

# **Tort Reform with Chinese Characteristics: Towards a “Harmonious Society” in the People’s Republic of China**

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## I. INTRODUCTION

The safety and quality of products coming out of the People’s Republic of China (PRC or China) has been the object of significant attention in recent months. Analyses of the problem have tended to focus on three areas: immoral business practice by the producers, corrupt and ineffectual government oversight, and poor quality control and supply chain pricing pressure by American importers.<sup>1</sup> The role that China’s underdeveloped tort regime plays in fostering this and other similar problems is missing from the public discussion.

Chinese individuals know first-hand the risks of dangerous products and properties. Over 5,000 miners die every year in mining accidents.<sup>2</sup> Construction accidents are also common in China and have received significant public attention, in particular following the May 2008 earthquake in Sichuan.<sup>3</sup> Work accidents are estimated to claim 20,000

1. See e.g., David Armstrong & Sabine Muscat, *China Product Safety Concerns Have High Stakes, Far-Reaching Effects*, S.F. CHRON., Aug. 19, 2007, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/08/19/MNV1RKN0L.DTL>.

2. David Barboza, *105 Dead After Explosion in Chinese Mining Region*, N.Y. TIMES, Dec. 7, 2007, at A6, available at <http://www.nytimes.com/2007/12/07/world/asia/07mine.html>.

3. *China: School Collapses in Quake Due to Flaws*, CNN.com, Sept. 4, 2008, <http://edition.cnn.com/2008/WORLD/asiapcf/09/04/china.quake.schools.ap/index.html> (last visited Sept. 6, 2008); see also *Chinese Mall Collapses, Scores Feared Dead*, CNN.com, Dec. 2, 2000, <http://archives.cnn.com/2000/ASIANOW/east/12/02/china-collapse/index.html>.

lives and lead to 100,000 injuries each year in the PRC.<sup>4</sup> Statistics for injury or deaths due to dangerous products, traffic accidents, and medical accidents are not readily available, but there is little doubt that injuries and deaths are occurring.

With tort law historically underdeveloped in China, persons injured by dangerous products or situations have largely been unable to use the courts to demand compensation or safer products and properties. China has instead left safety in the hands of government agencies and private businesses. If any breakdown occurs in either, private persons suffer the consequences.

Fortunately, there are signs that nascent change may be occurring. In the last ten years, as Chinese citizens have shown an increased willingness to go to court when injured, China's legal leaders have responded with new rules that seem to encourage this trend. Between 2001 and 2004, a series of laws, regulations, judicial interpretations, and cases established expanded protections with respect to product liability, traffic accidents, workplace accidents, medical malpractice, emotional distress, and general personal injury tort doctrine. In addition, a draft Tort Law is working its way through the National People's Congress (China's legislature), which may be adopted in 2008.<sup>5</sup> Backed by various societal and political developments, China seems to be on the path towards establishing a more sophisticated tort compensation regime. This is a trend that this article will call "tort reform with Chinese characteristics."<sup>6</sup>

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4. Yang Shaorong, *Gong shang shi gu qin quan sun hai pei chang yu gong shang bao xian bu chang (pei chang) de jing he yu zhi du xuan ze* [Conflicts and Choices between Work Injury Tort Compensation and Work Injury Insurance Compensation], in REN SHEN SUN HAI PEI CHANG SI FA JIE SHI RUO GAN WEN TI SHI PING [ISSUES ON JUDICIAL INTERPRETATION OF PERSONAL INJURY COMPENSATION] 274, 274 (Wang Liming & Gong Pixiang eds., Ren min fa yuan chu ban she [People's Court Publishing] 2005).

5. George W. Conk, *A New Tort Code Emerges in China: An Introduction to the Discussion with a Translation of Chapter 8—Tort Liability, of the Official Discussion Draft of the Proposed Revised Civil Code of the People's Republic of China*, 30 FORDHAM INT'L L.J. 935, 935–99 (2007).

6. Under the economic reforms begun by Deng Xiaoping in 1978, the Chinese Communist Party has sought to build "socialism with Chinese characteristics." See *Socialism with Chinese Characteristics*, PEOPLE'S DAILY, Sept. 30, 2007, <http://english.peopledaily.com.cn/90002/92169/92211/6275043.html> (last visited Aug. 27, 2008); see also Deng Xiaoping, Building a Socialism with a Specifically Chinese Character, in 3 SELECTED WORKS OF DENG XIAOPING, 1982–1992 (The Bureau for Compilation and Translation of Works of Marx, Engels, Lenin and Stalin Under the Central Committee of the Communist Party of China trans., 1994), available at <http://english.peopledaily.com.cn/dengxp/vol3/text/c1220.html>. The reference is ironic because in fact, the reforms undertaken have been widely recognized to be capitalist in nature. "Tort reform with

This article presents an analysis of tort law in China specifically focusing on personal injury tort law. It provides a general background on the role of tort law in society, and then it analyzes the specific laws, regulations, and cases that form the personal injury tort regime, covering both historical and recent laws. The article then explores the forces in society and politics that seem to be behind the new legal rules. It concludes by drawing attention to several steps that may be taken as part of further reform.

## II. THE ROLE OF TORT LAW IN SOCIETY

### A. *The Economic and Social Function of Tort Law*

Americans live under the protective umbrella of tort law. In general, sidewalks are free from large holes, labels accurately describe food and medicine, and cars follow the basic rules of the road—a stark contrast from China. After many years of litigating personal injury, Americans take safety as a given. A safe society, however, did not develop out of thin air. Rather, the law required it to be so—specifically, the law of torts.

“Tort” literally means “wrong” in Latin. In Europe and America, tort rights permit a private person to obtain civil compensation from an individual who has wrongfully caused him or her injury. The right to be made whole dates back to pre-Biblical precepts and is one of the most basic forms of justice a legal system can provide.<sup>7</sup> A moral imperative, tort law represents our respect for and responsibility towards our fellow human being, as individuals and as a society.<sup>8</sup>

Tort law has also been recognized as playing an important role in a modern economy. The threat of money damages uses economic incentives to deter dangerous conduct or situations. A safer environment increases a society’s efficiency by minimizing injuries, health care costs, lost labor time, and damage to property.<sup>9</sup> When tort law works properly, and is supported by the economics of a functioning insurance system, landlords repair sidewalks, restaurants monitor the temperature of their

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Chinese characteristics” suggests, with similar irony, that tort reform should be understood in the Chinese context to be an expansion of tort protections, whereas in the United States it is understood to be a roll-back of tort law protections.

7. See Nelson P. Miller, *Seven Conceptual and Historical Errors in Tort Law*, 40 TORT TRIAL & INS. PRAC. L.J. 59, 60–62 (2004).

8. The precept “Do not do unto others as you would not have them do unto you” undergirds both Western and Chinese morality. See, e.g., THE ANALECTS OF CONFUCIUS 77 (Simon Leys trans., 1997).

9. For a discussion of the deterrence utility of tort law, please see Gary Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

coffee, contractors build safe buildings, and drivers follow the rules of the road. These are just a few examples of tort law's impact.

### B. "Tort Reform"

Tort law developed in the West over several hundred years, with its most rapid growth occurring during the period of industrialization in the late 19th and early 20th centuries.<sup>10</sup> Although advocates of "tort reform" in the United States have argued in the last twenty years that the system has become costly and burdensome, a short trip into a world without these protections reveals the genuine value they contribute to America's economy and society.<sup>11</sup>

Let us imagine a world without the incentives of tort law. When competition, greed, and carelessness lead to accidents, and the injured do not have rights to sue, they must rely on whatever mediation or grievance procedures are supplied by political and administrative authorities. If the authorities choose not to act, then the injured individual is left with no power to remedy his or her harm, except perhaps to beg for charity from the wrongdoer. In China, a number of criminal and administrative regulations deal with personal injury, including product liability and mine safety.<sup>12</sup> Enforcement, however, has been hampered by local protectionism and corruption.<sup>13</sup> In particular, local government officials tend to favor industry over other priorities because their superiors evaluate them for promotion principally based on economic growth statistics.<sup>14</sup> In addition, officials are often financially interested in local industry.<sup>15</sup> This systemic corruption has resulted in dysfunctional local

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10. See generally G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (expanded ed. 2003).

11. For a discussion on U.S. tort reform, see, for example, John C.P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL'Y 3, 3–16 (2004); Carl T. Bogus, *Fear-Mongering Torts and the Exaggerated Death of Diving*, 28 HARV. J.L. & PUB. POL'Y 17, 17–37 (2004); see also JAY FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 19–48 (2004).

12. See discussion on Product Quality Law and Production Safety Law *infra*.

13. See Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 395–96 (2000).

14. See Minxin Pei, "*Made in China*" Label Won't Survive Without Rule of Law, GLOBAL VIEWPOINT, June 14, 2007, available at [http://www.digitalnpq.org/articles/global/192/07-16-2007/minxin\\_pei](http://www.digitalnpq.org/articles/global/192/07-16-2007/minxin_pei) (last visited Sept. 7, 2008).

