

# THE TORT SYSTEM IN CHINA<sup>1</sup>

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## I

### INTRODUCTION

The enactment of the *General Principles of Civil Law of the People's Republic of China* ("General Principles") was an epic event in China's legal history. Since its promulgation, experts on the science of civil law, Chinese and foreign alike, have made fruitful studies of this important law. This article will explore the stipulations of the *General Principles* with respect to the civil liabilities arising from tortious conduct.<sup>2</sup> In consideration of the public's limited knowledge about China's tort system as a whole, this article will examine and analyze the following issues: (1) the origins, development, and contemporary status of the tort system in China; (2) the constituent elements of tortious conduct; (3) the imputation of civil liability arising from tortious conduct; and (4) the principles and methods used in the calculation and payment of damages.

## II

### THE ORIGINS, DEVELOPMENT, AND CONTEMPORARY STATUS OF THE TORT SYSTEM IN CHINA

In its long history, the Chinese tort system has developed under unique social circumstances, resulting in a system with distinct Chinese characteristics. For analytic and descriptive ease, this article will examine the system chronologically.

#### A. The Tort Systems in Ancient China<sup>3</sup>

The origin of China's tort system can be traced back to the Qin (221-206 B.C.) and Han (206 B.C.-201 A.D.) Dynasties. According to bamboo slips

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1. China has never developed the sort of complete system of tort law that exists in the United States, England, and France. The legal provisions concerning tortious acts can be found scattered throughout the Constitution, the *General Principles of Civil Law*, and other separate legislation.

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2. Chapter 3, section 6, of the *General Principles*, in particular, provides for civil responsibility in tort. That section contains only 17 articles, but there are a total of 20 if one also includes the relevant articles in sections 1 and 3.

3. According to historians, Chinese law began in the Xia Dynasty (21st-16th century B.C.). There is almost no way of examining the law from that period; what we know is drawn from the writings of authors from subsequent periods. It is even difficult to find original materials from the Shang (ca. 1550-1121) and the Zhou (1121-221) Dynasties, both of which experienced significant

discovered in a Qin Dynasty tomb at Shuihu, Hubei Province,<sup>4</sup> there were rules on compensatory damages. For example, the chapter on “Legal Questions and Answers” in the bamboo slips contained the following hypothetical: *A*, a minor, raised a horse of his own. The horse was then stolen by *B*. Later, the horse ate a bushel of grain belonging to *B*. Is *A* guilty? No, *A* is neither guilty nor liable for the loss of the grain since *B* had stolen the horse.

Similar rules existed during the Eastern Han Dynasty (ca. 54-201 A.D.). The biography of Mr. Gao Shi states that a Mr. Liang Hong of the Han Dynasty was taking care of his family’s pigs in the forest when cinders from a fire he had been tending accidentally set fire to someone else’s house. Liang Hong went to the injured party to find out how much the damages were and offered his pigs as compensation. The injured person said that the pigs were insufficient compensation, so Liang Hong had to go to work for some time in the injured party’s household.

Later, in the Tang Dynasty (618-709), the law stipulated that whoever jettisons, loses, or negligently damages governmental or private property shall compensate the loss accordingly.<sup>5</sup> It was also stipulated in the law of the Ming Dynasty (1359-1644) that one who intentionally burns down a vacated house and any goods stored around the house that both belong to someone else shall compensate with the whole of his own property for the loss of the aggrieved party at the fair market price.<sup>6</sup>

In ancient China, there was a word (*chang*) that had essentially the same meaning as the modern word for restitution and compensation (*peichang*). Thus, it is clear that in ancient Chinese society there were already provisions regarding compensation for tortious acts. Several characteristics of the ancient laws concerning tortious conduct deserve mention.

First, there was not a single act or code of law which comprehensively delineated the liabilities arising from tortious conduct. Ancient Chinese society basically developed two mechanisms for coping with tortious conduct. One was to lay down rules addressing the problems of a particular category. For example, there were rules delineating the liabilities for tortious conduct such as causing damage to government and private property and for seizure of private land by governmental officials. These rules, too specific in their application, fell short of providing general principles concerning tort liability. The second manner of dealing with tortious conduct was to provide solutions to each individual case, such as the one mentioned in the biography of Mr.

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economic and cultural development. Therefore, this introduction to the system of torts in Chinese society begins with the Qin Dynasty (221-201 B.C.).

4. In December 1975, at Shuihu, in Yumeng County, Hubei Province, 1155 Qin Dynasty bamboo slips, used then for recording documents, were discovered. They have been catalogued and published in a series of volumes.

5. If one abandoned, damaged, threw away, or accidentally damaged the property of an official or ordinary person, damages had to be accordingly paid.

6. Anyone who intentionally set fire to someone else’s empty house and the articles therein would have to make monetary restitution to the injured party for all of the property damaged.

Gao Shi. The cases so adjudicated did not have the binding effect upon later cases as is true in the English and American legal systems. Only when cases were referred to government officials would precedent exert some psychological influence on the officials who later adjudicated similar cases. It is fair to say that a salient feature of the tort system in ancient China was that the relevant rules were too scattered and their application was too limited. And the system was far from comprehensive when contrasted with the present system.

Second, tort liabilities were resolved principally in connection with criminal proceedings. Laws in ancient China were designed to protect the interests of society as a whole. Unlawful acts such as larceny, robbery, personal injury, and defamation were first and foremost considered crimes and therefore had to be addressed through the criminal process. An aggrieved party's property damages would be recognized only after a criminal proceeding. That party would then have a right to claim compensation. Such was the method by which tort liability was resolved through the criminal process. If, however, the tortfeasor had died or had been pardoned by an order of general amnesty, efforts to find and ascertain criminal liability were prohibited, and the aggrieved party would then be deprived of the right to petition for damages. The chapter on "Legal Questions and Answers" written in the bamboo slips of the Qin Dynasty contains the following passage concerning the point in question. A tortfeasor stole a large sum of money before the amnesty and spent it all after the amnesty. Shall he still be held liable? No, he is no longer liable for the theft.<sup>7</sup>

The Code of Law of the Qin Dynasty treated defamation as criminal conduct. Thus, a tortfeasor would not be held civilly liable for any damage to a person's reputation. The Code of Law of the Tang Dynasty stipulated that

when draft horses belonging to the government are struck down with disease while traveling to other localities, they shall be treated at the county on the way of the journey. Should the treatment be inappropriate, the man responsible shall be flogged with a stick thirty times. If the inappropriate treatment results in the death of the livestock, the man shall be flogged with a stick forty times for the death of each one of the livestock. He shall be flogged with the stick eighty times for the death of three of the livestock. The number of blows shall not exceed one hundred times for any number of deaths of the livestock.<sup>8</sup>

These stipulations fully reflect a prominent feature of the tort system in ancient China. That is, tort liability cases were handled under the criminal law. This occurred because of the predominant attitude of attaching greater importance to criminal law than to civil law. This attitude was a central factor giving rise to ancient Chinese tort laws.

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7. There was no responsibility to pay damages if one stole a large amount of property before an amnesty but had used it completely by the time of the amnesty.

