

Tortious Liability For Defective Products In The People's Republic of China

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I. INTRODUCTION

The traditional preoccupation of China's leaders with gross industrial output has long compromised economic efficiency and product quality. Official consternation at socialist industry's failure to meet expected quality standards already accompanied "socialist transformation" as early as the 1950s,¹ but it was not until 1978 that the State Council, following directions from the Party, prohibited statisticians from including products which do not meet state standards in the annual figures for industrial output.² Thenceforth, statisticians have set apart the proportion of products which do not meet state standards. Generally, there has been a proportional decrease in the number of substandard products, but this is not always the case. It is alarming that even official statistics show the quality score of many industrial products, especially consumer products, to be low and falling.³ There is special cause for concern since, in 1987, China's rural industrial output exceeded agricultural output for the first time.⁴

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1. See, e.g., Zhong Gongyebu Guanyu Zai Shengchan Chang-kuang Jianli Zerenzhi de Zhishi (Directions from the Ministry of Heavy Industry Concerning the Establishment of a Responsibility System in Factories and Mines)(promulgated May 28, 1953) ZHONGHUA RENMIN GONGHEGUO GONGYE QIYE FAGUI XUANBIAN 25 (1981).

2. Guowuyuan Guanyu Bu Hege Pin Bu Jisuan Chanliang Chanzhi de Tongzhi (State Council Notice Concerning Not Calculating Products Not Up to Standard as Part of the Value of Industrial Output) (promulgated Dec. 17, 1978), GONGYE QIYE GUANLI WENJIAN XUANBIAN 436 (1984).

3. In 1986, sewing machines, bicycles, and wrist-watches scored little over 90 out of a possible 130 points, all down from the previous years's score. See ALMANAC OF CHINA'S ECONOMY, iii-31 (1987).

4. *Nongcun Jingji Fasheng Lishi Jubian*, *Feinong Chanzhi Souci Chaoguo Nongye* (There is a Significant Change in the Village Economy, Non-agricultural output value exceeded The Agricultural Output Value for the First Time), RMRB—HB, Jan. 5, 1988, at 1; see State Economic Commissions, Ministry of Agriculture, Animal Husbandry and Fisheries, State Bureau of Industry and Commerce, *Views Concerning the Strengthening of Industrial Products Quality Management Work in Rural-Township Enterprises*, ALMANAC OF CHINA'S ECONOMY, x-6 (1987).

The problem of product quality concerns the substandard nature of both legitimate and counterfeit or unmarked goods. The Chinese press is replete with examples of dissatisfied customers who have purchased faulty manufactured goods, especially consumer durables. In August 1987, the Ministry for Light Industry announced that it would organise an exhibition of shoddy goods in Beijing. In response to the announcement, the Ministry received over 1,900 complaints about poor quality products, half of which concerned refrigerators, bicycles, and washing machines: the other half were complaints about television sets.⁵ Since that time, there have also been numerous reported cases of injury, and even death, caused by certain goods, in particular medicine, food, and drink.⁶ Most reports concern the manufacturer's or seller's contractual and criminal liability. In response to consumer claims, retailers have denied responsibility and referred customers to manufacturers. Most often the manufacturer is located in a distant province and fails to answer the consumer's letters and telegrams.⁷

Following these developments there was a flurry of legislative activity which created new administrative measures for standardization, supervision, and licensing of a wide range of industrial products. The measures covered imported goods, as well as those designed for export.⁸ The vertical orientation of these new laws was typical of a

5. *Leizhi Chanpin Zhanlan Zhengji Gongzuo Jiesu* (The Movement for Collection and Exhibiting Poor Quality Products Concludes), RMRB, Nov. 9, 1987, at 1. The exhibition was not held because of strong reaction from manufacturers: *Liezhan' Liuchan de Neimu*, RMRB, Dec. 15, 1987, at 3.

6. See generally *Jiaqiang Jiandu Guanli Baozhang Renmin Jiankang* (Strengthen Supervision and Administration, Protect People's Health), *Zhongguo Fazhibao*, Aug. 28, 1987, at 2. A city in Hebei Province held an exhibition of 46 types of fake and/or bad quality foodstuffs. *Handanshi Juban Weilie Shipin Zhanlan* (Handan City Holds Counterfeit Product Exhibition), *Zhongguo Fazhibao*, Nov. 15, 1986, at 1.

7. The response to this has been the promulgation of national and regional legislation imposing statutory warranty periods on the sale of television sets, refrigerators, washing machines, electric fans, and radio-cassette players; *Bufen Guochan Jiayong Dianqi "Sanbao" Guiding* (Provisions for "Three Warranties" of Some Chinese Manufactured Domestic Electrical Appliances), e.g. *Zhongguo Fazhibao*, Aug. 16, 1986, at 2. The Provisions make both retailers and manufacturers liable to honor the warranty.

8. See *Huaxue Weixian Pin Anquan Guanli Tiaoli* (Regulations for the Safety Control of Dangerous Chemical Items) (issued Feb. 17, 1987) *ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO*, Mar. 10, 1987, at 197; *Shanghaishi Zhizhi Bu Zhengdang Jingzheng Zanxing Guiding* (Shanghai City Temporary Provisions for the Control of Unfair Competition) (adopted Oct. 15, 1987), 12 *FAGUI XINXI* 45 (1987); *Jugong Chanpin Zhiliang Guanli Tiaoli* (Regulations for the Administration of Military Industrial Product Quality) (promulgated June 5, 1987), *Jingji Ribao*, June 13, 1987, at 4; *Guojia Youzhi Chanpin Pingxuan Tiaoli* (Regulations for the Appraisal of Superior Quality Products) (promulgated Apr. 10, 1987), *Zhongguo Fazhibao*, April 22, 1987, at 2; *Bufen Guochan Jianyong Dianqi "Sanbao" Guiding* (Provisions for "Three Warranties" of Some Chinese Manufactured Domestic Electrical Appliances) (issued July 30, 1986), *Zhongguo Fazhibao*, Aug. 16, 1986 at 2; *Chanpin Zhiliang*

centrally planned socialist economy. These measures sought to set and maintain product standards by administrative means. Unlike many other reforms, however, they did not link quality control with economic performance. Instead, some of the laws offered rewards for success and threatened punishment for non-compliance, but they did not necessarily cause a manufacturer to feel the economic effects of producing poor quality goods.⁹ Nor did these laws address the problem of supervising the supervisors, that is, making administrative authorities themselves economically responsible for quality control failures.