15. See, e.g., Edward Cody, *Chinese Raise Outcry Over Local Officials' Perpetual Corruption*, WASH. POST, June 22, 2007, at A16, available at <http://www.washingtonpost.com>

governance.<sup>16</sup> In many cases in China, local government will not be favorably disposed to the injured victim.

A tort regime is structurally less susceptible to these problems. The injured individual decides whether or not to bring a case, thus eliminating the opportunity for political and administrative authorities to quash the matter even before a case starts. Judicial systems are, for structural reasons, better equipped to contain corruption. Whereas political administrative enforcement generally operates with a wide degree of largely unreviewable discretion, judicial decision-making contains certain internal safeguards, such as an evidentiary record that can be reviewed on appeal, that make it easier for the system to identify and limit errors, including corruption. The factors behind Tort Reform with Chinese Characteristics is discussed later in this article, but the fact that China seems to be moving away from purely criminal and administrative prevention of dangerous situations towards private disposition in courts is a positive development—quite to the contrary of what advocates of tort reform in the West would have many believe.

First, however, China needs to put in place a complete tort law regime, the substance of which we now turn to consider.

### III. THE EVOLUTION OF TORT LAW IN CHINA

#### *A. Early Tort Law in China*

##### *1. The General Principles of Civil Law*

The first PRC laws to spell out a legal obligation to compensate another for an injury were the General Principles of Civil Law (the General Principles).<sup>17</sup> When they were passed by the National People's Congress in 1986, the General Principles were meant to be an overall framework for more specific laws to be adopted subsequently. The adoption of subsequent laws did not promptly come to pass, and the General Principles are still the basis of tort law in China today.<sup>18</sup>

The General Principles' provisions on personal injury tort liability are limited and tend to be very general. The principal article establishing liability simply states, “[c]itizens and legal persons who through their

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post.com/wp-dyn/content/article/2007/06/21/AR2007062102464.html (last visited Aug. 20, 2008).

16. MINXIN PEI, BEIJING DRAMA: CHINA'S GOVERNANCE CRISIS AND BUSH'S NEW CHALLENGE 4 (Carnegie Endowment for Int'l Peace, Policy Brief No. 21, 2002), available at <http://www.carnegieendowment.org/files/Policybrief21.pdf> (last visited Aug. 27, 2008).

17. YANG LIXIN, QIN QUAN FA LUN [TORT LAW] 6–7 (2004).

18. *Id.*

fault encroach upon state or collective property, or the property or person of another people shall bear civil liability. Civil liability shall be borne even in the absence of fault, if the law so stipulates.<sup>19</sup> Standards for fault and causation are not provided. The joint liability provision states, without further explanation, “[i]f two or more persons jointly infringe upon another person’s rights and cause him damages, they shall bear joint liability.”<sup>20</sup> The comparative negligence article is equally barebones, stating, “[i]f a victim is also at fault for causing the damage, the civil liability of the infringer may be reduced.”<sup>21</sup>

Although the General Principles set forth the basic principles of tort law—including clauses on defenses, product liability, construction accidents, and more—without further clarification the provisions provide only rough guidance to China’s courts on how to handle a personal injury tort case.<sup>22</sup> Courts are not structurally set up to develop law through case precedent because the PRC is a civil law country. The absence of sufficiently detailed positive law thus impedes the uniform application of such law, and in China, the very application of the law itself. (This is discussed below in Part B.)

The General Principles also include a provision known as Equitable Liability.<sup>23</sup> Originally from Soviet law, Equitable Liability allows the court to order a party to pay even though they are not found to be at fault or strictly liable.<sup>24</sup> The principle, unfamiliar to Western lawyers, continues to be important in Chinese tort law.

The General Principles were supposed to be followed by a more complete civil code, but that did not happen. Instead, in 1988 the Supreme People’s Court adopted a judicial interpretation of the General Principles known as the Opinion on the General Principles of Civil Law (the Opinion), which was reportedly drawn from a proposed draft Civil Code.<sup>25</sup> The Opinion is nearly as wide-ranging as the General Principles are, covering

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19. General Principles of the Civil Law (promulgated by the Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 106, *translated in LAWINFOCHINA* (last visited Aug. 20, 2008) (P.R.C.) [hereinafter General Principles].

20. *Id.* art. 130.

21. *Id.* art. 131.

22. *Id.* arts. 122, 125, 128.

23. *Id.* art. 132.

24. Bai Shuo, *Gong ping ze ren yuan ze yan jiu* [Research into the Equitable Liability Principle], QIN QUAN FA PING LUN [TORT L. REV.], 2004 No. 3, at 39.

25. William C. Jones, *The Significance of the Opinion of the Supreme People’s Court for Civil Law in China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 97, 100 (Pitman B. Potter ed., 1994).

everything from civil capacity to creditor rights.<sup>26</sup> The provisions relating to torts touch on a miscellany of issues. One provision makes a beneficiary of aid liable for an injury to the person helping him or her.<sup>27</sup> Another clarifies that the State is liable for the actions of its employees.<sup>28</sup> Product liability provisions declare that privity of contract is not required to recover against the manufacturer.<sup>29</sup> Several articles clarify who bears liability when minors or those without civil capacity commit torts.<sup>30</sup> The Opinion also narrows equitable liability, limiting it to: (i) when the harmed party was acting in the interests of the other party, (ii) when the harmed person was injured during a rescue attempt (can recover from beneficiary, but not the rescuer), or (iii) perhaps in the spirit of *res ipsa loquitur*, when piled materials fall.<sup>31</sup> Significantly, the Opinion makes court orders available to stop a tort or eliminate a known danger.<sup>32</sup> Although the Opinion provides additional detail that the General Principles lack, many important tort areas are still left uncovered in PRC law.

## *2. The Product Quality Law and the Consumer Rights and Interests Law*

One of the first laws to significantly address tort rights in China is the Product Quality Law. Adopted in 1993, it provides a codified framework for the administrative, contract, and tort regulation of products. The law establishes administrative oversight of manufacturing and mandates quality testing, inspections, and labeling standards.<sup>33</sup> The law also establishes contract rights whereby sellers must repair, replace, or compensate buyers when products they sell fail to meet warranties for general or specific use.<sup>34</sup>

The sections relating to tort rights are by no means insignificant.<sup>35</sup> First, the law declares that product manufacturers are strictly liable for

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26. Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law (for Trial Implementation) (promulgated by the Sup. People's Ct., Jan. 26, 1988, effective Jan. 26, 1988), *translated in* LAWINFOCHINA (last visited Aug. 20, 2008) (P.R.C.).

27. *Id.* art. 142.

28. *Id.* art. 152.

29. *Id.* art. 153.

30. *Id.* arts. 148, 158–61.

31. *Id.* arts. 155–157.

32. *Id.* arts. 154, 162.

33. Product Quality Law (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 22, 1993, effective Sept. 1, 1993), arts. 7–49, *translated in* LAWINFOCHINA (last visited Aug. 21, 2008) (P.R.C.).

34. *Id.* art. 28.

35. See generally Li Han, *The Product Quality Law in China: A Proper Balance Between Consumers and Producers?*, 6 J. CHINESE & COMP. L. 1 (2003).

damages due to defects, unless the manufacturer can prove: (i) the product was not in circulation, (ii) the defect was not in the product when put into circulation, or (iii) the defects could not have been known at the time of circulation for scientific and technical reasons.<sup>36</sup> Defects are defined as “irrational dangers existing in products that threaten the safety of person or property, or products that do not conform to the standards set by the State or the specific trade, if there is any.”<sup>37</sup> Sellers are only responsible for defects they cause and can seek indemnity against manufacturers for any compensation they have to pay, and vice versa.<sup>38</sup>

The Product Quality Law makes compensation available for a range of expenses related to the injury.<sup>39</sup> The statute of limitations is two years from discovery of the harm, but unless specific warranties extend the period, a party cannot recover if the product has been in circulation for more than ten years.<sup>40</sup> The law also encourages mediation and declares arbitration clauses in a contract to be binding.<sup>41</sup>

The Product Quality Law is more thorough and detailed than the General Principles. However, the law does not give injured parties unfettered access to the courts. Instead, it shields manufacturers from products liability litigation by requiring the enforcement of arbitration clauses without regard to whether they were contracts of adhesion or were otherwise unfair. As a product of relatively early legal reform in the PRC, the law still permits only limited use of courts.

Eight months after passing the Product Quality Law, the National People’s Congress again addressed product liability in the Consumer Rights and Interests Protection Law. The law confirmed some of the rights set forth in the Product Quality Law but went beyond it in making any business entity that sells or provides use of a product or service liable to a consumer who purchases or uses it and suffers injury.<sup>42</sup> For example, if one improperly uses another’s business license and causes injury, the injured can seek recovery against the business license

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36. Product Quality Law, *supra* note 33, art. 29.

37. *Id.* art. 34.

38. *Id.* arts. 30, 31.

39. *Id.* art. 32.

40. *Id.* art. 33.

41. *Id.* art. 35.