8. Compare: If during the course of using official livestock on business, the animals became sick and one remained in the county through which one was passing to treat the animals, where the care and treatment was inappropriate, one was to be beaten with a bamboo stave thirty times. Intentional mistreatment or improper care which caused the death of the animal resulted in a beating of 40 strokes per head of livestock, with a limit of 80 strokes per three head, but never to exceed 100 strokes.

Third, tortious conduct was regarded as the basis of liability. According to the General Principles of Criminal Law of the Sung Dynasty, a liability meant an obligation defined by law or a failure to compensate in time for the overdue property borrowed from the government or a private citizen, or damage to property which somebody else has produced or obtained through his labor. The latter half of the law described what is called a "unilateral unlawful act," which could be considered the basis of the debt, but not independent tortious conduct.

### III

#### THE TORT SYSTEM IN THE CIVIL LEGISLATION OF MODERN CHINA

The term "modern" used in this context refers to the period from 1911 to 1949. During this period, two major legal systems existed. The legal system under the Guomintang Government was embodied in the "Six Laws." The legal system of the Chinese Communist Party was represented by the laws promulgated by the various revolutionary base areas. This article does not address the minor legal systems such as the one existing during the latter part of the Qing Dynasty.

##### A. Tort Law Under the Guomintang Government

The tort system under the Guomintang Government was principally contained in the chapter on debt in the Civil Code promulgated by the Guomintang in 1930. Articles 184-198 of the Civil Code are the specific provisions dealing with tortious conduct.

The Civil Code comprehensively delineated a tort system by stating the general principles of civil liability arising from tortious conduct, and by specifically stipulating some major tortious acts and corresponding liabilities. For example, article 184 provides: "One who intentionally or negligently infringes upon the right of someone else shall be liable for damages thus incurred. This rule also applies to the one who causes damages to another by means contrary to general moral standard and custom. One who violates a law designed to protect the rights of others shall be presumed to be at fault." In addition, the Code also lays down specific provisions regarding the liability for tortious actions by public employees, the duty to compensate for wrongful death, pecuniary liability arising from personal injury, and non-pecuniary liability arising from injury to person, health, reputation, and freedom. Although the tort system was delineated in the Civil Codes's chapter on debt, the tort system obtained a much more important legal status. Compared with its counterparts in ancient China, the tort system under the Guomintang Government made great headway both in terms of its content and structure, leaving behind an old system which was backward, incomplete, and scattered. It is fair to say that the tort system under the Guomintang Government signified the establishment of China's tort system.

## B. Tort System in the Revolutionary Base Areas

The tort system in the revolutionary base areas developed gradually, too. During the existence of the bases, the main task for the people's democratic governments in the various bases was to emancipate the peasants from the bondage of feudalistic exploitation; and the primary concern of the legislation at the time was to recognize land ownership of the peasants.<sup>9</sup> It follows that the tort system there focused on the liabilities arising from infringement on land rights. During 1937-1945, the various anti-Japanese bases promulgated many regulations regarding land ownership. For example, regulations existed on such matters as deeds to (Ningxia) land in the Shaanxi-Gansu-Ningxia border region (April 1938), regulations concerning land of the Shaanxi-Gansu-Ningxia border region (April 1939), guidelines for the resolution of disputes arising from property mortgages and overdue debt of the Shaanxi-Gansu-Ningxia border region (September 1943), and provisional rules concerning the use of land of the Shanxi-Hebei-Shandong-Henan border region (1942). The latter provided that "[a] landowner shall be allowed to clear from his land livestock or goods belonging to another when such livestock stray onto or such goods are misplaced on his land. The landowner is entitled to seek compensation should any damage be done to his land as a result." Another regulation read:

A landowner should allow the owner of adjoining land to use his land if the latter so uses it out of necessity in the course of building houses within his own land or alongside the common passage. That landowner has, however, the right to claim compensation if he suffers any damages as a result of his neighbor's conduct.

In addition, the laws in the revolutionary base areas also dealt with other tortious conduct. For instance, regulations on the protection of human rights and property rights were promulgated in 1942 by the government of the Shaanxi-Gansu-Ningxia border region, and regulations of the Northwest Shanxi Province on the protection of human rights were approved by the provisional government of the Northwest Shanxi Province. Rules were also laid down on the method of discharging civil liabilities arising from tortious conduct. For example, the Provisional Judicial System of the Shanxi-Hebei-Shandong-Henan-Taiyue border region provided that methods of discharging civil liabilities must include compensation (restitution and pecuniary damages), expressing sympathy and solicitude, and apology for and admission of one's mistake.

There was some lack of uniformity among the regulations of the various base areas since during wartime each of them had to lay down rules suitable for that particular region. Nonetheless, the methods adopted by the various base areas to deal with tortious conduct were more or less homogeneous. In particular, mediation was uniformly used to settle the issue of the amount of damages. In *Liang Zhenggao v. Mrs. Luo Mingshan*,<sup>10</sup> Mrs. Luo Mingshan

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9. ZHAO KUNBO & YU JIANPING, *ZHONGGUO GEMING GENJUDI ANLI XUAN (A SELECTION OF CASES FROM CHINA'S REVOLUTIONARY BASE AREAS)* (1984).

10. *Id.* at 249-51.

dropped kindling material on the bed in Liang Zhenggao's house. A fire broke out in the house, causing 56,000 yuan in damages. The case was settled through mediation with the plaintiff agreeing to accept 25,000 yuan in damages from the defendant.

While the rules concerning civil liability arising from tortious conduct in the revolutionary base areas were not very comprehensive, great importance was nonetheless attached to the adjudication of tort cases.

#### IV

#### THE TORT SYSTEM IN THE PEOPLE'S REPUBLIC OF CHINA ("PRC")

##### A. Prior to the Enactment of the *General Principles*

More than thirty years passed before modern tort law was established in the PRC. During the initial period of the PRC the state promulgated a series of laws and regulations, some of which addressed the tort system. These laws and regulations included, for example, the Provisional Rules for the Mining Industry (promulgated by the State Council in 1950) and the Provisional Procedures for the Settlement of Maritime Disputes (promulgated by the Ministry of Communications in 1952).

The first Constitution of the People's Republic of China (1954) expressly provided that the state "shall protect the right of the peasants over their land and the right over other means of production in accordance with law" (article 8), and that the state "shall protect the right of the handicraftsmen and other non-agricultural individual laborers over their means of production in accordance with law" (article 9). The Constitution also provided that the state "shall protect the right of the capitalists over their means of production and the right over other assets in accordance with law" (article 10). Article 97 of the Constitution specifically provided that "those who suffer damages as a result of violation of their civil rights by governmental employees have the right to claim compensation."

These provisions laid the foundation for a tort system in the PRC, and thereafter, many governmental agencies promulgated, in accordance with the Constitution, a host of rules and regulations regarding compensation for damages. Among these rules and regulations were Rules Concerning Compensation for Maritime Losses, which were published on September 19, 1959, and came into effect on October 15 of that year, and the Regulations Regarding the Protection of Forestry, promulgated by the State Council on May 27, 1963. Meanwhile, the Supreme People's Court issued judicial interpretations of those rules and regulations, taking into account the specific problems encountered in judicial practice. An example contained in the interpretation was a reply to a question concerning pensions paid to workers and staff members killed in traffic accidents. It is fair to say that before the Cultural Revolution (1966-1976), rules and regulations concerning compensation for tort damages encompassed a wide range of subjects,

including tort liabilities arising from traffic accidents, trademark infringement, environmental pollution, and tortious conduct by governmental employees.