In the first six months of 1985, consumer led demand and excess liquidity combined with a relaxation of certain centralized planning measures, resulted in an "overheated" economy and an overall drop of 11.6% in major industrial product standards.¹⁰ Proposals for further standardization, licensing, supervision, and other administrative controls resulted.¹¹ A change in approach took place in April 1986, when the State Council promulgated the Regulations Concerning Liability for the Quality of Industrial Products.¹² For the first time, state

Jiandu Shixing Banfa (State Council Trial Measures for the Supervision of Product Quality) (approved Mar. 7, 1985, promulgated Mar. 15, 1985), ZHONGGUO JINGJI GUANLI FAGUI WENJIAN HUIBIAN (Collection of Laws and Documents on China's Economic Management) 248 (1985); Gongye Chanpin Shengchan Xukezheng Shixing Tiaoli (State Council Provisional Regulations for Licensing the Production of Industrial Products) (approved Apr. 7, 1984), ZHONGGUO JINGJI GUANLI FAGUI WENJIAN HUIBIAN (Collection of Laws and Documents on China's Economic Management) 251 (1985); *Shouyao Guanli Tiaoli* (Regulations for the Administration of Veterinary Pharmaceuticals) (promulgated May 21, 1987) Zhongguo Fazhibao, June 22, 1987, at 2; Guojia Jingji Weiyuanhui Guanyu Shixing Guojia Jianduxing de Chanpin Zhiliang Choucha Zhidu de Tongzhi (Notice of the State Economic Commission on Implementing the System of State Random Product Quality Testing), ZHONGGUO JINGJI GUANLI ZHANGCE FALING XUANBIAN, July-Dec. 1985 (Selection of China's Policies, Laws and Edicts on Economic Management, July-Dec. 1985) 85 (1987); Chukou Jidian Chanpin Zhiliang Xukezheng (Provisional Regulations for the Administration of Quality Licensing of Exported Electrical Products) (State Council, promulgated Feb. 20, 1986), ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO Mar. 31, 1986, at 186. This list is not intended to be exhaustive but to indicate the depth and breadth of recent legislation.

9. See e.g., Gongye Qiye Quanmian Zhiliang Guanli Zhanxing Banfa (Provisional Measures for Overall Quality Management in Industrial Enterprises) (promulgated Mar. 10, 1980), ZHONGGUO JINGJI FAGUI XUANBIAN (1977-1984) at 260 (1984).

10. See Guanyu Niuzhuan Bufen Gongye Chanpin Zhiliang Xiajiang Zhuangkuang de Baogao (Report Concerning Partially Reversing the Fall of Industrial Product Standards), ZHONGGUO JINGJI GUANLI ZHANGCE FALING XUANBIAN, July-Dec. 1985 (Selection of China's Policies, Laws and Edicts on Economic Management, July-Dec. 1985) 80 (1987). In 1985, a selection of 40 products from 500 enterprises were found to be substandard. *Weihu Xiaofeizhe Hefa Quanyi You le FAGUI Baozhang* (There Are Now Statutes Guaranteeing Protection of Consumers Legitimate Rights and Interests), Zhongguo Fazhibao, Sept. 2, 1986, at 3.

11. *Id.*

12. Gongye Chanpin Zhiliang Zeren Tiaoli (Regulations Concerning Liability for the Quality of Industrial Products) (issued Apr. 5, 1986), ZHONGHUA RENMIN GONGHEGUO

economic management adjusted its traditionally vertical orientation so as to make manufacturers, retailers, transporters, bailees, and even quality inspection authorities directly liable to end-users for products not meeting requisite standards. The law all but eliminated the distinctions between tort and contract. It also provided for administrative and criminal liability, and a cause of action for end-users seeking compensation for defective products.

II. THE LEGISLATIVE FRAMEWORK

A. *Administration of Product Quality Control*¹³

There is more than enough legislation on product quality control to make it a separate topic of discussion. It will be mentioned here only briefly by way of background. Like much economic legislation in China, product quality control is divided into domestic and foreign systems which respectively regulate products for internal circulation and for import or export.

1. Domestic System

Quality control starts with standardization. China promulgated national regulations for the administration of standardization.¹⁴ Although international standards are not directly accepted in the Chinese legal system, they provide a point of reference for establishing state standards.¹⁵

Since 1984, all industrial products must be licensed under the authority of the State Economic Commission.¹⁶ The quality of licensed products is to be monitored and the license will be revoked if there is any decrease in quality. It is also unlawful to put unlicensed products into circulation.¹⁷

GUOWUYUAN GONGBAO, May 20, 1986, at 418 [hereinafter *Product Quality Liability Regulations*].

13. See *supra* note 8 for a list of the principal legislation discussed in this part.

14. For a discussion of China's standards system, see Note, *Administrative Law of Standardization in the P.R.C.*, 1 J. CHINESE L. 271 (1987).

15. In 1987, the State Economic Commission announced a six-point plan to improve product quality which includes the introduction of 1,000 new standards based on international standards (article on file with author); Wen Hui Bao (HK), Nov. 25, 1987; see also *Product Quality Liability Regulations*, *supra* note 12, art. 3 which provides that state standards shall not be lower than the level of international standards.

16. LI CHUNTIAN, BIAOZHUNHUA GAILUN (General Introduction to Standardization) *passim* (1982).

17. This is well illustrated by the case of a Shenzhen wholesaler fined 1,000 yuan for selling single-phase kilowatt-hour meters manufactured without a license. The illegal proceeds of sale were also confiscated. *Cuzhi Lanzao Zhiliang Dilie: Wo Shi Chachu Yi Pi Weille Diandu Biao* (Manufactured in a Slipshod Way with Inferior Quality: Our City Investigated

Quality control is regulated by national legislation for industry as a whole and for certain specialized products such as foodstuffs, pharmaceuticals, and chemicals. Quality control is primarily an enterprise's own responsibility, but the departments of industry and commerce, the standards bureaux, and recently established inspection and measurement centers all have overall supervisory powers.

Moreover, goods distributed according to an economic contract are subject to inspection by the buyer, or by a commodity inspection agent, before the buyer accepts delivery.

Except for the Regulations for the Administration of Advertising,¹⁸ China has not yet promulgated national legislation on unfair and restrictive trade practices. Nevertheless, there are a number of local laws. Wuhan and Shanghai have laws to prevent improper competition. Shenyang and Fujian have laws to protect consumers. These experimental, local laws regulate product quality insofar as they inhibit the circulation of substandard goods.