42. Law on the Protection of the Rights and Interests of Consumers (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), arts. 35–36, 40, *translated in* LAWINFOCHINA (last visited Aug. 27, 2008) (P.R.C.).

lender.<sup>43</sup> For another example, if the injury-causing business entity is located at a stall within a market or a traveling exhibition and is no longer available, the injured party can seek recovery against the stall rental operator.<sup>44</sup> False advertising is also permitted to give rise to liability under the law.<sup>45</sup> Furthermore, any of the following can give rise to liability for defective products: failure to meet intended use, failure to meet product standards, failure to meet representations, failure to meet promised quantity, service or fees contrary to contract, or improperly refusing or delaying to fix, exchange or accept return. The consumer can demand the remedies of return, exchange, repair, or compensation. If the tortious action results in bodily injury, the business entity can be held liable for medical costs, disability, funeral costs, and survivor support. A wide-ranging law, the Consumer Rights Law still forms an important part of present PRC tort law and, as can be seen from the cases discussed below, works hand-in-hand with the revised Product Quality Law.

The General Principles, the Opinion, the Product Quality Law, and the Consumer Rights and Interests Protection Law are the first generation of Chinese tort law. Their legal rules are broadly written and their doctrinal coverage is often incomplete. Where the government established a more detailed regime, as under the Product Quality Law, it still appears hesitant to invite litigation.

#### *B. New Tort Laws Adopted Between 2000 and 2004*

Between 2000 and 2004, the National People's Congress, the State Council, and the Supreme People's Court issued a range of new laws, rules, and case examples relating to personal injury tort law. Together, these new laws may be able to provide a framework for a genuine tort compensation system in China. They give more extensive guidance to the courts than the previous laws and display a more favorable attitude towards private court actions. It may even be possible to interpret a nascent interest in using litigation to complement regulation in deterring dangerous behavior. If they are supported and enforced by PRC courts, the new rules should encourage people to behave more responsibly and to take care not to harm their fellow human beings when they act.

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43. *Id.* art. 37.

44. *Id.* art. 38.

45. *Id.* art. 39.

## 1. Laws

### a. *The Revised Product Quality Law*

In 2000, the National People's Congress returned to the problem of dangerous products when it revised the Product Quality Law. Amendments principally focused on reducing corruption.<sup>46</sup> For example, the revised law now prohibits government agencies that enforce product quality regulations from also engaging in the business of manufacturing and selling products.<sup>47</sup> However, the revised law displays some faith in courts to effectuate product quality enforcement. In particular, the law declares “public organizations or public intermediary organizations [that] make promises or warranties concerning the quality of a product” to be liable for harms caused by the product.<sup>48</sup> Although a “public organization or public intermediary organization” is not specifically defined, they are likely to include industry associations, trade unions, public membership associations, and possibly even local government authorities. The law also does not clarify to what extent these organizations can be held liable for the entire harm caused by the product. Nevertheless, if applied broadly, the provision represents a significant expansion of tort deterrence, especially given the public nature of the new potential defendants.

### b. *The Production Safety Law*

The process of industrialization in China, as elsewhere, leads to industrial accidents. The problem has come under increasing attention in recent years because reforms in the media during the late 1990s led to more coverage of “bad news” inside China.<sup>49</sup> In 2002, the National People's Congress passed the Production Safety Law. The law covers business inspection and reporting requirements as well as directions and limitations on how the local government agencies inspect and issue permits. However, the law also includes rights for employees. Article 48 entitles employees to “claim compensation[s] against the entity concerned

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46. Product Quality Law (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 2000, effective Sept. 1, 2000), arts. 3, 9–11, 16–25, 56–72, *translated in LAWINFOCHINA* (last visited Aug. 21, 2008) (P.R.C.) [hereinafter Product Quality Law Revision].

47. *Id.* art. 25.

48. *Id.* art. 58.

49. Benjamin Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 27, 68 (2005).

if . . . they have the [legal] right to do so . . . .”<sup>50</sup> This would seem to reinforce the use of tort rights that already exist under the General Principles or elsewhere. The law also prohibits employers from using exculpatory clauses to limit their liability for injuries to employees.<sup>51</sup> In addition, a party hiring a subcontractor is made jointly liable with the subcontractor for injuries to an employee of the subcontractor.<sup>52</sup> Furthermore, the law brings tort pressure to bear on local governments by holding that if they issue “empty” permits (i.e., permits where the permitting party does not meet the regulatory standard) and employees are subsequently injured, the local government can also be held liable for those injuries.<sup>53</sup> Although the focus of the law is administrative enforcement, it also includes several court-based provisions that further expand tort rights.

### c. The Road Traffic Safety Law

In 2003, the National People’s Congress dealt with one of the modern world’s most common causes of personal injury, the automobile. The Road Traffic Safety Law, combined with its accompanying implementing regulations, fully replaces administrative regulations adopted in 1991.<sup>54</sup> The new law covers everything from vehicle license requirements to highway maintenance standards for local governments.

One part of the law sets out the management of disputes following traffic accidents. The law clarifies what had been a significant point of disagreement by establishing liability for traffic accidents generally based upon fault.<sup>55</sup> More complicated rules arise, however, if nonmotor vehicles or pedestrians are involved. In those cases, a presumption arises that the motor vehicle driver was negligent, which can be overcome if the nonmotor vehicle party is found to have violated the

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50. Production Safety Law (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2002, effective Nov. 1, 2002), art. 48, *translated in* LAWINFOCHINA (last visited Aug. 27, 2008) (P.R.C.).

51. *Id.* arts. 44, 89.

52. *Id.* art. 86.

53. *Id.* art. 79.

54. Road Traffic Safety Law (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2003, effective May 1, 2004), *translated in* LAWINFOCHINA (last visited Aug. 21, 2008) (P.R.C.); Dao lu jiao tong an quan fa shi shi tiao li [Regulation on the Implementation of the Law on Road Traffic Safety] (promulgated by the St. Council, Apr. 30, 2004, effective May 1, 2004), art. 115, *translated in* LAWINFOCHINA (last visited Aug. 27, 2008) (P.R.C.).

55. Road Traffic Safety Law, *supra* note 54, art. 76. This had been a significant point of contention, with some arguing that strict liability for hazardous activities applied under General Principles art. 123. See Wang Mou su Zhongtie Sui dao ji tuan yi chu you xian gong si, jiao tong shi gu qin quan sun hai pei chang jiu fen an [Wang v. Zhongtie Tunnel Group Co. Ltd.] (2000), *reprinted in* YANG LIXIN, QIN QUAN XING WEI FA AN LIE JIAO CHENG [TORT LAW CASEBOOK] 165–66 (2003).

traffic laws and the accident occurred even though the motor vehicle attempted to avoid the accident. These are significant clarifications in PRC tort doctrine.

The Road Traffic Safety Law also establishes a multistep dispute resolution process. First, the parties must attempt mediation through the local Public Security Bureau's traffic department. If the parties cannot reach a solution, the law provides that they may take the case to court.<sup>56</sup> This result is important because it was hardly a foregone conclusion. With automobile ownership in China rapidly increasing, the number of accidents and disputes will also increase. By choosing to allow cases to proceed beyond administrative mediation, the Chinese leadership is displaying a decided acceptance for increased tort litigation.<sup>57</sup>

Equally important is the fact that the law also mandates that drivers carry insurance.<sup>58</sup> In an interesting innovation, the law creates a traffic accident assistance fund to cover situations where the tortfeasor cannot cover the difference between insurance payout and their liability.

## 2. *Regulations*

In 2002 and 2004, the State Council adopted two important regulations relating to personal injury torts—the Medical Accident Regulation and the Work Injury Regulation. Each was given application in relevant court cases through judicial interpretations issued by the Supreme People's Court.<sup>59</sup>

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56. Road Traffic Safety Law, *supra* note 54, art. 74.

57. Many thanks to Professor David Jung of U.C. Hastings College of the Law for suggesting this line of argument.

58. Road Traffic Safety Law, *supra* note 54, art. 17.

59. Zui gao ren min fa yuan guan yu can yu “Yi liao shi gu chu li tiao li” shen li yi liao jiu fen min shi an jian de tong zhi [Notice of the Supreme People's Court on Trying Civil Cases on Medical Disputes by Referring to the “Regulation on Handling Medical Malpractices”] (promulgated by the Sup. People's Ct., Jan. 6, 2003, effective Jan. 6, 2003), *translated in LAWINFOCHINA* (last visited Aug. 27, 2008) (P.R.C.); Zui gao ren min fa yuan guan yu shen li ren shen sun hai pei chang an jian shi yong fa lu ruo gan wen ti de jie shi [Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury] (promulgated by the Sup. People's Ct., Dec. 4, 2003, effective May 1, 2004), art.12, *translated in LAWINFOCHINA* (last visited Aug. 27, 2008) (P.R.C.) [hereinafter Personal Injury Interpretation].