During the Cultural Revolution, however, laws were trampled under foot. The people lost the protection of their democratic rights, and existing laws could no longer be enforced. Under such conditions, the tort system of China ceased to exist.

## B. The Enactment of the *General Principles*

Since the time of the Third Plenum of the Eleventh Central Committee of the Chinese Communist Party, China's political situation has become ever more stabilized, and increasing importance has been attached to the protection of the lawful rights of citizens and legal persons. At the same time, the country is accelerating the creation of civil laws, including those governing compensation for tort damages. The enactment of the *General Principles* signified the establishment of the tort system in the People's Republic of China.<sup>11</sup>

It is worth mentioning that Chinese civil law theories built on the basis of the studies that were made in the 1950's of Soviet civil law theories. Despite the great efforts made by commentators and practitioners of law, Chinese civil law as a whole had not broken away from the Soviet framework in terms of both the basic principles and the structure of civil law. The same is true of the tort system. For instance, a considerable number of commentators consistently opposed compensation for emotional distress, and the courts of law simply ignored emotional distress cases. Furthermore, in the study and analysis of a tort system, the PRC had followed Soviet civil law theory and practice. As in the Soviet system, tortious conduct was treated simply as the origin of a debt, to the disregard of the uniqueness of the tort system itself.

The *General Principles*, on the other hand, was enacted

in conformity with the need for development of socialist modernization, in accordance with the Constitution and the actual situation of the People's Republic of China, and based on a summary and analysis of the practical experience in civil activities, . . . to protect the lawful civil rights and interests of citizens and legal persons, and to correctly regulate civil relations.

Thus, the *General Principles* signifies a retreat from the Soviet civil law model and the formation of a tort system with Chinese characteristics.

First of all, there has been a change in structure. In the Continental civil law system, tortious conduct and civil liability arising therefrom are treated as the origin and content of an obligation. Provisions of tortious conduct are therefore relegated to those concerning obligations. If the same pattern were followed in the *General Principles*, the provisions regarding debts would be overinclusive, rendering the structure of the *General Principles*

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11. The remedies are varied: Halt the infringement (*tingzhi qinhai*), eliminate the impediment, remove the danger, return the property, restore the original condition, repair, rebuild, return, compensate for damages, pay the penalty for breach, remove the [bad] impression, restore the reputation, make apologies. See art. 134 of the *General Principles* and Parts V.A and VII *infra*.

disproportionate. In the *General Principles*, an independent chapter is devoted to civil liability. In order to maintain consistency with the rest of the *General Principles*, this chapter is subdivided into General Provisions, Civil Liability for Breach of Contract, Civil Liability for Torts, and Forms of Civil Liability. Since this chapter not only addresses general matters of civil liability but also reflects the characteristics of various civil liabilities, coordination is achieved within the chapter itself. Furthermore, the chapter on civil liability also corresponds to Citizens—Natural Persons (chapter 2), Legal Persons (chapter 3), and Civil Legal Acts and Agency (chapter 4). The *General Principles*, when so structured, satisfies logical requirements and makes it easy for Chinese citizens to study and comprehend it.

Second, there is a change in the focus of the law. The *General Principles* sets as one of its aims the protection of the lawful civil rights and interests of citizens and legal persons. It mandates that the aim be adequately reflected in the chapters following the general provisions. As China's reforms of economic structure develop further both in the cities and the countryside, the characterization of tortious conduct today differs from that in the past. This change is manifested by the new types of tortious conduct achieving legal recognition, such as trademark infringement, product liability, and infliction of emotional distress. Some tortious conduct appears to be happening more frequently, such as torts arising from dismantling old houses and occupation of public real estate and common passages. Some other torts, such as invasion of the lawful rights of the operation of private individual businesses, have caused the aggrieved parties enormous damage. In addition, disputes arising from the use of land, irrigation systems, forests, and orchards have also increased in rural areas. Claims for compensatory damages are also on the rise for misuse of farm animals and for damage to crops caused by inadequate supervision of livestock. Resort to the system of compensatory damages is probably the only way to solve problems of this kind. The system of debt puts emphasis on the acquisition of property. It does not easily bring into play the aim of deterring tortious conduct so as to protect the lawful rights of citizens and legal persons.

As in other countries, in China there has been in the past as well as today both tortious conduct as a social phenomenon and a corresponding law of torts. This co-existence and continuity was discussed in the references to Chinese history in the first part of this article. The previous law of torts, being too incomplete, failed to play its expected role. The enactment of the *General Principles*, on the other hand, summarizes the practical experience and lessons from the past, takes into account China's reality, and forms, among other things, a tort system with Chinese characteristics. Only when great efforts are being made to strengthen the socialist legal system can this be accomplished.



## V

## THE CONCEPT OF TORTIOUS CONDUCT AND THE ELEMENTS OF LIABILITY

## A. The Concept of Tort

The term "tort," a French word by origin, means fault. A tortious act is a civil fault or wrong. In Chinese civil law theory, a tortious act means an act or omission which unlawfully invades the property right or the person of another. The tort system is designed to resolve the issues of whether a tortfeasor should compensate for the damage he has caused by his act or omission and of how compensation shall be made.

Article 106 of the *General Principles* stipulates: "Where a citizen or legal person through fault interferes with and causes damage to state or collective property, or to the property or person of another, he shall bear civil liability." This is the kind of civil liability that is called "civil liability of torts." Civil liability may arise simultaneously with criminal liability or administrative liability, and may arise by itself as well. The occurrence of criminal, administrative, and civil liability often presents itself very distinctly in traffic accident cases. In *Ma Shuzhen v. Wang Jianmin*, the defendant, after having consumed some alcohol, was driving his car at an excessive rate of speed when he hit and knocked down the plaintiff, who was riding on a bicycle, and caused severe injuries (contusion of the waist and thigh) to the plaintiff. *Ma Shuzhen* involves three different kinds of liabilities. First, the defendant should be held criminally liable since he had imbibed alcohol and was driving at an excessive rate of speed when he caused the accident. The procuratorial authorities thus may bring a public prosecution against him. Second, while so driving, the defendant violated the traffic regulations; and the traffic authorities have the right to take the administrative measure of revoking the defendant's driver's license. Third, the plaintiff has the right to claim damages. Article 110 of the *General Principles* stipulates:

Where in regard to a citizen or legal person who is civilly liable, an inquiry as to administrative liability is needed, then there shall be an inquiry as to administrative liability; if the conduct constitutes a criminal act, then as to the citizen or legal representative of the legal person there shall be an investigation according to law as to criminal liability.

It should be obvious, however, that civil liability in tort is different from either criminal liability or administrative liability.

