



JONES DAY  
**COMMENTARY**

## CHINA'S NEW TORT LAW COMES INTO EFFECT

On July 1, 2010, China's Tort Liability Law ("the Law"), which was passed on December 29, 2009, came into effect. The Law's contents are mostly from existing laws concerning tort liabilities, such as the General Principles of the Civil Law, the Consumer Protection Act, the Law on Product Quality, the Environmental Protection Law, and the Transportation Safety Law, etc.

With merely 92 articles, the Law sets the general principles in tort cases. Article 5 states that where other laws have specific provisions, those specific provisions apply. It is expected that the Supreme People's Court will provide further interpretations and instructions as issues regarding the Law's implementation arise.

The Law has two major parts: One is the "general principles" of tort, the other is the "specific types" of torts.

### GENERAL PROVISIONS

This section addresses the Law's general applications, such as the rights and interests protected, remedies, defenses, and tortfeasors.

**Rights and Interests Protected.** Article 2 of the Law contains a detailed list of the personal and property rights and interests the law protects, namely the rights to life, health, name, reputation, honor, image, privacy, marital autonomy, guardianship, ownership, usufruct, security interests, copyrights, patents, exclusive use of trademarks, discovery, equity, and inheritance.

It is not clear from the Chinese version whether the delineation of the specifics excludes other rights not on the list, although many English translations of this provision interpret it as including other personal and property rights and interests not listed. Commentators also tend to view this list as nonexclusive. The courts may address this issue in their decisions.

**Remedies.** The remedies provided in Article 15 are largely the same as in Article 134 of the General Principles of the Civil Law, which was enacted in 1986. These remedies are:

- Cessation of infringement
- Removal of obstacle
- Elimination of danger

- Return of property
- Restoration to original conditions or state
- Compensation for damages
- Apology
- Elimination of effects and restoration of reputation.

Specifically, compensation for damages includes the following:

**Damages for Physical Harm.** Compensation for physical harm includes medical expenses, transportation costs, and lost income. In cases of disability, the damages include expenses for disability-related appliances and disability compensation. In cases of death, a close relative can bring the tort claim, and the damages include funeral expenses and death compensation.

The Law specifically provides that in the case of serious psychological harm, damages for mental distress can be sought. Although the Supreme People's Court has long allowed damages for mental distress (see *Interpretation of the Supreme People's Court on Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts*, 2001), this is the first Law stating such damages.

**Property Damages.** Property damages are decided by the following standards:

- By the damaged property's market value at the time of tort occurrence;
- By the tortfeasor's gains if the damages to the plaintiff cannot be decided;
- By the court in its discretion if the tortfeasor's gains cannot be decided and the parties cannot agree on the damage amount.

**Defenses.** Chapter Three of the Law lists certain defenses under which the tort liability can be mitigated or relieved:

- If the victim contributes to the injury, the tortfeasor's liability can be mitigated.
- If the victim intentionally causes injury, the tortfeasor will not be liable.
- If the injury is caused by a third party, the third party should take the responsibility.

- Other defenses, such as force majeure, self-defense, or necessity, are included.

**Tortfeasors.** Although generally a tortfeasor is liable for liabilities caused by his conduct, the Law provides for vicarious liabilities. Some noteworthy vicarious liabilities include:

- Employer's liability for torts caused by its employees' execution of their work duties.
- Liability of a person receiving labor service for the harm caused as a result of the labor services by the service provider.
- Liabilities of managers of a public venue and organizers of a mass activity.
- Liabilities of educational institutions.

Internet service provider's liability for its users—The provision states that if an internet service provider is notified of an infringement by its user and fails to take necessary measures in a timely manner, it is jointly and severally liable with the user for any additional harm caused by the lack of action.

## SPECIFIC TYPES OF TORTS

The specific types include:

- Product liability
- Liability for motor vehicle traffic accident
- Medical malpractice
- Environmental tort
- Liability for ultrahazardous activity
- Liability for harm caused by domestic animals
- Liability for harm caused by an object.

Two types of torts among these specific torts are discussed here.

**Product Liability.** The provisions are similar to those in the Law on Product Quality. A manufacturer is liable for the harm caused by defects in its product. A victim can choose to sue the manufacturer or the seller. If the defect is caused by the manufacturer and the seller compensated the victim, the seller can seek refund from the manufacturer.

A significant feature of the product liability provisions is that they provide for “punitive damages.” Punitive damages can be claimed when a manufacturer or a seller knows of a defect but continues to manufacture or sell the product and causes death or serious injury. Product liability is the only tort where the Law specifically provides for punitive damages.

**Environmental Tort.** Notably, this section contains a burden-shifting provision. Article 66 provides that in cases of disputes, the polluter bears the burden of proof on the issues of liability, mitigation, and causation. Given the difficulty of proving causation, this provision will encourage the plaintiff to initiate such lawsuits.

In addition, Article 68 provides that even if a third party’s fault caused the pollution, the victim may claim compensation from the polluter.

## NO RETROACTIVE APPLICATION

The Supreme People’s Court issued Instructions on the Application of the Law on June 30, 2010. The Instructions mainly address the retroactive application of the Tort Liability Law. They provide that for cases arising out of tortious acts that occur after the effective date of the Law, *i.e.*, July 1, 2010, the Law applies; for cases arising out of tortious acts that occurred before the effective date of the Law, the then-existing laws apply. The Instructions further clarify that if the tortious acts occurred before the effective date of the Law, but the harm appeared after the effective date, the Law applies.

Although many commentators emphasize the significance of having a uniform tort law, the lack of specifics makes it necessary to reference and apply other laws in the application of the Law. In doing so, the Law’s relationship with other laws needs to be further clarified by China’s Supreme People’s Court.

## LAWYER CONTACTS

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