Note, the State Council is China's cabinet of administrative agencies led by the Premier. It has the power to adopt regulations within areas of its ministries' functional authority. The Supreme People's Court can make regulations effective in civil cases through its power of judicial interpretation, although the appropriateness of that power

*a. Regulation on the Handling Medical Accidents  
(the “Medical Accident Regulation”)*

As China’s first State Council-level regulation on handling medical accidents, the Medical Accident Regulation of 2002<sup>60</sup> is a significant piece of Tort Reform with Chinese Characteristics. Like other tort reform laws and regulations, it generally expands liability and keeps opportunities open for court recovery, but not without certain limits.<sup>61</sup>

Under the new regulation, if “medical malpractice” occurs, the injured may recover from the medical provider, including the hospital and the doctor.<sup>62</sup> However, the Regulation is careful not to open liability too far because hospitals are generally state entities and doctors are considered state employees. The new regulation defines medical malpractice as any medical treatment that causes “personal injury.” Recovery is only permitted, however, if the injury was “obvious” and not latent.<sup>63</sup> The Regulation specifically excludes a number of situations from coverage: injuries resulting from emergency medical procedures taken to save the patient, any treatment of an unusual illness, consequences “that cannot be predicted or prevented by existing technical or medical conditions,” infections caused by “faultless blood transfusions,” consequences caused by patient delay in seeking treatment, and consequences caused by “force majeure.”<sup>64</sup>

The Regulation establishes special investigation and dispute resolution procedures. When a medical accident occurs, the Regulation charges the local health department with investigating, but an independent panel of outside experts determines the technical questions involved.<sup>65</sup> Once the investigation is complete, the Regulation directs the health department to attempt to mediate a resolution between parties.<sup>66</sup> However, the parties may go to court if the mediation is unsuccessful.<sup>67</sup>

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has been questioned before. See generally Li Wei, *Judicial Interpretation in China*, 5 WILLAMETTE J. INT’L L. & DISPUTE RESOLUTION 87 (1997).

60. Regulation on the Handling of Medical Accidents (promulgated by the St. Council, Apr. 4, 2002, effective Sept. 1, 2002), translated in LAWINFOCHINA (last visited Aug. 21, 2008) (P.R.C.) [hereinafter Medical Accident Regulation].

61. See Yang Lixin & Kai Xueshi, *Lun mei guo yi liao sun hai pei chang xhi du gai ge ji qi jie jian yi yi* [Discussing American Medical Malpractice Reform and its Significance as a Reference], QIN QUAN FA PING LUN [TORT L. REV.], 2003 No. 2, at 150, 150. For a comparison with the older “Methods on Handling Medical Accidents,” see Hong Liping, *Yi liao shi gu de jie ding ji xiang guan wen ti tan xi* [An Analysis of Defining Medical Malpractice and the Related Issues], 2 FA XUE [LAW SCIENCE MONTHLY] 75, 75 (2003).

62. Medical Accident Regulation, *supra* note 60, art. 46.

63. *Id.* arts. 2, 4.

64. *Id.* art. 33.

65. *Id.* arts. 20–22, 23, 27, 35–36.

66. *Id.* arts. 37–48.

67. *Id.* art. 46.

The Regulation continues the general trend toward clarifying the law and expanding rights. Although it carves out certain situations from the definition of medical malpractice, it increases opportunities to recover for injuries wrongfully suffered during medical procedures.

### *b. The Work Injury Insurance Regulation*

A critical part of a personal injury tort system is the means to compensate employees for injuries on the job. China's 1994 Labor Law formally required employers to ensure the safety of their workers on the job. In 1996, further provisional regulations created a work injury insurance program.<sup>68</sup> However, detailed rules for the handling of work injury cases did not come out until the State Council adopted the Work Injury Insurance Regulation in 2003.<sup>69</sup>

The Regulation provides a framework for compensation and support after a work accident and mandates employers participate in a nationwide no-fault insurance system.<sup>70</sup> It establishes reporting rules, defines rules regarding ability to work, and provides a baseline for treatment, time-off, and compensation of the injured.<sup>71</sup> Should a "work injury" as defined in the regulation occur, the employee has a right to receive compensation through the insurance scheme. Parties may arbitrate disputes over these provisions under the Labor Law, which provides that if arbitration is not satisfactory, recourse through the court is allowed.<sup>72</sup>

Work injury compensation schemes inherently seek to replace the complication and expense of employer-employee litigation with the simplicity of insurance-based recovery. This article includes them in the Discussion because such schemes are targeted directly at reducing personal injury, which is the principal concern of tort laws. The Regulation represents the same concerns by the PRC government that

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68. See *Qi ye zhi gong gong shang bao xian shi xing ban fa* [Provisional Measures on Enterprise Employee Work Injury Insurance] (promulgated by the Ministry of Labor, Aug. 12, 1996, effective Oct. 1, 1996) (P.R.C.).

69. *Gong shang bao xian tiao lie* [Work Injury Insurance Regulation] (promulgated by the St. Council, Apr. 27, 2003, effective Jan. 1, 2004), translated in *LAWINFOCHINA* (last visited Aug. 27, 2008) (P.R.C.); Personal Injury Interpretation, *supra* note 60, art. 11.

70. Work Injury Insurance Regulation, *supra* note 69, art. 2.

71. See generally *id.*

72. Labor Law (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), art. 79, translated in *LAWINFOCHINA* (last visited Aug. 27, 2008) (P.R.C.).

led to the expansion of other tort rights. Moreover, the Regulation permits recourse through the court if a dispute over compensation arises. This further suggests that the PRC authorities are increasingly comfortable with increased amounts of litigation.

### 3. Court Directives

Because China uses a civil law system, courts in China do not play the role in developing law that they do in the United States and other common law countries.<sup>73</sup> However, the Supreme People's Court has displayed considerable ability in establishing legal rules through its power of judicial interpretation.<sup>74</sup> The court also uses its bureaucratic circular, the Supreme People's Court Gazette,<sup>75</sup> to direct the lower courts. Over the course of a year, the Gazette usually publishes forty to fifty lower court cases, each of which has been edited by the Supreme People's Court.<sup>76</sup> Finally, the Supreme People's Court can exert influence through external programs, such as through support for and participation in legal education and academic endeavors. Through these means, the Court has played a central role in Tort Reform with Chinese Characteristics. Specifically, it promulgated two important judicial interpretations on tort doctrine, published several cases on torts in the Supreme People's Court Gazette, and supported a new academic review solely dedicated to tort law.

#### a. *The Interpretation on Problems Regarding Ascertainment of Compensation Liability for Emotional Damages in Civil Torts (the "Interpretation on Emotional Distress")*

Promulgated in 2001, the Interpretation on Emotional Distress permits an individual to recover in PRC courts for emotional distress, principally

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73. There are four levels of courts in China that each serve defined geographical areas. Basic courts generally serve small urban or rural districts. Intermediate courts generally serve a city. High courts serve a province. The Supreme People's Court is national in scope. The nature of the case and the amount in controversy determine which level of court will have original jurisdiction. Civil Procedure Law (promulgated by the Nat'l People's Cong., Oct. 28, 2007, effective Aug. 11, 2008), arts. 18–39, translated in LAWINFOCHINA (last visited Aug. 27, 2008) (P.R.C.); see also DANIEL CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL (West 2003).

74. Wei, *supra* note 59, at 92–93.

75. STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 284–85 (2001).

76. Author's estimate of number of cases from a review of the China Law Yearbooks. A compilation of the Gazette cases appears in the annual China Law Yearbook to which for convenience reasons this article primarily cites.

when it occurs in connection with another tort.<sup>77</sup> Recovery may also be had for a number of stand-alone emotional distress torts: the separation of a parent from child, suffering due to the death of a close relative, insult to the deceased, violating the deceased's privacy, the illegal use or damage to a corpse, and harm to a "special memento of personal significance."<sup>78</sup> Although brief, this judicial interpretation is important because it makes recovery available for an entirely new type of injury.<sup>79</sup>

*b. The Judicial Interpretation on Personal Injury Compensation  
(the "Personal Injury Interpretation")*

Promulgated in 2003, the Personal Injury Interpretation forms the most comprehensive update of China's personal injury laws since the Opinion.<sup>80</sup> The Personal Injury Interpretation, which is important enough in China to give rise to conferences and books, clarifies important areas of personal injury law and expands areas of recovery.<sup>81</sup>

The Personal Injury Interpretation covers a wide range of doctrinal topics, including comparative negligence, joint and several liability, strict liability for dangerous activities, joinder of necessary parties, and damages. Most provisions provide guidance in areas the General Principles left vague. For example, on comparative negligence the General Principles stated: "where a victim is negligent, the liability of the tortfeasor may be reduced."<sup>82</sup> The Personal Injury Interpretation is clearer and more in line with Western tort doctrine: "the plaintiff's own negligence will reduce the defendant's liability unless the defendant acted intentionally or was grossly negligent."<sup>83</sup> Similar clarification takes place, for example,

77. Interpretation of the Supreme People's Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts (promulgated by the Sup. People's Ct., Mar. 8, 2001, effective Mar. 10, 2001), arts. 1, 8, *translated in* LAWINFOCHINA (last visited Aug. 21, 2008) (P.R.C.) [hereinafter Interpretation on Emotional Damages].