First of all, the civil liability in tort is a kind of legal sanction. In civil activities, an actor bears the possible obligations to act (a positive act that one takes some steps to engage oneself in) and to abstain from an act (non-interference with the civil rights of another). If the actor violates his legal obligations and causes damages to another as a result, the law requires that the actor bear liability accordingly. The law of torts requires that the injuring party compensate the aggrieved party for the loss of property and eliminate the effect of the tortious act, so as to fully protect the personal and property rights of the aggrieved party.

Second, the civil liability of tort is a kind of property liability. It is the content of the system of civil laws and bears the general characteristics of the latter. Its scope of liability is limited to property liability. Article 134 of the *General Principles* delineates ten major forms of civil liability. The eighth of these forms (damages for breach of contract) clearly bears the characteristics of property (personal) liability. Although the ninth form (elimination of effects and restoration of reputation) and the tenth form (apology) are also major forms of civil liability, they do not have widespread application. They come into play only in cases involving emotional distress. Criminal and administrative liability mainly restrict the personal freedom of the actor; and property (personal) liability does not play a major role in either criminal or administrative law.

In addition, whether the injuring party should be held civilly liable for tortious conduct depends on the wishes of the aggrieved party, who may abandon the right to claim compensation from the injuring party so as to relieve the latter of tort liability. On the other hand, once a person's conduct violates criminal law or administrative law, he shall accordingly be held liable, at least in theory, unless the law enforcement agencies acquit him in accordance with law.

#### B. The Constituent Elements of Tortious Conduct

The *General Principles* continues to follow the theory of the Continental law system as it pertains to the constituent elements of tortious conduct. That is, acts which fall into the category of tortious conduct are viewed as the premise of tort liability. The actor is not liable for any acts which do not fall into this category even if such acts caused damage to another.

#### C. The Existence of Actual Damage<sup>12</sup>

Actual damage means damage that one has in fact caused to another. Emphasis is put on the actual existence of such damage, to the exclusion of any probable or speculative damages. In that sense, actual damage is not what a party or a judge assumes was inflicted. Furthermore, damage should be calculable. That is, the diminution of one's property caused by the tortious act of another should be measurable in terms of pecuniary loss. In cases involving the infliction of emotional distress, it is often impossible to calculate damage, though damage does exist in fact. Damages of this kind should be treated as special cases. The problem of emotional distress will be analyzed below in conjunction with the discussion of methods of compensation.

Damage can be classified as damage to property or damage to person. The former means damage or loss caused to state, collective, or private property. The latter means the necessary expenses incurred as a result of personal injuries. Damage can also be classified as direct or indirect

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12. See Jiang Datao, *Dui qinquan sunhai zeren zhidu ruogan wentide zai renshi* (Consideration of Several Questions Concerning the System of Torts and Damages), 3 ZHENGFA LUNTAN (POL. L. FORUM) 24-30 (1986).

(consequential). Direct damages means the diminution of a vested interest, whereas indirect (consequential) damage denotes an increase of interest which should have been achieved but in point of fact has been frustrated. In judicial practice, it proves very difficult to find a uniform standard to determine indirect (consequential) damage. In this regard, two questions arise. The first concerns a suspension of production caused by tortious conduct. Owing to the negligence of the driver, a truck runs head-on into a factory building, thereby causing a suspension of production. The factory loses the profit it would have gained but for the accident. What should be the measure for such indirect losses? The second question concerns indirect injury. If an act of a person causes only indirect injury to another, will recovery be allowed? It is because of the problems presented by the question that recovery for indirect damages is set aside in some cases.

#### D. The Occurrence of Unlawful Conduct

The term "unlawful conduct" in this context means conduct that is in violation of the Constitution, other laws, or social values. Tortious conduct is an invasion of rights. Once a person has the rights given or approved of by the Constitution, other laws, or social values, others are obligated not to invade those rights.

There are two kinds of conduct which may cause injury to the property or person of another. One is unlawful and the other lawful. Not all injurious conduct is unlawful. Tort liability arises only when injury is occasioned by unlawful conduct. There is no tort liability if the conduct is lawful, even though it may cause injury. This is why the illegality of conduct as an essential element of a tortious conduct is emphasized. The *General Principles* provides that the following types of conduct are lawful.

The first type of lawful conduct is legitimate self-defense. Article 128 of the *General Principles* stipulates that "where in legitimate self-defense damage is caused, there is no civil liability." Legitimate self-defense is lawful conduct protecting the public interest, the personal safety of oneself and of others, and defending other rights from invasion by ongoing unlawful conduct. One's self-defense may halt such unlawful invasion, or it may fail to check the invasion and even cause injury to the person who resorts to self-defense. Since legitimate self-defense is praiseworthy conduct, the person injured while exercising legitimate self-defense should be compensated accordingly.

It is further provided in article 128 that "[i]f legitimate self-defense exceeds the limits of what is necessary, and unnecessary damage is caused, there shall be appropriate civil liability." Self-defense which goes beyond the limits of what is necessary, called excessive self-defense, is a kind of illegitimate conduct. It may also be regarded as unlawful conduct. Since the limit of what is necessary is the criterion by which to judge whether self-defense is legitimate or excessive, the interpretation of that criterion is obviously of paramount importance. A limitation on legitimate self-defense effectively checks the injurious conduct. Accordingly, this criterion can only

be interpreted to mean that the self-defense should be no more than commensurate with the injurious conduct.

The second type of lawful conduct is the avoidance of danger in an emergency. Like legitimate self-defense, the avoidance of danger is a measure taken in times of emergency to protect the public interest, personal safety, and other interests. Article 129 of the *General Principles* provides that

where [action taken to] avoid danger in an emergency causes damages, the person who caused the dangerous situation bears civil liability. Where the danger was due to natural causes, the one [who took action to] avoid danger bears no civil liability or bears appropriate civil liability. If unnecessary damage was caused because inappropriate means were used or the necessary limits were exceeded, the person who [took action to] avoid danger shall bear appropriate civil liability.

A problem arises because if the danger is occasioned by natural causes, the person who takes action to avoid it may bear civil liability. It should be recognized further that when the person took the action, he or she very often could not possibly have discerned the source of the danger. As a possible consequence of this inability, in order to avoid any future civil liability, the actor may well elect to ignore the public interest and the rights of the private person and property at stake. Such inaction may result in aggravated losses of the said interest and rights. Furthermore, suppose the actor who took some legitimate measures to avoid a danger occasioned by natural causes was nevertheless later found liable for some civil liability. Does that mean that the avoidance of danger was an unlawful act? If it is said to be unlawful, it is still difficult to find a reasonable basis to sustain the argument. If, on the other hand, the act is to be considered lawful, why then should the actor be held civilly liable? It is questionable whether such a provision in the *General Principles* will prove feasible in judicial practice.

#### E. The Causal Connection Between an Unlawful Act and Damage

The term "causal connection" describes the necessary and objective relationship between the tortious conduct and the damage done. In other words, the relationship can be described as one in which the damage would not have occurred but for the tortious conduct.