2. Foreign System

The system for regulating the quality of goods for export tends to mirror the domestic system. Legislation dealing with the quality of products for export is generally stricter than domestic legislation.¹⁹ In addition to production licensing, a manufacturer of goods for export must obtain an export license from the Ministry of Foreign Economic Relations and Trade [MOFERT].²⁰ Importers must also obtain import licenses from MOFERT. In addition, imported and exported goods are subject to the compulsory scrutiny of China's commodity inspection bureaux which certifies not only the quantity and packaging of goods, but also their quality.²¹

and Deals with a Shipment of Fake and Bad Quality Electricity Meters) Shenzhen Tequ Bao (Shenzhen Special Economic Zone Daily), Sept. 2, 1987, at 1.

18. Guanggao Guanli Shixing Tiaoli (Provisional Regulations for Advertising Administration) (promulgated Feb. 6, 1982) COLLECTION OF LAWS AND REGULATIONS OF CHINA CONCERNING FOREIGN ECONOMIC AND TRADE RELATIONS XV-17 (1983).

19. For example, Chukou Jidian Chanpin Zhiliang Xukezheng Guanli Shixing Tiaoli (State Council Provisional Regulations for the Administration of Quality Licensing of Exported Electrical Products) (promulgated Feb. 20, 1986), ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO, Mar. 31, 1986, at 186, applies stricter controls to exported electrical products. There are similarly specialised regional regulations, e.g., Guangdong Province Measures to Administer the Registration of Export Commodity Producing Enterprises (on file with author).

20. See generally J. Horsley, *The Regulation of China's Foreign Trade*, in FOREIGN TRADE, INVESTMENT, AND THE LAW IN THE P.R.C. 5 (1987).

21. *Id.*

B. *Legislation and 'Protective Statutes' Creating Liability*

In both civil law and common law systems, tortious liability can arise from conduct which is adjudged unlawful due to general principles proscribing the infliction of damage, or due to breach of a statute for the protection of a prescribed class of persons. The general duty to compensate for damage is contained in the civil code or in case law. Any special duties are to be found in protective statutes. It is up to a plaintiff to show that he was within the class of persons protected by a statute. This system is familiar both to the common lawyer (breach of statutory duty) and to the Civil lawyer,²² although different theoretical tools are used to analyze each individual case.

In China, apart from the General Principles of Civil Law [hereinafter Civil Law], there are other laws which create civil liability and provide compensation for a tortious act.²³ These laws can hardly be described as civil legislation, since their primary objective is to enforce a system which will prevent damage and injury, and not compensation. Neither can these statutes be described merely as protective because they do more than create a duty not to harm a class of persons; they expressly create the constituents and form of liability. The 1982 Provisional Regulations for Advertising Administration²⁴ are a good example. The relevant provisions are as follows:

Article 6

The content of an advertisement must be easily understood and true to fact. . . .

Article 13

. . . Advertisers shall be liable for breach of Article 6 but advertising units who know about the false situation shall be jointly and severally liable. . . .

22. See e.g., ZHONGHUA MINGUO MINFA (hereinafter CIVIL CODE OF THE R.O.C.) art. 186(2) (Taiwan); cf. Bürgerliches Gesetzbuch [BGB] art. 823II (W. Ger.).

23. ZHONGHUA MINGUO MINFA TONGZE (General Principles of the Civil Law of China) [hereinafter CIVIL LAW] (adopted Apr. 12, 1986) in RMRB, Apr. 14, 1986, at 2-3, trans. in Gray & Zheng, 34 AM. J. COMP. L. 722 (1986); Other laws concern environmental protection; e.g. Haiyang Huanjing Baohu Fa (Marine Environmental Protection Law) (promulgated Aug. 23, 1982, effective Mar. 1, 1983), art. 42, ZHONGHUA RENMIN GONGHEGUO FALÜ HUIBIAN (1979-84) at 325 (1985), traffic accidents at sea Haishang Jiaotong Anquan Fa (Maritime Safety Law) (promulgated Sept. 2, 1983, effective Jan. 1, 1984), ZHONGHUA RENMIN GONGHEGUO FALÜ HUIBIAN (1979-84) 437, art. 46 (1985), as well as product quality.

24. Guanggao Guanli Tiaoli (Provisional Regulations for Advertising Administration) (promulgated Feb. 6, 1982), COLLECTION OF LAWS AND REGULATIONS OF CHINA CONCERNING FOREIGN ECONOMIC AND TRADE RELATIONS XV-17 (1983). Now repealed and replaced by Guanggao Guanli Tiaoli (Regulations for the Administration of Advertising) arts. 3 & 20, Guowuyuan Fabu Xinde Guanggao Guanli Tiaoli (State Council issues a New Regulation for Advertising Administration), Zhongguo Fazhibao, Nov. 12, 1987, at 2.

Article 14

... Advertisers who violate these regulations shall be liable to compensate for losses caused to end-users and consumers. . . .

The Advertising Regulations create a specific obligation to pay damages for losses caused by misrepresentation in an advertisement. If the misrepresentation is about the quality of a product there will be civil liability to compensate for losses caused as a result of a quality defects. Although not "product liability" in the traditional sense, this law appears to have been the basis of a creative decision in the Shanghai Intermediate People's Court in 1984. The facts are as follows:

In 1983, the Wuxi Thermal Insulation Plant in Jiangsu Province advertised its new insulating material claiming it was fire-resistant. The material was used to insulate the roof of a factory building owned by the Shanghai Petrochemical Works. In fact, the insulation was flammable and caught fire during welding on the roof by a construction team from the Ministry of Nuclear Industry, causing one death and the destruction of the 1,400 square metre roof and some equipment. The Shanghai Petrochemical Works sued the Wuxi Thermal Insulation Plant.

The Court, relying on the Advertising Regulations, ordered the Wuxi Thermal Insulation Plant to pay 35,000 yuan in damages. At the same time, 81,000 yuan in damages was levied against the construction team for carrying on welding operations on the roof before ascertaining whether the insulation was fireproof. The decision was upheld on appeal to the Shanghai Higher People's Court.²⁵

This novel application of the Advertising Regulations resulted in a successful action for misrepresentation. Usually this action would be brought in contract²⁶ but perhaps the parties did not include a term as to the insulation's fire resistant quality. Perhaps there was no contract at all. In any event, the lack of, or incompleteness of, a con-

25. This summary of the case is based on two newspaper reports: *Advertising Company Sued for False Claim*, Ta Kung Pao (Weekly), Oct. 16, 1986, at 1; *Plant Fined Over Fatal Works Fire*, China Daily (Beijing ed.), Oct. 11, 1986, at 1.