78. *Id.* arts. 2–4.

79. See YANG, *supra* note 17, at 703.

80. See generally Personal Injury Interpretation, *supra* note 59, arts. 1–36.

81. See, e.g., REN SHEN SUN HAI PEI CHANG SI FA JIE SHI RUO GAN WEN TI SHI PING [ISSUES ON JUDICIAL INTERPRETATION OF PERSONAL INJURY COMPENSATION] (Wang Liming & Gong Pixiang eds., Ren min fa yuan chu ban she [People's Court Publishing] 2005).

82. General Principles, *supra* note 19, art. 131.

83. Personal Injury Interpretation, *supra* note 59, art. 2. Also, if the plaintiff was grossly negligent, that will reduce liability as well in cases where the defendant acted with gross negligence or possibly even intention.

for joint and several liability<sup>84</sup> and damages.<sup>85</sup> These are precisely the kind of clarifications courts need to handle increased tort litigation. Although damages are generally beyond the scope of this article, it is worth noting that the Personal Injury Interpretation significantly raises the amount for damages for death and injuries, which suggests not only that China's standard of living is rising but also that the leadership takes seriously individuals' rights to secure genuine recovery in court.

In addition to clarifying basic doctrine, the Personal Injury Interpretation breaks new ground in several areas. First, it expands vicarious liability, especially against employers. Article 9 creates basic respondent superior liability, making employers liable for the torts their employees committed in the normal scope of their employment duties, including in some cases torts committed intentionally or with gross negligence. While employers may seek indemnity from the employee, an intentional act or gross negligence by the employee will not absolve the employer from potential liability to the injured party. Article 10 provides that one is not liable for the torts of an independent contractor but specifically notes that any negligence by the hiring party may result in liability.

The Personal Injury Interpretation also establishes vicarious liability in three other relationships as well. Clients are now vicariously liable for the torts of their lawyer-agent.<sup>86</sup> If one provides labor services gratuitously, the aided party is vicariously liable for any injuries to the volunteer or to others committed during the provision of aid.<sup>87</sup> Also, when one suffers injury in the course of "maintaining the legitimate rights and interests of the state, collectivity or any other person" and there is no other means of securing compensation, the benefited party may be required to pay supplementary compensation up to the amount of the benefit received.<sup>88</sup>

The Personal Injury Interpretation also breaks new ground with provisions dedicated to specific situations, in particular security at public

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84. Here, the General Principles are particularly unhelpful. Article 130 states that "[i]f two or more persons jointly infringe upon another person's rights and cause him damage, they shall bear joint liability." The new Judicial Interpretation is more specific. Article 3 states that when two tortfeasors act with "joint intent" or "joint negligence" or their acts "directly combine to result in the same injury," joint and several liability attaches. Where several acts only "indirectly combine," defendants are liable only to "the extent of their fault." Article 4 provides that if two persons jointly endanger another who is injured, there is a presumption of liability rebuttable by a defendant proving he did not cause the injury. Similarly, under article 5, the joinder of all joint tortfeasors is mandatory, dismissal of all tortfeasors is mandatory if the plaintiff dismisses any, and equal liability is the default rule for cases where liability is difficult to determine.

85. See Personal Injury Interpretation, *supra* note 59, arts. 17–35.

86. Personal Injury Interpretation, *supra* note 59, art. 8.

87. *Id.* arts. 13, 14.

88. *Id.* art. 15.

accommodations, school safety, and construction. Article 6 parallels the *Shanghai Galaxy* case discussed below in establishing that persons injured at a hotel, catering, or other entertainment business may recover from the establishment for breaches of a newly established duty of security.<sup>89</sup> Article 7 provides that students injured at school may recover from the educational institution for any negligence that caused the injury.<sup>90</sup> Article 16 provides that those injured due to problems with roads, bridges, tunnels, buildings, trees, or piled-up articles may recover against the designer, constructor, and owner.<sup>91</sup>

These provisions suggest an attempt to use tort law to effect behavior change in the relevant situations. In the past, China's leadership may have handled these problems by issuing administrative orders and publicly punishing the officials responsible. Crime at public accommodations and accidents at school and construction sites, however, are problems that may be difficult to address through administrative measures alone. The adoption of the Personal Injury Interpretation suggests a willingness by the PRC authorities to use lawsuits to deter such dangerous conduct. This truly is Tort Reform with Chinese Characteristics.

### c. Cases

The Supreme People's Court rarely publishes cases dealing with personal injury tort law.<sup>92</sup> However, in 2002 and 2003 the Court published five important cases on personal injury. Although this still represented only a small fraction of the forty or so cases published by the court in those years, the publication of any tort case nevertheless signals new interest by the judicial leadership in personal injury tort matters. The cases generally focus on gaps in the law, in particular liability for injuries caused by third parties, public accommodation liability, equitable liability, and product quality. They seem to suggest

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89. *Id.* art. 6.

90. *Id.* art. 7. If a third person causes the injury, a school is still a supplementary obligor.

91. *Id.* art. 16. The Interpretation expands upon General Principles art. 126, which stated that “[i]f a building or any other installation or an object placed or hung on a structure collapses, detaches or drops down and causes damages to others, its owner or manager shall bear civil liability, unless he can prove himself not at fault.” General Principles, *supra* note 19, art. 126. The new Judicial Interpretation addresses areas of law previously neglected by the General Principles, including the liability of designers or constructors as parties as well as the breadth of structures and natural installations.

92. See cases in 1990–1999 LAW Y.B. CHINA.

an interest by the PRC authorities in providing greater compensation to injured persons and in using the deterrent effect of tort damages to prevent potentially injurious behavior in certain situations.

In *Wang v. Shanghai Galaxy Hotel*, a robber had attacked hotel guests, and the issue was whether the hotel could be held civilly liable because it had failed to provide adequate security.<sup>93</sup> On appeal, the Shanghai Intermediate People's Court ruled that if the individual responsible was unavailable or unable to pay complete compensation, the hotel could be held liable under the Consumer Rights and Interests Law and under breach of contract.<sup>94</sup> The Court found under the Consumer Rights and Interests Law that when a business “provides a product or service that causes personal injury to the consumer, it has a duty to compensate.”<sup>95</sup> In addition, the Court found that the hotel had failed to meet its contractual promises of 24-hour security and that although it could not be held wholly liable for the 500,000 *yuan* claimed by the injured party, it was responsible for 80,000 *yuan* in damages.<sup>96</sup>

*Shanghai Galaxy* is important for its emphasis on a tort right of recovery for failure to provide security at a public accommodation, a principle that was eventually incorporated into the Personal Injury Interpretation. It also suggests that the Supreme People's Court has an interest in using tort obligations to force businesses in the entertainment and public accommodation industries to provide greater protection to their customers from the rising risk of crime.

In *Chen v. Mitsubishi Automotive*, the windshield glass on a jeep shattered suddenly, killing a passenger.<sup>97</sup> At trial, the Basic People's Court in Beijing applied fault-based principles from the General Principles of Civil Law to find that the company was not liable because it was not negligent.<sup>98</sup> However, on appeal the Beijing #2 Intermediate People's Court reversed the lower court's decision.<sup>99</sup> The appellate court noted that the manufacturer, but not the consumer, was in a position to certify that the glass did not comply with relevant safety standards.<sup>100</sup> Therefore, the court held that under the amended Product

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93. Wang Liyi, Zhang Lixia su Shanghai yin he bin guan pei chang jiu fen an [Wang v. Shanghai Galaxy Hotel] (Shanghai No.1 Interm. People's Ct., Jan. 17, 2001), reprinted in 2002 ZHONGGUO FA LÜ NIAN JIAN [2002 LAW Y.B. CHINA] 971–75.

94. *Id.*

95. *Id.*

96. *Id.*

97. Chen Meijin, Lin Dexin su Ri ben san ling qi che gong ye zhu shi hui shi sun hai pei chang jiu fen an [Chen v. Mitsubishi Auto. Indus. Headquarters] (Beijing No.2 Interm. People's Ct., Aug. 10, 2000), reprinted in 2002 ZHONGGUO FA LÜ NIAN JIAN [2002 LAW Y.B. CHINA] 975–78.

98. *Id.*

99. *Id.*

100. *Id.*

Quality Law, the manufacturer was strictly liable.<sup>101</sup> The importance of this case lies in its relatively clear effort to guide the courts in rigorously applying strict liability under the Product Quality Law—an important message in support of tort law as deterrence.