Generally speaking, the connection between tortious conduct and damage can be demonstrated clearly, as in the instance of a cyclist riding on the sidewalk and injuring a pedestrian. Difficulty arises, however, when several unrelated factors contribute to a single result. In *Wang Guiqin v. Li Xuejie*, the plaintiff's husband was riding a bicycle which had no brakes and was zigzagging along. He collided with the defendant, who was cycling in the opposite direction. A quarrel ensued, during which plaintiff's husband fainted and fell to the ground. He was then rushed to the hospital where he died. The plaintiff claimed that her husband died as a result of the quarrel. The court held that the plaintiff's husband died as a result of cerebral hemorrhage and that there was no proximate cause between his death and either the collision or the quarrel. The plaintiff's claim for damages was denied.

## F. Fault

The term “fault” refers to the mental state of the actor during the course of his tortious conduct. His conduct is intentional if the actor knew that his conduct might cause injury to another and he either expected injury or took a reckless attitude towards the injurious result. The actor is negligent if he ought to have foreseen the outcome as a result of his tortious conduct, or, although he did foresee the result he credulously believed that his conduct would not cause damage. Intentional or negligent, this conduct is classified as “fault” in civil law. Article 106 of the *General Principles* stipulates the civil liability of fault. This in fact had been adopted in judicial practice long before the promulgation of the *General Principles*. Most problematic of all is finding a way to define fault properly.

Although it is not difficult to determine whether a tortious act is intentional or not, commentators on civil law have been far from unanimous as to what constitutes fault. Some advocate that fault should be determined by the foreseeability of injury from the standpoint of the actor. There is no fault if the actor could not foresee the outcome which occurred as a result of his conduct. Others propose that fault should be determined by a uniform standard of whether the injurious outcome ought to have been foreseen by the actor, and that this standard should have general application. There is no fault if this uniform foreseeability standard is satisfied. The former approach seems more realistic since, due to differences in life, knowledge, and experience, people vary widely as to their ability to foresee future results. It may be more realistic to determine fault with this criterion. On the other hand, this standpoint would encourage people to use all kinds of excuses to establish that they could not foresee the harmful result, and judges would have difficulty in making decisions. Easily applicable as it may be, the latter view detaches itself from the specific circumstances of each individual case. In medical malpractice cases, doctors should be judged to have greater foreseeability as to the result than laymen. A doctor’s awareness of foreseeability may be utterly beyond the abilities of an ordinary person.

Judicial practice has already provided us with a more feasible solution to the problem, that is, to divide foreseeability into ordinary and professional foreseeability. That a smoldering cigarette butt thrown onto a stack of dry hay may cause a fire is within the scope of ordinary foreseeability. Professionals, such as medical doctors, are required to exercise a higher degree of care in the course of their professional service. Both the ordinary person and the professional should be held liable in negligence if they fail to foresee the result which is within their respective scopes of care. It will be gross negligence if a professional fails to foresee what an ordinary person could have foreseen.

It is not always important to divide fault into intentional fault and negligence and subdivide the latter into negligence and gross negligence in order to determine whether the tortfeasor should be held civilly liable. Under

some circumstances, however, the divisions are instrumental in determining the scope of liability.

## VI

### ALLOCATION OF TORT LIABILITY

The allocation of liability decides who should bear the responsibility for the damage caused by tortious conduct. Articles 117-120 deal with tort liability arising from fault, and articles 121-127 deal with tort liability where no party involved is at fault.

As shown in article 106 of the *General Principles*, there are two ways to allocate tort liability. One is characterized by a determination of fault (see also articles 117-120). The other is to allocate liability regardless of fault. Some commentators say that allocation of liability regardless of fault is what articles 121-127 of the *General Principles* are all about. This is a simplistic analysis of articles 117-127 of the *General Principles*. Two concepts—fault and faultlessness—are employed in the *General Principles* to classify and cover all kinds of tortious conduct.

The theoretical basis is the general process of causation. This presumes that because of the fault of the actor, damage occurred and the actor should be liable for such damage. Furthermore, once the actor's conduct causes damage, he should answer for it even if there was no subjective fault on his part. It can be said that article 106 of the *General Principles* is based on an idealized presumption which is meant to describe logically the causal relationship between conduct and damage.

Factual situations, on the other hand, invariably go contrary to the logical sequence of a tortious act. In point of fact, when a tortious act has occurred, it is not always possible to find out exactly what was subjectively intended by the tortfeasor before the tortious conduct was committed, i.e., whether there was fault on the part of the tortfeasor. For example, suppose a big fire broke out due to someone's negligence. Suppose further that all the evidence which could have proved negligence on the part of the tortfeasor in causing the fire was totally destroyed, and the aggrieved party could not establish that the tortfeasor either intentionally or negligently caused the fire. Such being the case, if the tortfeasor tried to find excuses to escape liability, it is very difficult to determine the mindset of the tortfeasor before and after the incident. A judge in such a case has to resort to some legally compulsory measures in order to render a fair judgment. For that purpose, the law has first stipulated that the tortfeasor will be relieved of any tort liability if the aggrieved party fails to prove there was fault on the part of the tortfeasor. (This rule is often applied to ordinary tort cases.) Second, the tortfeasor will be held liable if he did commit certain affirmative acts regardless of whether he was at fault. (This rule is often applied to the so-called "special tort cases.")

As far as the second rule is concerned, there are many relevant legal rules. Article 121 of the *General Principles* delineates the tort liability of state agencies and their employees. According to this article, the agencies and their

employees shall be civilly liable if in the course of performing their official duties they violate the lawful rights and the interests of citizens or legal persons and cause damage. As sometimes happens, there may have been neither intentional tort nor negligence on the part of the actor. This method of allocating tort liability, which may be called a “regardless-of-fault” method, does not account for the mindset of the actor at the time when the incident happened.

The “regardless-of-fault” method does not conflict with the concepts of “fault” and “faultless” as found in paragraphs 2 and 3 in article 106 of the *General Principles*. Articles 121-127 of the *General Principles* focus on the “regardless-of-fault” type of tort liability. This liability can be divided into “ordinary” and “special regardless-of-fault” categories, which are discussed immediately below.

#### A. Ordinary “Regardless-of-Fault” Cases

No inquiry is made, under any circumstances, as to whether there was fault on the part of the actor. That is, once it is ascertained that the actor committed a certain conduct which caused damage, no inquiry will be made to find out whether the actor was at fault. Furthermore, no question will be asked as to whether the action was intentional or whether the aggrieved party was contributorily at fault. This type of tort liability includes cases of state tort liability, products liability, and liability arising from failure to meet safety standards in construction projects, all of which are addressed briefly below.

1. *Damage Caused by State Agencies or their Employees in the Course of Performing their Official Duties (Article 122)*. This rule is also called “state tort liability.” As early as the 1950’s, rules regarding state tort liability, such as the Provisional Rules Concerning the Administration of Harbors of the PRC,<sup>13</sup> were established. For the state to be held liable, the tortious conduct must be committed in the course of performing official duties. The state will not be liable for damages caused by state agency employees in the capacity of ordinary citizens engaged in civil activities.