26. Compare a 1982 case, reported in a collection for the "reference" of all courts, where the manufacturer of prefabricated building materials was ordered to pay 57,775 yuan to rebuild a partially constructed building after it was discovered the materials were substandard. The decision was based on an application of article 31(1) of Provisional Regulations on Industrial and Mining Contracts. *Chanpin Zhiliang Bu He Guiding* (Product Quality Does Not Meet Standards), ANLI XUANBIAN 100 (1984).

tract posed no obstacle to reliance on the Advertising Regulations as a basis for liability. Interestingly, the Regulations draw no distinction, as a common lawyer might expect, between fraudulent, negligent, and innocent misrepresentation. The court apparently failed to make that distinction as well. Consequently, strict liability applied to the misrepresentation, while the welder's liability for failing to check the fire resistance of the insulation was based on negligence.

The tortious nature and effect of the provisions in the Advertising Regulations is not unique. For example, article 39 of the Provisional Foodstuffs Hygiene Law states:

Violators of this law who cause food poisoning or other food related illness or condition shall be liable to compensate for damage. The person suffering damage has the right to demand compensation. Compensation includes hospital and medical expenses, loss of earnings, compensation for living expenses, funeral expenses, [and] expenses necessary for the maintenance of the deceased's dependents.²⁷

In the absence of a civil code the Chinese lawmakers have created another basis for tortious liability. Unlike the Advertising Regulations article 39 creates product liability as in *Donoghue v. Stevenson*²⁸ for it would be a violation of the Foodstuffs Hygiene Law to produce or sell a bottle of ginger beer containing the decomposed remains of a snail. This aspect of the Chinese law is not well illustrated with cases. Newspaper reports focus on the administrative and criminal liability of public health offenders. But some cases, food poisoning in particular, are bound to give rise to civil claims in accordance with this provision.²⁹

More recently, some local legislation has created even broader liability. Fujian Province's Regulations for the Protection of Legal Rights and Interests of Consumers³⁰ is among China's first consumer

27. Civil Law, *supra* note 23, art. 119.

28. *Donoghue v. Stevenson*, 1932 App. Cas. 562 (H.L. 1932). This is the landmark case the majority judgment of which first defined the nature and scope of the duty of care in the tort of negligence in English common law. The action arose from the plaintiff's consumption of a bottle of ginger beer made by the defendant soft-drink manufacturer which contained the decomposed remains of a snail. As a product liability case, its significance is that it abandoned the rigidity of contract in favor of tort theory as in the landmark New York decision, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

29. On October 31, 1987, 762 guests at Shanghai's Dongfeng Hotel received food poisoning at a banquet: *Shanghai Fasheng Zhongda Shiwu Zhongdu Shigu* (Significant Food Poisoning Incident Occurred in Shanghai), RMRB—HB, Nov. 6, 1987, at 4.

30. *Fujiansheng Baohu Xiaofeizhe Hefa Quanyi Tiaoli* (Fujian Province Regulation Protects Consumers Legitimate Rights and Interests) *Zhongguo Fazhibao*, Sept. 24, 1987, at 2 [hereinafter *Fujian Consumer Protection Regulations*].

protection laws.³¹ The regulations recognize Chinese consumers' associations³² and standardize their role in the settlement of disputes between consumers and the producers or retailers of goods and services. Despite the fact that the Fujian Regulations came into force well after the Civil Law, they create their own basis of tortious liability for damage caused to consumers by defective products and by unlawful business practices.³³ The regulations are not necessarily inconsistent with the Civil Law. Indeed they sometimes reiterate the Civil Law. These local laws indicate how the courts should interpret the term "substandard" (*bu hege*).

The widest and most systematic regulation of product liability is found in the Product Quality Liability Regulations.³⁴ Like the legislation discussed above, the Product Quality Liability Regulations are a unique Chinese amalgam of administrative provisions which define product quality and prescribe how it is to be maintained. They also note the consequences for breach of quality control requirements, which include administrative and criminal penalties, as well as civil liability in contract or tort. Although they are consistent with, and sometimes overlap other legislation, the Product Quality Liability Regulations provide the most precise statement of what product liability is, and what parties are liable. For this reason we shall consider them together with the Civil Law below.

C. *The General Principles of Civil Law and Product Liability*

1. The System of Obligations

Chinese civil law scholarship has been under the continuing influence of Pandectist legal thought, primarily from German civil law adopted through Japan in the Republican Period and through the

31. Shenyang City promulgated (Certain Interim Provisions for the Protection of Rights and Interests of Consumers) on January 19, 1987. See *Xiaofeizhe Quanyi You le Fagui Baozheng* (Consumer's Rights and Interests Have Legal Protection) *Zhongguo Fazhibao*, Mar. 5, 1987, at 2. The text of these provisions has not been published in the national press.

32. Consumer's associations have been active for some years in many major Chinese cities conducting comparative testing of products and assisting consumers with complaints. See, e.g., *Quanguo Jianli Xian Yishang ge Ji Xiaofeizhe Zuzhi Erbai Yu ge* (200 Consumer Groups Have Been Established Throughout the Country Above the County Level), *Zhongguo Fazhibao*, Jan. 6, 1987, at 1. There is also a national consumer's association which received 3,732 complaints in the first half of 1986, of which 70% concerned product quality, especially bicycles, sewing machines, furniture, clothing, and shoes. The goods were from 127 factories nationwide, of which 54 were in Guangdong Province. *Caiqu Quieshi Cuoshi Cuoshi Weihu Xiaofeizhe Hefa Quanyi Yifa Zhicai Luezhishi Shangpin Shengchan* (Adopting Practical Means To Protect The Legal Rights of Consumers and Punishing According to Law Those Enterprises Which Produce Poor Quality Commodities), *Zhongguo Fazhibao*, Aug. 4, 1986, at 1.

33. See Fujian Consumer Protection Regulations, *supra* note 30, arts. 10, 12.

34. See, Product Quality Liability Regulations, *supra* note 12.

Soviet Union after 1949. Like their European counterparts, Chinese legal scholars are committed to a system of obligations comprising contract, tort, quasi-contract and quasi-delict. Although strongly influenced by economic-legal thought, the 1964 draft civil code reflected a Pandectist mode of thinking, as did the first comprehensive civil law textbook published in 1958.³⁵ The pandectist influence resemblance grew stronger in the 1982 draft³⁶ and can still be found in the Civil Law although somewhat disguised in the awkward dichotomy between civil rights and civil liability: Note Article 84:

An obligation is a relationship of specific rights and duties between parties, arising either from terms of a contract or from a provision of law. The one that enjoys a right is the obligee and the one that bears the duty is the obligor.