In 2003, *Li v. Lu*, like *Shanghai Galaxy*, dealt with a breach of security at a public accommodation.<sup>102</sup> Several guests had fought with the son of the owner of a small restaurant in Wuxi, a wealthy mid-sized city in the Jiangsu province.<sup>103</sup> Another guest was injured, and he sued the restaurant owner under the Consumer Rights and Interests Law and the General Principles on the grounds that his rights as a consumer had been violated.<sup>104</sup> The court found the consumer protection law inapposite because third party criminal activity was not a service that the public accommodation was providing.<sup>105</sup> The court recognized the restaurant owner had a duty under “sincerity and existing legal principles” (presumably the General Principles) to provide for the safety of his customers but held that the owner would only be liable if he had failed to meet the standard of care appropriate to the size and scope of his business.<sup>106</sup> The restaurant at issue was relatively small, so the court found that the owner had met his duty of care when he called the police.<sup>107</sup> Thus, the owner was not liable to the guests for their injuries.<sup>108</sup>

In 2002, in the similar case of *Li v. May Flower Company*, a box of liquor brought into a restaurant by customers had exploded, knocking out a wall that fell onto other customers.<sup>109</sup> Here, the Intermediate People’s Court located in the wealthy southern city of Zhuhai, Guangdong applied equitable liability to find the restaurant liable to its guests for their injuries.<sup>110</sup> Even though the restaurant could not have foreseen that alcohol brought into the restaurant would explode and was

101. *Id.* at 977.

102. Li Bing su Lu Xianfu, Lu Xianfeng, Zhu Haiquan ren shen sun hai pei chang jiu fen an [Li v. Lu] (Guangdong High People’s Ct., Nov. 26, 2001), reprinted in 2003 ZHONGGUO FA LÜ NIAN JIAN [2003 LAW Y.B. CHINA] 1042–44.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1043.

109. Li Ping, Gong Nian su Wu yue hua gong si ren shen sun hai pei chang jiu fen an [Li v. May Flower Co.] (Wuxi Interm. People’s Ct., Aug. 21, 2001), reprinted in 2003 ZHONGGUO FA LÜ NIAN JIAN [2003 LAW Y.B. CHINA] 1038.

110. *Id.*

thus not negligent, equitable liability under the General Principles and the Opinion required the restaurant to compensate the victims because the plaintiffs were at the restaurant in furtherance of the restaurant's economic interests.<sup>111</sup> The publication of the companion cases of *Li v. Lu* and *Li v. May Flower Company* suggest that the Supreme People's Court is seeking to refine the duty to provide security in a public accommodation.<sup>112</sup> However, the difference between liability and no liability turns on the size and prosperity of the defendant.<sup>113</sup> This may reflect policy concerns regarding compensating innocent plaintiffs and certain aspects of the Socialist legal tradition.<sup>114</sup>

The last case during that period, *Zhou v. Wang*, arose out of a traffic accident in Xuzhou, a relatively poor city in the otherwise wealthy province of Jiangsu.<sup>115</sup> A truck had run off the road, killing a bicyclist and injuring a farmer.<sup>116</sup> The bicyclist's parents had recovered against the driver in an earlier case, but the recovery had been reduced because the earlier court had found the deceased bicyclist partially responsible for the accident.<sup>117</sup> The injured farmer thus sued the parents in *Zhou*, seeking a portion of their recovery from the previous case.<sup>118</sup> The court denied recovery.<sup>119</sup> Although the bicyclist was found partially responsible thereby reducing the parents' recovery from the tortfeasor, the bicyclist's parents could not be held liable for other parties' injuries.<sup>120</sup> Therefore, the plaintiff farmer could only seek recovery from the principal tortfeasor (what actions the farmer had taken against the truck driver were not considered).<sup>121</sup> The relevance of this case again seems to lie in its clarification of doctrinal points on comparative negligence and contribution—both important parts of tort doctrine whose subtleties are not necessarily intuitive to those otherwise unfamiliar with them.<sup>122</sup>

The five relatively mundane tort cases are noteworthy in how they begin to fill certain gaps in PRC tort law. Moreover, from their very

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Zhou Qingan su Wang Jiayuan, Li Shurong dao lu jiao tong shi gu sun hai pei chang jiu fen an [Zhou v. Wang] (Xuzhou Interm. People's Ct., Dec. 20, 2001), reprinted in 2003 ZHONGGUO FA LÜ NIAN JIAN [2003 LAW Y.B. CHINA] 1044.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Zhou Qingan su Wang Jiayuan, Li Shurong dao lu jiao tong shi gu sun hai pei chang jiu fen an [Zhou v. Wang] (Xuzhou Interm. People's Ct., Dec. 20, 2001), reprinted in 2003 ZHONGGUO FA LÜ NIAN JIAN [2003 LAW Y.B. CHINA] 1044.

122. *Id.*

publication, the cases show the growing support of the Supreme People's Court in using the courts to recover for personal injuries.

#### *d. Tort Law Review*

Because China follows the civil law system, it places great importance on academic interpretation of the law.<sup>123</sup> The decision of the Supreme People's Court to partner with People's University Law School (China's top law school) in jointly publishing a law review focused exclusively on tort law should be taken as part of an effort by the Supreme People's Court to effect a change in the law. The *Tort Law Review*, edited by influential People's University law professor Wang Liming, publishes articles by leading torts scholars from China and abroad.<sup>124</sup>

In the preface to the first edition of the law review, Wang Liming lays out several reasons why tort law is important to modern China. "First, [tort law] is the primary civil law means of protecting human rights and citizen's bodily interests" and "makes specific" the rights provided for in international human rights treaties.<sup>125</sup> Second, tort law is of "special utility" in the development of China's "socialist market economy." Wang notes that all economically successful countries have well-developed tort compensation regimes and that tort law leads to a more efficient and balanced economy by compensating the injured, spreading losses, balancing interests, and teaching and punishing the careless.<sup>126</sup> Finally, tort law provides justice, which is essential to a "modern civilized society" and is important to China's progress towards the rule of law.<sup>127</sup> These are ambitious goals for tort law in China. Their forthright explication in the *Tort Law Review*'s preface highlight the reform-minded purpose of the Supreme People's Court and its academic partners and further supports the reading that Tort Reform with Chinese Characteristics is an affirmative policy choice.

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123. See generally ALAN WATSON, THE MAKING OF THE CIVIL LAW 168–78 (1981), as reprinted in JOHN MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 939–40 (1994).

124. Wang Liming, *Fa kan ci* [Inaugural Preface], QIN QUAN FA PING LUN [TORT L. REV.], 2003 No. 1, at i–iii (2003).

125. *Id.* at i.

126. *Id.*

127. *Id.* at ii–iii.

#### IV. FORCES BEHIND TORT REFORM IN CHINA

Having explored the changes in China's tort law, we now delve into the question of why these changes occurred. This article argues that three factors influenced China's adoption of new tort rules: the continuing progress of legal reform, the social transformation brought by China's "Reform and Opening" policy, and a political shift following Hu Jintao's ascension to power.

##### *A. Towards a Legalized Society*

To a certain extent, tort reform in China is simply the latest step in China's effort to build the rule of law. Historically, law has not been an important tool of governance in China. Similar to the Qing Dynasty before it, the Communist Party under Chairman Mao Zedong ruled the country through edicts directed internally at the Party bureaucracy and enforced outwardly through public ideological direction. Until relatively recently, publicly available laws could fit into a thin volume.

In 1979, Deng Xiaoping came to power and made developing a legal structure an important part of his Reform and Opening policy.<sup>128</sup> Nevertheless, legal reform has moved at a measured pace. Among the more notable early laws adopted were the Sino-Foreign Equity Joint Venture Law and the Criminal Law in 1979, a contract law in 1981, an amended State Constitution in 1982, the General Principles in 1986, and the Sino-Foreign Cooperative Joint Venture Law in 1988.<sup>129</sup> Legal reform proceeded more quickly in the 1990s as China adopted the Civil Procedure Law in 1991, the Company Law in 1993, and the Labor Law

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128. LUBMAN, *supra* note 75, at 124.

129. *Id.* at 176–88. See Zhong wai he zi jing ying qi ye fa [Sino-Foreign Equity Joint Venture Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 8, 1979, effective July 8, 1979) (P.R.C.); Xing fa [Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980), *translated in* LAWINFOCHINA (last visited Aug. 27, 2008) (P.R.C.); XIAN FA [CONSTITUTION] (1982) (P.R.C.); Chinese-Foreign Contractual Joint Venture Law (promulgated by the Nat'l People's Cong., Apr. 13, 1988, effective 1988), *translated in* LAWINFOCHINA (last visited Sept. 9, 2008) (P.R.C.) [hereinafter Sino-Foreign Cooperative Joint Venture Law].

in 1994, among many others.<sup>130</sup> In 1999, the rule of law was enshrined in the PRC Constitution as official state policy.<sup>131</sup>

Chinese law is still underdeveloped in many topical areas, and China's leaders have indicated they hope to have all the basic laws for a market economy in place by the end of this decade.<sup>132</sup> As noted earlier, the National People's Congress is expected to adopt a draft Tort Law in the near future. Given the history of experimentation in Chinese law-making, the fact that a full Tort Law is expected to be adopted may help explain the appearance of the new tort rules—especially the Personal Injury Interpretation—as an effort to experiment with doctrine in preparation for a new law on torts.<sup>133</sup>

Legal reform, however, does not fully explain the timing and substance of the personal injury tort laws passed as part of Chinese tort reform. Admittedly, new laws tend to favor plaintiffs by creating new rights where previously none existed. However, given China's administrative orientation to governance, one might expect new personal injury laws to emphasize administrative regulation and place limits on the role of courts and litigation.<sup>134</sup> Instead, Tort Reform with Chinese Characteristics seems to represent a political choice to allow expanded access to court. This requires us to consider the second and third factors effecting tort reform in China—societal transformation due to China's Reform and Opening policy and a political shift following Hu Jintao's ascension to power.