2. *Tort Liability Arising from Damages Caused by Defective Products (Article 122)*. Article 122 of the *General Principles* is composed of two parts. First, if because of the defective quality of goods, damage is caused to the property or person of another, the manufacturer and seller of the goods shall bear civil liability. In other words, once the defect causes damage to property or person, the manufacturer and seller shall be liable regardless of whether or not they were subjectively at fault or whether or not there was a causal connection between the tortious conduct and damage. Second, if transporters and bailors are

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13. Article 20 of these Rules provides:

If with no legal basis the harbor bureau on its own authority issues an order prohibiting a vessel from leaving port, the said vessel may seek from the harbor bureau compensation for damages directly arising from the prohibition on leaving port, and also retains the right to sue the bureau in court.

responsible for damages, the manufacturer and seller has the right to claim compensation from them, but only after the manufacturer or seller has discharged its liability to the injured party.

3. *Tort Liability Arising from Damages Caused by Failure to Take Safety Measures at Construction Site (Article 125).* Article 125 of the *General Principles* stipulates that “where without placing clear signs and adopting safety measures excavations are dug or repairs or installation of underground facilities or the like are made in public areas or along a road or in a roadway, thereby causing damage to another, the person doing the work shall bear civil liability.” It is a basic obligation for construction workers to take measures to prevent others from being injured. Failure to do so is in violation of the law. However, a tort action will not lie unless damage was caused and there was a causal connection between the tortious conduct and the damage.

#### B. Special “Regardless-of-Fault” Cases

Tort liability arising from tortious conduct regardless of fault on the part of the tortfeasor has been discussed. However, the tortfeasor can be exonerated from liability if he can prove that the damage was caused by the aggrieved party or by a third party. Discussion now turns to such cases.

1. *Damages Caused by Ultrahazardous Activities.* Article 123 of the *General Principles* provides:

Where engaging in work which constitutes high risk to the surroundings, such as work in the upper atmosphere or work involving high pressure, flammables, explosives, strong poisons, radioactive substances, or high speed transportation vehicles, results in damage to another, there shall be civil liability; if it can be proved that the damage was intentionally caused by the party who suffered the damages, there shall be no liability.

In other words, before the tortfeasor can exculpate himself from liability he must prove that the injured party had the intent to cause harm and carried out that intent.

2. *Damages Caused by Buildings.* Article 126 of the *General Principles* stipulates:

Where buildings or other facilities, as well as railings or hanging articles, collapse or loosen or fall, and cause damage to another, the owner or person in control of the building or facility shall bear civil liability, but not where he is able to prove that he was not at fault.

The reason that article 126 includes “the person in control of the building or facility” as a potentially liable party is that in China buildings and residential houses are largely state-owned.

According to the *General Principles*, the special tort cases also include damages caused by animals and pollution (articles 127 and 124). In addition, article 33 provides that if a person who is incompetent or has limited competence causes damage to another, his guardian is liable. If the guardian has fulfilled his duty as a guardian, his liability may be appropriately reduced.



Equity is also one of the basic principles for allocating liabilities. In *Wang Gang v. Li Jun*, Li Jun jokingly gave Wang Gang a gentle slap on the back of his head. Wang Gang fainted and collapsed onto the ground and later died in the hospital. According to the autopsy, Wang Gang had previously received cerebral damage, which was the cause of his death. Prior to his death, no one knew he had suffered cerebral damage before. Since Li Jun could not have anticipated the death, he should not be held liable for Wang's death. There is yet no clear-cut criterion for applying the principle of equity. Rather, its application is prompted by the general moral standard of society.

## VII

### DAMAGES

#### A. Principles

In traditional Continental law theory, civil liability in tort is synonymous with damages. Article 134 of the *General Principles*, however, includes as a form of tort liability non-physical damages. It classifies the forms of civil liability of tort into two groups. The first group includes the return of property; restoration of the original condition; cessation of infringement; payment of compensation; elimination of obstructions; elimination of danger; and repair, reconstruction, or replacement. These can be characterized as physical damages. The second group consists of elimination of effects and restoration of reputation and apology. These are known as non-physical damages. Of all the forms of civil liability, payment of compensation is perhaps the most frequently used in tort actions.

In the system of damages established by the *General Principles*, the greatest difficulty lies in determining compensation for emotional distress or whether emotional distress can be compensated monetarily at all. Prior to promulgation of the *General Principles*, courts at various levels and most commentators on civil laws consistently refused to accept the idea of compensating emotional distress with pecuniary damages. They believed, first of all, that a person's reputation was not a commodity, and thus its value could not be measured in terms of property. Second, since emotional distress could not be estimated in terms of monetary damages, it was difficult to establish feasible and practicable criteria to measure damages. An opposing view held that damages for emotional distress could more comprehensively and effectively protect the civil rights of citizens and legal persons. With the enactment of the *General Principles*, which recognizes damages for emotional distress, the focus of the various opinions has perhaps shifted towards the methods for compensating for emotional distress.

## B. Methods of Compensation

The methods and assessment of damages vary as to the different kinds of tort cases.

1. *Compensation for the Infringement on the Property Rights of Citizens and Legal Persons.* Article 117 of the *General Principles* provides for three kinds of compensation for such infringement: namely, the return of property, the restoration of the original condition, and the payment of compensation. As far as payment of compensation is concerned, if there is interference causing damage to state or collective property or another person's property, the property must be restored to its original condition, or an amount equal to its value must be paid as compensation. Second, if the injured party sustains other substantial loss as a result of the tortious conduct, the party who caused the damage must also pay compensation for that loss.

2. *Compensation for the Infringement on Intellectual Property.* In a case of an infringement on intellectual property rights, the injured party has an option either to claim actual damages or to claim as damages the profits made by the injuring party during the period of infringement.

3. *Compensation for Personal Injury.*

a. *Injury.* Article 119 of the *General Principles* provides that where personal injury is caused to a citizen, compensation must be paid for medical expenses, loss of income from work, expense of living as a disabled person, and similar expenses.

b. *Death.* Article 119 also provides that "where death is caused, there shall be payment for funeral expenses, as well as expenses such as necessary maintenance for the deceased's dependents." The necessary maintenance is assessed in light of the average living standard in the area where the deceased had lived. If the injured party died during medical treatment, the injuring party should also compensate for the medical expenses, loss of income from work, travel expenses, and so on.

4. *Compensation for Emotional Distress.* In handling tort cases such as traffic accidents which result in the death of the injured party, courts normally divide damages into two parts. One part would be direct and incidental damages sustained by the injured party or his family as a result of the accident. The other part would be an amount of money as condolence to the injured party or his family. It should be said that the latter amount derives solely from the general moral standard of the society, and is therefore influenced by the feelings of the general public. The assessment of emotional distress damages, which should be different from the assessment of ordinary tort damages, may consider the following factors: the degree of the emotional distress; the degree of fault of the injuring party; the economic well-being of both parties; and the social impact of granting damages for emotional distress.

## VIII

## CONCLUSION

In China, the study of tort liabilities has just begun. The enactment of the *General Principles*, however, will give great impetus to the study and enhance public awareness of citizens' rights and obligations. It can be predicted that studies on China's tort system will increase quantitatively and qualitatively in the near future.