The obligee has the right to demand that the obligor perform his duty according to the terms of the contract or the provision of the law.³⁷

Obligations can thus arise from a contract or from legislative provisions, including those creating obligations in tort, whether specified in the Civil Law or some other statute, in quasi-contract, in quasi-delict or in some other type of action.³⁸ Therefore, the provisions on tortious liability in the Civil Law and in the administrative legislation discussed above are not mutually exclusive. Rather, the Civil Law must be treated more as a general law which co-ordinates the special types of tortious obligations created by particular laws and regulations.³⁹

2. Elements of Tortious Liability and Product Liability

The primary provision on tort is article 106. Like equivalent articles in other codes, its simplicity is deceptive.⁴⁰ It can only be

35. ZHONGHUA RENMIN GONGHEGUO MINFA JIBEN WENTI (Basic Problems in the Civil Law of the People's Republic of China) (1958), *trans. in* Joint Publications Research Service, Nov. 1961, No. 19500-4879 [hereinafter 1958 TEXTBOOK].

36. Translated into English by W. C. Jones in 10 REVIEW OF SOCIALIST LAW 193 (1984).

37. See CIVIL LAW, *supra* note 23, art. 84.

38. Examples include an executor's obligation to give effect to a valid testamentary disposition; the finder of a lost object or treasure trove's obligation to the owner; or an obligation created by an administrative order to allocate resources according to a plan. See MINFA YUANLI (Principles of Civil Law) 212 (Tong Rou ed. 1986); MINFA JIAOCHENG (Civil Law Textbook) 198 (Tang Dehua ed. 1987).

39. This is consistent with the pragmatic civil law drafting policy by which special laws preceded but are intended to stand together with the Civil Law in its present form. See E. Epstein, *Evolution of China's General Principles of Civil Law*, 34 AM. J. COMP. L. 705 (1986).

40. See CIVIL LAW, *supra* note 23; see CODE CIVIL [C. CIV.] art. 138(2) (Fr.); BGB

fully understood in its theoretical context. It states that:

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 must bear civil liability.⁴¹

Apparently, there are only three elements in tortious liability: damage; causation; and fault. Like German law, and those civil law systems based on German Law such as the Japanese, Taiwanese, and Soviet, Chinese civil law has kept the element of fault (*guocuo*) separate from objective unlawfulness (*weifaxing*). Fault is the attitude of a person who either intentionally (*guyi*) or negligently (*guoshi*) causes damage.⁴² Unlawfulness is the harmful violation, by act or omission, of a legal norm without a legally recognized excuse.⁴³

In addition to the general provision, there are seventeen articles on tort, thirteen of which enumerate specific instances of tortious liability either by reference to the type of right infringed,⁴⁴ or the way in which the damage was caused.⁴⁵ This pattern follows that adopted in the 1982 draft civil code. Yet, in the first circulated draft of the Civil Law there was a greater number of enumerated torts than ever before. This draft included an article on product liability. Though the drafting process shows that there was some controversy as to how the article should be worded, there was clearly no question of leaving it out. The final text adopted by the National People's Congress states:

Where because of the substandard quality of goods damage is caused to the property or person of another, the manufacturer or seller of the goods must bear civil liability according to law. Where transporters and bailees are

supra note 22, art. 823ii; MINPŌ art. 709 (Japan); GRAZHDANSKII KODEKS RSFSR (CIVIL CODE) art. 444; CIVIL CODE OF THE R.O.C., *supra* note 22, art. 709; MINPOP art. 750 (S. Korea).

41. See CIVIL LAW, *supra* note 23, art. 106.

42. MINFA JIAOCHENG, *supra* note 38, at 243.

43. Ma Qi, *Lun Sunhai Peichang Zeren Goucheng de Yiban Tiaojian* (Discussion of the Ordinary Constituent Elements of Liability to Compensate for Causing Damage), NORTH-EAST PEOPLE'S UNIVERSITY JOURNAL OF SCIENCE AND LITERATURE 159 (1957). (This is without question the most thorough survey of the early position in Chinese socialist law which has come to light).

44. See CIVIL LAW, *supra* note 23, art. 117 (interference to personal or real property), art. 118 (interference to personal or real property), art. 120 (interference to name, likeness, reputation or honor).

45. *Id.* at art. 121 (by state workers), art. 122 (by substandard products), art. 123 (by ultra-hazardous activities), art. 124 (by environmental pollution), art. 125 (by roadworks), art. 126 (by defective premises), art. 127 (by domesticated animals), art. 128 (by excessive self-defense), art. 129 (by rescue), art. 133 (by an incompetent person).

responsible for this [damage], the manufacturers and sellers have the right to demand compensation for loss.⁴⁶

Article 122 must be read in conjunction with China's general principles of civil liability in tort, as well as with the Product Quality Liability Regulations. In the following discussion, therefore, we will consider both the elements of tortious liability in general, and criteria and issues of product liability in particular.

a. Damage

For civil liability to arise, damage must be caused to property or person. Damage must be actually caused. A technical infringement of rights, actionable *per se* as common lawyers would put it, is not sufficient in Chinese law. The protected rights or interests are not set out in article 106, but are referred to in the civil rights enumerated in Chapter Five of the Civil Law. These civil rights include property rights, personal rights, and economic interests such that the scope of compensation recoverable is potentially large. In principle, compensation may be had for nervous shock as well as for "pure" (direct) economic loss.

The recoverability of economic loss which does not arise from physical injury to property or person ("pure" economic loss) is a controversial issue in many legal systems. Experience has shown that apart from any policy considerations, the courts' ability to grant compensation for pure economic loss is limited by the theoretical framework of their respective systems of tortious liability. In France, for example, there is no theoretical bar to the recovery of pure economic loss because the core provision on tortious liability⁴⁷ turns simply on the word "damage", which has been interpreted to include physical, economic, or moral damage.⁴⁸ In Germany, however, the core provision⁴⁹ turns on damage to six enumerated rights and interests: life, body, health, freedom, property, or "other right." Therefore, economic loss can only be recovered if it arises from physical damage or interference with some "other right" which has been interpreted to mean real and possessory rights, the right to a name, and intellectual property rights.⁵⁰ In English common law, in the absence of a contract, and apart from liability for negligent misrepresentation in a

46. See CIVIL LAW, *supra* note 23, art. 122.

47. See C. CIV., *supra* note 40, art. 1382.

48. See K. ZWIEGERT & H. KOETZ, 2 AN INTRODUCTION TO COMPARATIVE LAW, 283 (1977).

49. See BGB, *supra* note 22, art. 823i.

50. *Id.* at 270.