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130. See Civil Procedure Law (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), *translated in LAWINFOCHINA* (last visited Sept. 8, 2008) (P.R.C.) [hereinafter Civil Procedure Law 1991]; Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective July 1, 1994), *translated in LAWINFOCHINA* (last visited Aug. 27, 2008) (P.R.C.); Labor Law (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), *translated in LAWINFOCHINA* (last visited Aug. 27, 2008) (P.R.C.).

131. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 60–61 (2002).

132. MICHAEL HICKMAN ET AL., FRIED FRANK HARRIS SHRIVER & JACOBSON LLP, FOREIGN INVESTMENT IN CHINA 1 (2007), available for order at <http://www.friedfrank.com/index.cfm?pageID=309>.

133. See Lubman, *supra* note 13, at 385 (on experimentation).

134. See Timothy O'Neill, Through a Glass Darkly: Western Tort Law From a South and East Asian Perspective, 6, 8–10 (May 2004) (unnumbered Working Paper), available at <http://ssrn.com/abstract=546124>.

## B. Towards a Litigious Society

Legal reform increased the number of laws on the books, but for many years informal dispute resolution remained the preferred method for solving private disputes.<sup>135</sup> However, by the end of the 1990's and early 2000's, the Chinese public had become less reticent about taking disputes to court.<sup>136</sup> A number of social transformations effected this change.

First, the rise and acceptance of market economics made individualism and the assertion of individual rights acceptable as social and personal values. As individuals became wealthier, their sense of independence and social worth increased. When these personal and social values combined with a general loosening of social control by the government, people became more willing to assert their legal rights.<sup>137</sup>

Second, modest media liberalization under the Reform and Opening policy also contributed to an increased willingness to sue. The media was able to more accurately report on common social problems, and broadcast and print journalism began to regularly feature stories on laws and lawsuits.<sup>138</sup> This steady drumbeat increased the likelihood that an individual, when faced with a problem, would consider law and courts as a tool at their disposal.

Third, Chinese society gained greater access to lawyers. The number of lawyers in the PRC more than doubled in twelve years, from approximately 43,000 in 3,600 firms in 1989 to over 115,000 lawyers in nearly 10,000 law firms in 2001 (although in a nation of 1.3 billion this still represents a significant lack).<sup>139</sup> The structure of practice changed as well. Lawyers were no longer required to work in state controlled firms, and all law firms gained control of their own finances.<sup>140</sup> Moreover, with their employment now dependent on clients and not on the State, lawyers had to generate business. Many began to advertise, including

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135. *Id.*

136. Stanley Lubman identified this trend as early as 1999. See Lubman, *supra* note 13, at 406–07.

137. See James Harding, *Developing a Capitalist Taste for Litigation*, FIN. TIMES, Feb. 26, 1999, at 18; Philip Pan, *In China, Turning the Law Into the People's Protector*, WASH. POST, Dec. 28, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A30146-2004Dec27.html> (last visited Sept. 8, 2008).

138. See Benjamin Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 27, 68 (2005).

139. CHOW, *supra* note 73, at 229. Others have more recently estimated China has 120,000 lawyers in 30,000 firms. Clare Cheung, *Biggest Law Firm in China Seeks Help*, INT'L HERALD TRIBUNE, May 31, 2006, available at <http://www.iht.com/articles/2006/05/31/bloomberg/sxlawfirm.php>.

140. See Charles Chao Liu, *China's Lawyer System: Dawning Upon the World Through a Tortuous Process*, 23 WHITTIER L. REV. 1037, 1073–74 (2002).

over the Internet on such sites as [www.peichang.com](http://www.peichang.com) (“*peichang*” meaning compensation). Contingency fee arrangements came into use and, while existing in a grey area for a period of time, became recognized by PRC law in 2004.<sup>141</sup> A legal aid service system also came to supplement this growing access to lawyers,<sup>142</sup> and many people still took—and continue to take—their cases to court pro se.<sup>143</sup>

The result of these changes is clear: more people were going to court to recover for personal injuries. In 1990, there were 1.8 million civil cases in the PRC. By 2002, there were 4.4 million cases—a 144% increase.<sup>144</sup> Tort cases (as estimated by the author and which unavoidably covers matters beyond personal injury) doubled between 1990 and 2001, rising from over 174,000 to nearly 420,000. That number continued to grow, reaching over 880,000 in 2003 (under slightly different categorical calculations beginning in 2002).<sup>145</sup> In addition, cases were increasingly adjudicated rather than settled. In 1990, 53% of personal injury suits settled, but by 2002, only 19% of such suits settled. Although mediation was still important to and encouraged by Chinese courts,<sup>146</sup> litigants were showing themselves more willing to seek a judicial determination of their claims than ever before.

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141. Code of Conducts for Lawyers (for Trial Implementation) (promulgated by the All-China Lawyers Ass’n, Mar. 20, 2004, effective Mar. 20, 2004), art. 96, *translated in LAWINFOCHINA* (last visited Aug. 28, 2008) (P.R.C.).

142. Liu, *supra* note 140, at 1084.

143. *Id.* at 1083.

144. See Table *infra*.

145. See Table *infra*.

146. See Lubman, *supra* note 13, at 387–88; see also LUBMAN, *supra* note 76, at 217–49.

The following table shows the rise in tort adjudication.

Year	Total Civil Cases	Total Tort <sup>147</sup> Cases	Settled	Adjudicated
1990 <sup>148</sup>	1,850,000	170,000	90,000	50,000
1994 <sup>149</sup>	2,380,000	220,000	90,000	80,000
1997 <sup>150</sup>	3,280,000	310,000	110,000	190,000
1998 <sup>151</sup>	3,380,000	340,000	110,000	220,000
1999 <sup>152</sup>	3,520,000	380,000	120,000	250,000
2000 <sup>153</sup>	3,410,000	400,000	120,000	270,000
2001 <sup>154</sup>	3,460,000	420,000	120,000	290,000
2002 <sup>155</sup>	4,420,000	870,000 <sup>156</sup>	160,000	590,000
2003 <sup>157</sup>	4,410,000	880,000	170,000	710,000

An increasing amount of litigation drives the adoption of new tort rules for a number of reasons. Most simply, more cases means judges will require more guidance for the variety of factual and legal circumstances that arise. In addition, certain structural factors in the PRC legal system make concrete written guidance especially important. As noted earlier,

147. “Torts” was not a statistical category until 2002. For the years prior to 2002, “torts” included “Bodily Rights” cases and other “Compensation” cases. Post-2002, these categories were merged with several minor categories into “Rights, Tort Disputes and other Civil Disputes.” *Compare* 2003 ZHONGGUO FA LÜ NIAN JIANG [2003 LAW Y.B. CHINA] 1320, with 2001 ZHONGGUO FA LÜ NIAN JIANG [2001 LAW Y.B. CHINA] 1257.

148. 1991 ZHONGGUO FA LÜ NIAN JIANG [1991 LAW Y.B. CHINA] 934.

149. 1995 ZHONGGUO FA LÜ NIAN JIANG [1995 LAW Y.B. CHINA] 1064.

150. 1998 ZHONGGUO FA LÜ NIAN JIANG [1998 LAW Y.B. CHINA] 1239.

151. 1999 ZHONGGUO FA LÜ NIAN JIANG [1999 LAW Y.B. CHINA] 1022.

152. 2000 ZHONGGUO FA LÜ NIAN JIANG [2000 LAW Y.B. CHINA] 1210.

153. 2001 ZHONGGUO FA LÜ NIAN JIANG [2001 LAW Y.B. CHINA] 1257.

154. 2002 ZHONGGUO FA LÜ NIAN JIANG [2002 LAW Y.B. CHINA] 1239.

155. 2003 ZHONGGUO FA LÜ NIAN JIANG [2003 LAW Y.B. CHINA] 1320.

156. Please be reminded that the statistics changed in 2002. See *supra* note 148.

157. 2004 ZHONGGUO FA LÜ NIAN JIANG [2004 LAW Y.B. CHINA] 1055.

the PRC legal system is based on the civil law tradition, and judges are expected to apply the law as it was enacted in written codes. To properly handle cases, PRC courts need clearly articulated legal rules. The situation is further magnified in China because a high number of PRC judges do not have formal legal training<sup>158</sup> and the PRC does not have a fully developed case reporting system whereby judges can look to each other for guidance. Finally, courts and judges occupy a relatively weak position in the Chinese state. Courts can bolster the legitimacy and, ultimately, the enforceability of their decisions if they can point to a specific legal directive. A strong legal position bolsters courts' political position. Given this judicial environment, courts should themselves demand their superiors provide sufficient guidance to handle this growing part of their caseload.