## IX

## POSTSCRIPT

Although the *General Principles* contains special provisions concerning civil liability arising from tort, it is too sketchy when compared to foreign legislation and the needs of Chinese trial practice. Therefore the State Council has issued a series of rules and regulations; and on January 26, 1988, the Supreme People's Court adopted its Opinion (For Trial Use) on Questions Concerning the Implementation of the *General Principles* ("the Opinion").<sup>14</sup> This legislation and these judicial documents have played an important role in strengthening Chinese tort law. In the following pages, I will present and analyze several key cases in light of this recent legislation.

A. Protection of the Right of Reputation (*mingyuquan*)

After the *General Principles* was issued a source of increasing concern to people was protection of reputation. The number of plaintiffs bringing suits on the basis of article 120 has increased sharply, marking a new beginning in China's emphasis on the protection of the rights of the person (*renshenquan*).

1. *The Case of Shanghai Xinya Medical Rubber Factory v. Wujin Medical Facilities Factory*.<sup>15</sup> In 1983, the plaintiff began to manufacture and sell feminine hygiene devices. The market was good, and by 1985 the plaintiff was selling more than 600,000 units a year. That year, the defendant began to manufacture and sell the same product. In order to sell its overproduction, the defendant printed hundreds of advertisements and sent them to medical supply stores in Shanghai. In these flyers, the defendant claimed that women could injure themselves by using the plaintiff's product, and that the plaintiff had inventoried 1.05 million devices that were either partially effective or completely ineffective. In the wake of these notices, the plaintiff experienced a marked drop in sales and increase in returns.

The court decided that the defendant should place an announcement in a municipal daily newspaper apologizing to the plaintiff, thereby eliminating the effect of the infringement and restoring the plaintiff's reputation, and should

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14. Guanyu guanche zhixing, *Zhongguo renmin gongheguo minfa tongze ruogan wentide yijian* (shixing). For a translation, see Gray, *LAW & CONTEMP. PROBS.*, Spring 1989, at 27.

15. ZUIGAO RENMIN FAYUAN GONGBAO (BULLETIN OF THE SUPREME PEOPLE'S COURT), No. 1 (1989), at 41-43.

also compensate the plaintiff for damages in the amount of 30,000 RMB (approximately US \$ 7500).

2. *Analysis of the Decision.* The court considered this a case of a tort against the plaintiff's reputation and used article 120 of the *General Principles*, the provision that deals with the infringement of the right of a legal person to its reputation: "[The legal person] has the right to demand that the infringement cease, the reputation be restored, and the effects [of the infringement] be eliminated, and to demand an apology; he may also demand compensation for loss." The court's decision was absolutely correct and revealed the following tendencies.

a. *A stress on "eliminating the effect, restoring the reputation, and making an apology" and a de-emphasis on "compensation for loss."* The essence of infringement of the right to reputation is the defendant's aim to diminish the reputation of the plaintiff in order to obtain an unlawful benefit (*feifa liyi*). The Chinese have a singular attitude: "A soldier may be killed but not insulted." Thus, many plaintiffs bring suit not to be compensated for loss but because of loss of face or damage to reputation. Sometimes plaintiffs will sue for less than US \$100. It must be said that one of the responsibilities of the court is to restore the diminished reputation to its original condition. Between lower sales and returned products, the plaintiff in this case lost around 560,000 RMB but obtained only 30,000 RMB in compensation. Thus, the court's judgment reflected a lesser concern with compensation for monetary loss.

b. *A stress on compensating for "direct" (zhijie) rather than "indirect" (jianjie) damages.* "Direct damages" refers to the diminution of currently possessed property, while "indirect damages" indicates the loss of possible profits (*ji kede liyi*). In this case, in terms of the value of goods returned to the plaintiff between March 1986 and March 1987, direct damages totalled 120,000 RMB. Indirect damages, that is loss of sales as a consequence of the defendant's injury to the plaintiff's reputation, amounted to 440,000 RMB. The court's decision does not clearly state whether the 30,000 RMB was awarded as direct or indirect damages; but since for a long time courts have required compensation for only direct damages, we can infer that the 30,000 RMB was for direct damages.

c. *A stress on direct damages and a disregard for the unlawful benefit.* The decision in this case paid attention only to the direct damages suffered by the plaintiff but ignored the profit the defendant made by ruining the plaintiff's reputation. Article 92 of the *General Principles* states that "where improper benefit is obtained without lawful grounds, resulting in loss to another party, the improper benefit must be returned to the damaged party." Obviously, although the court did not see it this way, the unlawful profit the defendant made by ruining the plaintiff's reputation should be returned to the plaintiff.

The improper benefit may or may not be equal to the plaintiff's loss. If the improper benefit exceeds the loss, the plaintiff should be allowed to choose which of the two it wants. On this point, we ought to be consistent with the situation in trademark infringement.

## B. Product Liability

1. *Handling as a Civil Matter.* The Chinese product liability system has appeared over the last several years as a consequence of learning from foreign legislative experience. Before the promulgation of the *General Principles*, when sub-standard quality goods caused personal injury or property damage, civil compensation generally was incidentally resolved in the course of pursuing administrative and criminal responsibility. In China's new history of civil legislation, the *General Principles* for the first time defined "injury to another person or damage to another's property by sub-standard quality goods" as a tort with civil liability. Article 153 of the Opinion further advances the provisions on product liability, but in some respects differs from article 122 of the *General Principles*.

With respect to substantive law (*shitifa*), the *General Principles* provides for damage to the property or person of "another" (*taren*), while the Opinion extends the meaning of "another" to mean oneself (*benren*), that is the consumer or user, or a third party (*disanren*). With respect to procedure (*chengxufa*), the *General Principles* contains no provisions. Product liability suits are to be filed according to article 22 of the Code of Civil Procedure (For Trial Use) in the court of the jurisdiction where the tort occurred. In practice, product liability litigation may occur on the basis of a contract or occur where there is no contractual relationship. The Opinion provides: "Because of this [i.e., that the injured party may seek compensation from other than the manufacturer or the seller of the product], a suit may be brought in the court either in the jurisdiction where the plaintiff resides or the place of the tort." This is very reasonable. In addition, article 153, section 2, provides that "those engaged in transport and storage bear a responsibility for product quality. If the manufacturer or seller seeks compensation for loss, the case may either be handled separately or in a joint suit, with the transporter and storer listed as a third party." This regulation is particularly significant in instances in which the manufacturer or seller is unable to compensate the damaged party.

a. *The case of Houyingzi Cooperative v. Sanzhong Frozen Food Machinery Sales Agency.*<sup>16</sup> On July 13, 1988, the plaintiff bought a "White Tower" freezer produced by the defendant. On August 8, 1988, the defendant sent a person to test and adjust the freezer, after which it was put into use. On the morning of August 31, Wang Wenhai, an employee of the plaintiff unit, grasped the handle of the freezer to open the door and take out food.

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16. *Id.* No. 2 (1989), at 37-39.

Because the body of the freezer carried an electric charge, he received a fatal shock. Although the freezer had been examined and met provincial standards, the defendant had either failed to install, or else installed improperly, a motor and ground wire. The freezer could run normally for a period of time, but there was the constant possibility of the body of the freezer carrying a current because of the motor and ground problem.