"special relationship,"⁵¹ it seems that as a matter of policy the House of Lords is unlikely to again allow recovery for pure economic loss caused by merely negligent acts.⁵²

Tortious liability under the Civil Law is limited to the infringement of certain rights and interests specified in Chapter Five and would therefore seem to face the same restriction on recoverability of pure economic loss as in Germany. However, since the 1950s Chinese legal scholars,⁵³ like their Soviet counterparts,⁵⁴ have stated that as a matter of principle "actual damage" (*shiji sunshi*) includes both losses which have in fact been suffered (*jiji sunshi*) and losses of interest or profit which could have been obtained (*kede liyi*). The latter type of loss quite clearly includes pure economic loss and the examples used to illustrate it consistently relate to losses arising from downtime.⁵⁵ There is support for this view in the text of the Civil Law, which sets out three basic rules on remedies for a tort. The first two are based on restitution of property or damages equal to its value; but the third paragraph provides:⁵⁶

Where the injured party sustains other substantial loss as a result, the party who caused the damage must pay compensation for that loss.

"Other substantial loss" (*qita zhongda sunshi*) is broad enough to include pure economic loss but is qualified by "as a result" (*yinci zaoshou*) which is arguably limited to economic loss consequential to the physical losses referred to in the two preceding paragraphs.⁵⁷ A

51. *Junior Books Co. Ltd. v. Veitchi Co. Ltd.*, 1983 App. Cas. 520 will be limited to its facts. See HEUSTON, SALMOND AND HEUSTON ON THE LAW OF TORTS 229 (1987).

52. *Hedley Byrne & Co. v. Heller & Partners Ltd.*, 1964 App. Cas. 465 (H.L.).

53. 1958 TEXTBOOK, *supra* note 35, at 185.

54. 2 SULIAN MINFA (Soviet Civil Law) 395 (1986).

55. The 1958 Textbook gives an example of a loss of profit suffered by a factory treating wooden sleepers with creosote when it had to cease operations because poor quality creosote was supplied. See 1958 TEXTBOOK, *supra* note 35, at 185. Although an action against the suppliers would surely be in contract the writers also treated the principle as applicable to liability in tort. See *id.* at 332. A more recent example is of a restaurant which closes down after a violent brawl during which the restaurant fittings and food were damaged and destroyed and present customers frightened away. Here, it was said, the restaurant could claim not only for the physical damage and profit lost from the existing customers but also for the profit lost during the time it was closed for repairs. See JIANG PING, MINFA JIAOCHANG, (CIVIL LAW TEXTBOOK) 322 (1986); Tong Qiang, ZHAIQUAN, Obligations 20 (1987); see also ZHONGHA RENMIN GONGHEGUO MINFA TONGZE JIANGHUA, (Lectures on the General Principles of Civil Law of the PRC) 211 (Civil Law Teaching and Research Section Chinese University of Politics and Law eds. 1986).

56. See CIVIL LAW *supra* note 23, art. 117.

57. This argument has arisen in the course of discussions I have had with Chinese scholars but appears to be as yet undocumented.

recent case; *Shanghai Power Supply Bureau v. Proteus Shipping Co. S.A.*, Panama, seems to support the former interpretation:

In November 1984, the defendant's Panamanian registered vessel M.V. *Agamemnon* wrongfully dragged anchor while moored in the Huangpu River Shanghai Harbour and thereby fouled an underwater electricity cable. The power network was, therefore, cut off from a substation, a high voltage industrial zone, and the seventh city south power generator station which caused a power-cut to part of the area. Fourteen factories stopped production. The anchor damaged the cable, the power-cut damaged equipment of the substation, the high voltage industrial zone, and the factories and resulted in a loss of profit to both the power generator station and the factories.

The Shanghai Maritime Court held that on the facts proven the defendant's conduct was in breach of the Maritime Safety Law and awarded a total of 230,264 yuan damages for the cost of repairing the cable damaged by the anchor, for the damage to the equipment, and for the loss of profits caused by the power-cut.⁵⁸

It is unclear whether the lost profits were really pure economic loss because in awarding damages the court made no distinction between pure and consequential economic loss.⁵⁹ It is also unclear whether the factories were really parties to the action at all since their names do not appear in the report. Nevertheless, the court specifically allowed recovery for their loss of profits.

If pure economic loss is recoverable in China it is fair to infer that loss of profits due to downtime caused by a defective product will be recoverable whether or not the defect has also caused some physical harm. This would not be a surprising result in Canada⁶⁰ or in some American states,⁶¹ but is unlikely in the United Kingdom⁶² and

58. *Shanghai Gongdian Ju Yu Boluo de Si Hangwu Gongsì Haishi Sunhai Peichang Jiufen An*, ZHONGHUA RENMIN GONGHEGUO ZUIGAO FAYUAN GONGBAO, Mar. 20, 1986, at 28.

59. *Spartan Steel Alloys Ltd. v. Martin & Co.*, 3 All E.R. 557 (1972), where the English Court of Appeal allowed the loss of profit which would have been made on molten metal spoiled by the power cut but not profits lost on potential subsequent meltings which could not take place at all.

60. *Rivtow Marine Ltd. v. Washington Iron Works*, 1973 D.L.R. 3d 350 (Can.) (losses arising from downtime for repair of defective crane).

61. See, e.g., *Seely v. White Motor Co.*, 63 Cal.2d 9 (1968), allowing recovery for commercial losses arising from a defective truck which overturned.