These factors may explain the adoption of new rules, but it does not explain the generally favorable positions toward access to court and recovery by injured plaintiffs. Faced with a rising caseload, the PRC authorities could easily have followed American tort reform, limiting access to justice for fear of negative economic consequences. It chose not to. The reason lies in policy.

### C. Towards a "Harmonious Society"

China is still governed by a Communist Party that aspires to build "socialism with Chinese characteristics."<sup>159</sup> Socialism, however, has recently been overshadowed by its Chinese Characteristics as embodied in the PRC's drive towards economic development. While the Reform and Opening policy has greatly expanded private enterprise and personal freedom, it has also increased economic insecurity as the support provided by the State has been gradually reduced. The divide between rich and poor has grown greatly.<sup>160</sup> Economic dislocation and continuing

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158. LUBMAN, *supra* note 75, at 253–54.

159. Amendment to the Constitution (promulgated by the Nat'l People's Cong., Mar. 29, 1993, effective Mar. 29, 1993), art. 3, *translated in* LAWINFOCHINA (last visited Aug. 22, 2008) (P.R.C.) [hereinafter Constitutional Amendment 1993]; Amendment to the Constitution (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Mar. 15, 1999), art. 12, *translated in* LAWINFOCHINA (last visited Aug. 22, 2008) (P.R.C.) [hereinafter Constitutional Amendment 1999].

160. China's Gini coefficient, which measures income inequality, has risen from 28 in 1981 to 44 in 2002. By comparison, the Gini coefficient for India is 32 (2002), Canada is 33 (1998), and the United States is 45 (2004). United Nations University, UNU-WIDER World Income Inequality Database, Version 2.0c, May 2008, available at

government corruption have fueled popular dissatisfaction with the government. Protests over unpaid unemployment compensation, local government seizure of farmland for development, and the commercialization of health care have become common in recent years.<sup>161</sup>

To try to stave off any potential threat to stability, the PRC leadership under Hu Jintao has prioritized ameliorating the negative effects of economic development. Hu's policy, which he packages as building a "harmonious society" (*hexie shehui*), seeks to increase social support and protection for the less well off without substantially affecting economic growth.<sup>162</sup> Under the umbrella of building a harmonious society, the government has sought to increase rural incomes, boost labor protections, improve access to health care and education, and increase environmental oversight, among other goals.

Increased protection for consumers and workers clearly falls within the goals of the harmonious society policy. As noted above, Tort Reform with Chinese Characteristics was influenced by several factors, but it would likely not have been as favorable towards plaintiffs and their rights to access courts if the harmonious society policy had not emphasized protection for those less well off.<sup>163</sup> This is not to suggest that Tort Reform with Chinese Characteristics was a consciously planned endeavor under the Harmonious Society policy. Rather, in China's fragmented governance structure, the more likely explanation is that adoption of the laws, regulations, and court directives came about for their own reasons but were shaped by the prevailing political atmosphere.<sup>164</sup> In China, lower level officials take both rhetorical and policy cues from the rhetoric and policies of their superiors. Hu Jintao's emphasis on protecting the less well off would then, in a diffuse way, encourage the drafters of the various laws, regulations, and court directives to expand protections for injured persons. This helps explain the relatively pro-recovery stance

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[http://www.wider.unu.edu/research/Database/en\\_GB/database/](http://www.wider.unu.edu/research/Database/en_GB/database/) (last visited Sept. 13, 2008); World Bank.org, China—China Quick Facts, <http://go.worldbank.org/4Q7SC8DU50> (last visited Aug. 22, 2008).

161. One such protest occurred after a three-year old boy was allegedly refused emergency medical care for poisoning because his grandfather could not pay the \$82 fee. Joseph Kahn, *Crowd Protests Health Care in China*, N.Y. TIMES, Nov. 12, 2006, available at <http://www.nytimes.com/2006/11/12/world/asia/12cnd-china.html> (last visited Aug. 22, 2008); see also Edward Cody, *Officials Held Hostage by Farmers in China*, WASH. POST, Nov. 10, 2006, at A26, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/09/AR2006110900874.html> (last visited Aug. 22, 2008); Cody, *supra* note 16.

162. See Communique of the Sixth Plenum of the 16th CPC Central Committee (Oct. 11, 2006), available at [http://news.xinhuanet.com/english/2006-10/11/content\\_5191071.htm](http://news.xinhuanet.com/english/2006-10/11/content_5191071.htm).

163. Many thanks to Mr. Xu Xiaoliang of Soochow University, Kenneth Wang Law School for suggesting this line of argument.

164. On fragmented governance, see Lubman, *supra* note 13, at 385.

present in Tort Reform with Chinese Characteristics. Of course, the courts also have certain bureaucratic and institutional interests in seeing increased litigation and expanded tort adjudication rights, but Tort Reform with Chinese Characteristics emanated not just from the Supreme People's Court, suggesting the broader trend towards additional tort laws and favorable treatment of injured persons in China.

## V. CONCLUSION—STEPS FORWARD

China has changed dramatically since its first modern tort laws were adopted in 1986. The economy has grown at double-digit rates, the Reform and Opening policy has deepened, and the rule of law is now enshrined in the PRC Constitution. Informed and assertive individuals are increasingly turning to courts to secure rights and recoveries. Concerned with ameliorating the negative effects of economic growth, PRC leaders have adopted policies to protect the less well off. As a result, new laws, regulations, and model cases have begun to form a cohesive tort rights regime. However, further steps must be taken for the economic incentives of tort law to achieve their full effect in the PRC.

First, the National People's Congress must speedily adopt the draft Tort Law (or the relevant provisions of a Civil Code) presently under consideration. A new Tort Law will give judges additional direction and political support in tort cases, thereby improving their handling and making it easier to bring suit and secure recovery. Passage of a new Tort Law will also make clear to the Chinese public that when injured, they may seek compensation for their injuries in courts and that their claims will be backed by the full force of law.

The PRC must also encourage the growth of class actions. The Civil Procedure Law provides for “representative actions,” but a lack of subsequent guidance has resulted in limited use of those provisions.<sup>165</sup> The Supreme People's Court should issue judicial interpretations on these provisions and publish class action cases in the Supreme People's Court Gazette. Without the use of class actions, it is difficult to achieve sufficient economic scale to make complex cases economically viable or to make recovery sufficiently large enough to have a serious impact on

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165. Civil Procedure Law 1991, *supra* note 130, arts. 54–55; see also Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998).

large enterprises.<sup>166</sup> An increase in class actions would also need to be matched by overall improvements in court procedure and professionalism. Although both have seen considerable improvement in recent years, more needs to be done.<sup>167</sup>

Third, China should formally permit its lawyers to take cases under contingency fee arrangements. The contingency fee has been criticized in the West for contributing to unnecessary, frivolous litigation. However, contingency fee arrangements do make it possible for individuals of little means to retain a lawyer to prosecute a case.<sup>168</sup> Anecdotal evidence suggests contingency fees are already in use on an informal basis in the PRC, and their full acceptance would make access to justice much more available in China. The threat of a lawsuit must be sufficiently present for tort law to achieve its deterrent effect, and although many PRC litigants proceed *pro se*, ultimately (despite public outcries to the contrary) lawyers are needed to ensure an efficient and fair judicial system. Although access to lawyers has improved, hiring a lawyer can still be prohibitively expensive for many Chinese persons.

Finally, China's leadership should deepen its commitment to legal reform by separating the management and finances of local courts from the control of local governments. The Communist Party has long insisted on maintaining Party leadership of the courts. Presently, the Party controls the courts through the same local Party structures through which it controls local government. Courts are also beholden to local government officials because local governments set their budgets.<sup>169</sup> The situation could be dramatically improved without affecting Party control of the courts (a political reality in China which this author does not, by the suggestion contained herein, endorse or condone) by placing the courts under a separate Party organization and budget structure. The military offers a good model for Party control that is largely independent of local influence. A similar model for the courts would shield courts from local government meddling and improve their operation.

It is, perhaps, an unfortunate reality of human nature that the threat of punishment may be needed to force people to act. However, if Tort Reform with Chinese Characteristics continues and these and other reforms are put in place, the full force of tort law can begin to create an ethos of care in Chinese society. This sense of responsibility and fear of

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166. See T. Evan Schaeffer, Editorial, *Class Actions Lawsuits are a Deterrent to Corporate Scams*, ROANOKE TIMES, Feb. 20, 2001, at A13, available at <http://www.riverbendlaw.com/class%20action%202.htm>.

167. See LUBMAN, *supra* note 75, at 297.

168. For a good discussion of the virtues (or necessary evils) of contingency fees, see ALAN DERSHOWITZ, LETTERS TO A YOUNG LAWYER 169–75 (2001).

169. See generally CHOW, *supra* note 73, at 192–224.

liability will ultimately bring people in China to make places and products safer. Much to the chagrin of tort reform advocates in the United States, the expansion of tort law will go a long way towards making life in China safer, healthier, and more harmonious.