The court held that the plaintiff could return the freezer. The defendant was to pay the plaintiff 7900 RMB, which was to cover reimbursement for the cost of the freezer and shipping fees, as compensation for lost business. The defendant was also ordered to make two additional payments: 13,986.90 RMB for the funeral expenses of the deceased and for the living expenses and pension benefits he would have provided to those he would have supported had he not died; and 4,152.03 RMB to the deceased's relative in lost wages and transportation costs.

There are two interesting elements to the handling of this case. First, the local court which had jurisdiction refused to take the deceased's heir as a plaintiff in the case. This action violated the provisions of article 153 of the Opinion. In its report on this case, the Supreme Court approvingly noted the local court's decision to have the defendant compensate the cooperative for its losses and pay the deceased's heir living expenses and pension death benefits (*fuxufei*). However, the Supreme Court also observed that the trial court should have allowed the deceased's heir to have been a plaintiff, the cases to have been combined, and the deceased's heir to have assumed the duties and obligations of a joint participant in the litigation.

Second, notwithstanding historical practical experience, indirect damages may be compensated. In this case the court decided to compensate the plaintiff for damage caused by its business being halted. Damages arising from stoppage of business are the sort of indirect damages that may be compensated. This court's treatment of the issue is strikingly different from that of the court in the case of damaged reputation discussed above.

2. *Administrative Handling.* Strictly speaking, in China product liability is not simply a matter of civil law. In addition to the *General Principles* and the Opinion, there are a number of administrative regulations promulgated by the State Council that grant to administrative organs the right to handle disputes about product quality. Among these regulations are the Industrial Product Quality Liability Regulations,<sup>17</sup> issued by the State Council on April 5, 1986, the Guide to Administering Rural and Township Enterprise Industrial Product Quality,<sup>18</sup> issued by the State Economic Commission on June 30, 1987, and the Standardization Law of the PRC,<sup>19</sup> passed by the Standing Committee of the National People's Congress on December 29,

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17. Gongye chanpin zhiliang zeren tiaoli.

18. Xianzhen qiye gongye chanpin zhiliang guanli jianghua.

19. Zhonghua renmin gongheguo biaojun fa.

1988. In real life, the method of settling product quality disputes by administrative organs has been widely adopted and is quite effective.

For example, Shanghai Yikang Mine Water Company had produced a device, called the JSK-W Water Cleaner. In a quality examination, the water treated by the device was found to have bacterial levels 1.1 times greater than the national standard. On November 25, 1989, the Shanghai Bureau of Technology Inspection demanded that the company recover all cleaners sold, guarantee their repair, exchange, and return, and compensate any actual economic losses caused by the defective devices.<sup>20</sup>

3. *Employer Liability* (guzhu zeren). Employer liability has not yet received the attention from Chinese legal scholars that it deserves, but these sorts of cases have been encountered in trial practice. Under present circumstances, employer liability seems to occur most often in construction and in traffic accidents.

a. *Employer liability in construction.* In construction, the employer's liability is generally fault liability (*guocuo zeren*). Applying the stipulations of article 106, section 2, of the *General Principles*, we can see that the party who lets a construction contract (*fabao fang*) bears no tort liability with regard to the contractor (*chengbao fang*), employer, or the contractor's employees. An employer cannot evade fault liability toward an employee by inserting the phrase "not responsible for injuries on the job" into a contract for hire (*gugong hetong*).

The defendant in a recent case<sup>21</sup> contracted for a team from her construction company to demolish a factory building. She entrusted her husband with complete authority to organize and direct the work. In the course of the work, a concrete beam cracked and broke while being suspended from a crane. The defendant's husband was not paying attention. An employee who had been standing on the beam without being tied by a safety belt fell to the ground and injured his left foot. He died because a local infection led to necrosis and septicaemia. The employee's father and older sister brought suit. The court held that the defendant's agent (*daili ren*), the husband, had allowed the employees to work in violation of regulations. Once he discovered the accident, he took no preventive measures. His state of mind was one in which he knew or should have known the possibility of an accident but either ignored the possibility or paid little attention to it. It is a case of fault liability. The stipulation in the contract for hire that the employer was not liable for work injuries was an invalid civil act, and the defendant was to bear liability.

b. *Employer liability in a traffic accident.* Following the large increase in the number of various vehicles in China, the number of traffic accidents has also

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20. Fazhi ribao (Legal System Daily), Dec. 1, 1989.

21. BULLETIN OF THE SUPREME COURT, No. 1 (1989), at 23-24.

risen sharply. Most of the accidents have been resolved by traffic management departments (*jiaotong yingli bumen*). Only a few have been handled by the courts. Judging from the current tendency of legislation, problems of compensation arising from traffic accidents will be treated as civil cases.

In the late 1950's, the Supreme People's Court proposed that in instances in which the accident was caused solely because of the driver's negligence, the driver should assume the responsibility for compensation for injury, but the unit for which he worked would have to make up any shortfall. In 1988 the State Council issued the PRC Regulations for Highway and Traffic Control;<sup>22</sup> local governments also issued some measures to deal with traffic accidents. Consequently, the old practice of not recognizing employer liability has undergone a fundamental change.

Article 33, section 2, of the Beijing Municipal Temporary Methods for Handling Traffic Accidents (issued on March 31, 1988)<sup>23</sup> provides that if a party to a traffic accident has a work unit or is employed by a private person (*shougu yu siren*) (including urban and rural individual industrial and commercial households (*geti gongshanghu*)), then the work unit or the employer ought to pay first; then, based on either the relevant provisions or on contractual agreement, the employer or work unit should deal with the driver or seek reimbursement. Therefore, in dealing with traffic accidents, courts ordinarily make only the employer or work unit the defendant, thereby signifying the recognition of the employer's liability to pay compensation in such accidents.

As legal scholars understand it, the liability to pay compensation is not joint and several liability (*liandai zeren*). Establishing the employer's liability is based on the facts that: 1) the driver himself often lacks the capacity to pay compensation, yet the interests and rights of the victim or his relatives must be protected; and 2) even if the accident occurred only because of the driver's own carelessness, the employer ought to have some liability for improper management or neglect. Naturally, we need to continue to discuss these points.

## X

### UPDATED CONCLUSION

Signs of the unquestionably rapid development of tort law in China can be found in the strengthening of relevant legislation, making meaningful cases public (although these have no role as precedents), and strengthening the research on the question of the infringement of rights of the person. These have all played a role in enriching the content of Chinese tort law.

It should be acknowledged that there are many aspects of both system and theory in Chinese tort law that are disappointing. A particular problem is that

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22. Zhonghua renmin gongheguo daolu jiaotong guanli tiaoli.

23. Beijing shi daolu jiaotong shigu chuli zanxing banfa.



it is insufficiently concrete, so that an essentially similar case handled by different courts will have very different results, as for example in the cases we discussed involving whether indirect damages may be compensated. Moreover, the authority of judges (*faguan*) to handle cases of liability to pay compensation is too limited. Such restricted authority facilitates the possibility of using administrative measures to deal with cases of civil tort, when in fact this power ought to belong to judges.