62. *The Aliakmon*, 1986 A.C. 785 (H.L.).

absolutely impossible in West Germany.⁶³ Like their Western counterparts, Chinese courts may be reluctant to talk openly about the implications of insurance for tortious liability. In fact, the relative merits of loss and liability insurance are not yet discussed in Chinese civil law textbooks. It should be pointed out, however, that since the early 1980s the People's Insurance Company has been offering product liability insurance and many manufacturers of even famous brand consumer products have taken out coverage.⁶⁴

If, compensation is recoverable for pure economic loss resulting from downtime caused by a defective product, the next step is to ask whether the diminution of value in the same product or the cost of repairing its defect is also recoverable. This raises the familiar dilemma of claiming losses in tort which are usually only recoverable for breach of warranty. The uneasy distinction between contract and tort in product liability cases has become a favorite topic of discussion for legal writers and a universal dilemma for the courts. A manufacturer is liable in tort if it makes a defective product which breaks and injures someone. Assuming that the defect is discovered in time to prevent injury, the manufacturer is not immune from liability for the cost of repair merely because there is no contract with the end-user.⁶⁵ Such a simple proposition of justice does not, of itself, permit a simple answer in law. The United States Supreme Court has held that damage to a defective product alone is the essence of a warranty action and, therefore, a manufacturer has no duty to compensate for wear and tear.⁶⁶ In the United Kingdom, the courts have had to resort to the fiction of physical damage where the defective product is in need of repair,⁶⁷ and despite one attempt,⁶⁸ have been unable to penetrate the barriers between contract and tort.

Committed to a system of obligations which similarly distinguishes contract and tort, Chinese legal scholars also feel constrained to observe that tortious liability for defective products does not include compensation for the product itself; this is a contractual mat-

63. See B. S. MARKESINIS, *A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORT* 112 (1986).

64. Products insured include television sets, washing machines, refrigerators, and electricity leakage detectors. See *Chuxuxing Jiating Caichan Baoxian Shoudao Qingdao Jumin Huanying* (Qingdao Residents Welcome the Insurance Policy Protecting Property of Households Which Save Money), *Zhongguo Fazhibao*, May 29, 1987, at 2.

65. The example is Lord Denning's and he favored liability in tort for the cost of repair. *Dutton v. Bogner Regis U.D.C.*, [1972] 1 Q.B. 373, 396 (C.A.).

66. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 106 S. Ct. 2295 (1986).

67. See *Anns v. Merton London Borough Council*, [1978] A.C. 728.

68. *Junior Books Co. Ltd. v. Veitchi Co.*, *supra* note 51, but note that damage to the product itself is excluded in the Consumer Protection Act, 1987, ch. 43, § 5(2).

ter.⁶⁹ The Product Quality Liability Regulations make a distinction between liability to compensate for "economic losses" and liability to repair, refund, or replace a product during the warranty period. Article Twenty, however, suggests that even in the absence of a contract the courts may determine either type of liability:

Disputes that arise concerning product quality problems shall, when there is an economic contract, be handled according to the Economic Contracts Law. If there is no contract, any party to the dispute may request the relevant quality supervision institution to resolve the matter through mediation, or file suit in the People's courts.⁷⁰

In practice, there will rarely be an economic contract between the consumer and the retailer or manufacturer. However, it remains to be seen whether the courts will observe the traditional distinction between contract and tort to settle such disputes.

b. Causation

The damage must be caused by the violation of an enumerated right.⁷¹ In a product liability case the plaintiff has the burden to prove that the defect has caused his loss or injury. The standard used to judge the cause-and-effect relationship between the violation of right and damage is objective and said to be not mere "possibility" but "precision."⁷² The Chinese legal writers therefore stress the scientific aspect of causation. In their examples, breaks in the chain of causation are almost invariably proven with the aid of some expert verification.⁷³ As the following case shows, proof of causation has been a knotty problem in product liability disputes since the early days of the P.R.C.:

An X-ray tube newly purchased by the Jilin Central Railway Hospital exploded during an examination when unregulated current passed through it. The question which required scientific verification was whether the tube exploded because too much current passed through it or

69. *Qiantan Chanpin Zeren de Jige Falü Wenti* (Brief Comments on Several Product Liability Legal Issues), *Zhongguo Fazhibao*, Mar. 6, 1987, at 3.

70. See Product Quality Liability Regulations, *supra* note 12, art 20.

71. Unlike the C. Civ., *supra* note 40, art. 1382 (France), the word "cause" is not used in CIVIL LAW, *supra* note 23, art. 106 but the element of causation is encapsulated in the term "infringe and harm" [qinhai] which appears to have originated in the MINPŌ, *supra* note 40, art. 709 (Japan) and was also used in the *Zhonghua Minguo Minfa*, *supra*, note 22, art. 184.

72. Ma Qi, *supra* note 43, at 179.

73. E.g., *QINQUAN DE MINSHI ZEREN* (Civil Liability of Tort) 39 (Zhang Peilin ed. 1987).

because its quality was too low to withstand the current.⁷⁴

Writing in 1957 the author did not, as we might today, discuss the above case in terms of "misuse," but the point is clear that if the X-ray tube exploded because it was misused the chain of causation would have been broken. Alternatively, both the defect and the misuse of the product may have contributed to the damage. As we will see below this is not the same as contributory negligence, which is also an assessment of subjective blameworthiness, since tortious liability to end-users is strict liability; that is, fault is not an element in this tort and contributory negligence is therefore irrelevant.

c. Unlawfulness: Creating Legal Duties

In German law, the traditional approach has been to treat unlawfulness (*Rechtswidrigkeit*) and fault (*Verschulden*) separately so that fault will only be considered if unlawfulness is found.⁷⁵ This legal technique is used to classify as wrongful the defendant's acts and omissions by objective means. This performs a delineative function not dissimilar to the legal duty in tort (of care, honesty *etc.*) which is recognized by common law lawyers. The element of unlawfulness is satisfied if there is either a violation of the rights and interests specifically enumerated in the general provision on tort⁷⁶ or a violation of a protective statute (*Schutzgesetz*) which creates a duty owed to the plaintiff.⁷⁷ In practice, liability created by the two provisions may overlap. This is well illustrated by a leading German case on product liability in which the German Court of Appeal upheld a chicken farmer's claim against a vaccine manufacturer both on the grounds of negligent manufacture and breach of the Medicines Act.⁷⁸

Under the influence of the *BGB*, the Civil Code of the R.O.C.⁷⁹ copied this bifurcated approach to unlawfulness. More in keeping with the Soviet approach contemporary Chinese civil law scholars do not distinguish between a violation of the general legal duty created in article 106 of the Civil Law and special duties created by law. Therefore, neither the Soviet Civil Code, nor the Civil Law, contain a protective statute, the violation of which creates a duty owed to the plaintiff.⁸⁰ The Soviet approach is to treat a breach of a protective

74. Ma Qi, *supra* note 43, at 163.

75. Markesinis, *supra* note 63, at 40-43.

76. *BGB*, *supra* note 22, art. 823ii.

