall obligations were only applied to a limited number of products, including automotive products, toys, medicine and food. The Law expands the recall system to cover all products manufactured or sold in China.

The Law also allows consumers to bring actions to require corrective actions before any real harm has occurred. In situations where product defects endanger consumer personal or property safety, consumers are entitled to require that manufacturers and sellers eliminate the risk of harm.^{5/} Consumers do not have to demonstrate that they have already suffered actual harm as a result of product defects. However, the Law does not specify what kind of potential danger to personal or property safety may give consumers the right to request adoption of preventative measures.

The Law also does not define the term "defective." Article 46 of the Product Quality Law defines "defective products" as those products that may impose unreasonable danger and/or cause personal injury or property damage; in particular, if there are any applicable national or industry

standards for protection of health, personal and/or property safety, failure to comply with such standards would constitute “defective.”

C. Punitive Damages

Unlike most common law jurisdictions, punitive damages are generally not available in China. Prior to the promulgation of the Law, only the Consumer Rights Protection Law and the Food Safety Law referenced the idea of punitive damages (these laws actually used different legal terms when doing so). The Consumer Rights Protection Law sets out the concept of very limited “increased compensation” for consumers in cases of fraud, which is set at one time the purchase price of the disputed commodity or service.⁶⁷ The Food Safety Law, enacted after the melamine milk contamination incident in China, provides for a potential penalty of up to 10 times the purchase price of the food product in question.⁷⁷

The Law for the first time officially uses the term “punitive damages.” Punitive damages are applicable only when two conditions are satisfied: (i) the manufacturer or seller must know that a product is defective and they must continue to manufacture or sell the defective product, and (ii) the defective product must have caused death or serious injury.

The Law, however, does not set forth the standard or methodology used to calculate punitive damages. Damages are not capped or based on the price of the defective product. This issue may be clarified in a future Supreme People’s Court judicial interpretation.

III. Environmental Pollution

The Law establishes guidelines on liability for environmental pollution torts.⁸⁷ The provisions on burden of proof and joint liability are summarized below.

A. Burden of Proof

Pursuant to a 2001 judicial interpretation, the burden of proof in environmental pollution cases was shifted to the alleged polluters. In actual practice, courts in China require plaintiffs to present a *prima facie* case for causation, after which the alleged polluting defendant carries the burden to disprove the allegations. Article 66 of the Law stipulates that the polluter has the burden to demonstrate that it should not be found liable or that its liability should be mitigated.

B. Environmental Pollution by a Third Party

Article 68 of the Law states that the injured party may claim compensation either from the polluter or from a third party whose actions caused the environmental damage. The polluter may seek reimbursement from the third party after providing compensation to the injured party. For example, in the event that a third party steals petroleum by drilling a pipe and then fails to seal it, resulting in subsequent damage to the environment, the company that installed the pipe would be responsible for the damage and then could sue the third party to recover any losses. The provision holds a party responsible for damages it did not directly cause and increases the burden on a party to adopt adequate security measure to ensure that materials in their control are not improperly used.

IV. Medical Damages

The Law has a separate chapter addressing “medical damage liability,” which defines the liabilities of healthcare institutions and healthcare professionals for damages caused by them.⁹⁷

A. Presumption of Fault

In general, healthcare institutions and healthcare professionals are at fault if they fail to exercise reasonable care comparable with the then-prevailing medical standards. It is worth noting that healthcare institutions can be presumed to be “at fault” if they (i) violate laws, administrative regulations or relevant diagnostic and treatment practices; (ii) conceal or refuse to provide relevant medical records with respect to the disputes; or (iii) forge, falsify or destroy medical records.¹⁰⁷

B. Liability for Medical Product Defects

If a patient suffers damages caused by defective drugs, disinfectants, medical devices or transfusion of substandard blood, the patient may seek compensation either from the manufacturer or the blood-supplying institution, or from the relevant healthcare institution. Healthcare institutions, after paying compensation to the patient, are entitled to claim reimbursement from the manufacturer or blood-supplying institution.¹¹⁷

C. No Unnecessary Examination

Article 63 of the Law also provides that healthcare institutions and professionals shall not conduct any unnecessary examinations in violation of diagnostic and treatment practices. However, the Law does not define the term “unnecessary examination,” nor does it address the situation where a disputed examination may still be regarded as unnecessary after obtaining the patient or his/her family’s consent (in the event that the patient is not fully informed or is forced to give such consent). The Law also does not specify what kind of liability healthcare institutions or professionals may assume after conducting an unnecessary examination.

V. Observations

For manufacturers of medical products, drugs, devices, and diagnostics, as well as manufacturers of all types of construction, agricultural, building, and even high tech equipment, these new developments could establish higher or new exposure to liability in China. As many companies have learned throughout the world, careful attention to consumer or professional labeling, instructions, and warnings, along with monitoring and response to adverse events, are some of the tools to control that exposure. We would be pleased to assist you on related matters, and feel free to contact **Mao Rong**, **Michael Dardzinski** and **Joyce Sun** in Beijing, and **Christopher Howse** in Hong Kong.

- 1/ See Article 41 of the Law, and also see Article 41 of the Product Quality Law issued on February 22, 1993 and revised on July 8, 2000.
- 2/ Articles 27 and 33 of the Product Quality Law provide that the manufacturer shall put its name and address on the product or its package and provide a quality inspection certificate, while the seller shall verify the above information and certificate when accepting the product.
- 3/ See Article 41 of Product Quality Law.
- 4/ See Article 46 of the Law.
- 5/ See Article 45 of the Law.
- 6/ See Article 49 of the Consumer Rights Protection Law, issued by the Standing Committee of the National People’s Congress on October 31, 1993.
- 7/ See Article 84 and 85 of the Food Safety Law, issued by the Standing Committee of the National People’s Congress on February 28, 2009.
- 8/ See Chapter 8 of the Law.
- 9/ See Chapter 7 of the Law.
- 10/ See Article 58 of the Law.
- 11/ See Article 59 of the Law.

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