77. *Id.* art. 823ii.

78. *Id.* at 245.

79. CIVIL CODE OF THE R.O.C., *supra* note 22, art. 184.

80. *Supra* note 40.

statute the same way as any other unlawful conduct.⁸¹ Although Chinese treatises are silent on the relationship of protective statutes to the Civil Law's provisions on tortious liability, it seems likely that China will adopt the Soviet approach.

One Chinese legal scholar has characterized conduct as unlawful if it is prohibited by law, public order, or good morals and is not justified by a lawful excuse.⁸² In principle, any breach of the myriad of administrative regulations on product quality will satisfy the element of unlawfulness. In Germany, the practical result has been that the element of unlawfulness is automatically satisfied if a right or interest enumerated in the general provision on tort is violated in the absence of a legally recognized defence (*Rechtfertigungsgrund*).⁸³ So too, in most Chinese civil law treatises, unlawfulness is treated almost as a technical requirement which will be satisfied where damage is caused in the absence of a defence.⁸⁴ In many common law countries, the courts have extended the defendant's duty not to cause injury or damage to the plaintiff so far that "it ought to apply unless there is some justification for its exclusion."⁸⁵ Although the civil law approach is more subtle, there is no question that in both systems the courts are formulating public policy. At least one Chinese legal scholar has suggested that unlawfulness is a policy question because, apart from conduct prohibited by positive law, conduct may be unlawful merely because it breaches social public order (*shehui gong-gong shenghuo guize*) or good morals.⁸⁶

Liability under article 122 of the Civil Law is for damage caused to property or person "because of the substandard (*buhege*) quality of goods." The duty not to cause damage is thus defined in terms of "substandard quality" rather than the more familiar Western concept of "defect." This formula was only adopted in the third major draft of the Civil Law after consideration of an even broader concept of "problem of quality" which would be still harder to define. The meaning of "substandard quality" is readily defined by reference to administrative and technical specifications rather than by the general

81. SULIAN MINFA, *supra* note 54, at 396.

82. Ma Qi, *supra* note 43, at 163-73.

83. "Unlawfulness, in other words, depends on the harmful result *Erfolgsunrecht*," Markesinis, *supra* note 63. More recently, a new school of thought has shifted the focus from the harmful result to the wrongfulness of the conduct itself. As a result, negligence is treated more as a part of unlawfulness which is understood more in terms of a duty theory based on policy considerations.

84. PRINCIPLES OF CIVIL LAW, *supra* note 38, at 241; 1958 TEXTBOOK, *supra* note 35, at 325.

85. Home Office v. Dorset Yacht Co., 1970 A.C. 1004 (P.C.).

86. Ma Qi, *supra* note 43, at 166, 168.

criterion of safety. Without systematic caselaw it would be very difficult for Chinese courts to cope with general notions of defect and risk of harm. Therefore, defining product liability in terms of quality set by administrative standards gives the courts a solid peg on which to hang their decisions. Although western lawyers may feel more at ease with the concepts of defect and safety, in practice, little if anything turns on the different approaches because it is a defect which makes the product substandard and unsafe. What, then, is "substandard quality"?

Article two of the Product Quality Liability Regulations is a useful starting point for the definition of quality of "industrial products".⁸⁷ It sets out three factors for determining product quality which may be specified in legislation, state standards or in contract terms. First, there is the "application" to which the product is put. (Originally, the Chinese may have meant to say "use" which is a homonym with one different character. Probably nothing turns on this.) The second factor is the safety of the product and last, any other special requirements specific to a particular product or its type. Therefore, liability for a defective product is not based on some inherent, objective defect in the product, such as a flaw in its design or production, but on its failure to meet any of the quality requirements. At first sight, such liability is not "product liability" in the accepted sense, but "product quality liability" which appears potentially wider in scope especially in the case of administrative and criminal liability which may accrue for breach of quality requirements. However, civil liability only arises when the end-user's losses are *caused* by the failure of the product to meet the stated requirements so that the end-user will still have to prove some deficiency or defect in the product's

87. "Industrial products" are not defined but probably include all manufactured goods except military products which are the subject of separate legislation. Cf. Guanyu Guanche 'Zhonghua Renmin Gongheguo Youzhi Chanpin Jiangli Jiaoli' de Buchong Guiding (Supplementary Provisions for the Implementation of the High Quality Product Awards Regulations) (promulgated Feb. 28, 1981), art. 3, ZHONGGUO JINGJI FAGUI XUANBIAN 1977-1984 at 276 (1984) provides that agricultural products and agricultural byproducts, industrial products which have not been processed (e.g., coal, minerals, crude oil, natural gas, timber), electricity and superseded industrial products are not eligible for awards.

Article Two of the Product Quality Liability Regulation reads:

"relevant laws and regulations of the state, in quality standards and in contracts regarding the application (*sic*) and safety of products and other requirements of a special nature.

Liability for product quality refers to the liability to be borne for losses caused to end-users because of the failure of product quality to meet the above mentioned requirements."

Supra note 12.

quality. As we will see below, such a technical definition tends to take the verdict on a product's quality out of the court's hands.

Unfortunately, no regulations set forth a comprehensive list of quality requirements, and the requirements which do exist vary from one type of product to another. However, some general guidance may be obtained from the Product Quality Liability Regulations and article ten of the Fujian Consumer Protection Regulations.⁸⁸

These quality requirements are very broad indeed, covering not only inherent defects in a product itself,⁸⁹ but also its packaging,⁹⁰ labelling,⁹¹ and instructions.⁹² Such requirements also extend to matters which have no relevance to the safety of the product, such as product licensing, but this will not necessarily expand the scope of liability. It must not be forgotten that the damage must be *caused* by the fact that the quality of a good is substandard. For example, if a consumer is accidentally burned using a rice-cooker he cannot claim compensation merely because the rice cooker had been sold without a license. The victim must show that the substandard quality was a cause of injury, e.g., because the rice-cooker was in fact a reject product not licensed for sale to the public.

The duty created in Civil Law article 122 is owed to anyone who sustains personal or property damage from a substandard product. As liability is tortious, no contract is necessary between the parties. Potential plaintiffs include the purchaser, the consumer, and certain third parties. For example, several legal scholars refer to a case where a child was scalded by a thermos flask which burst whilst being carried by a passer-by. The flask burst because of a defect, and scholars conclude that the manufacturer is liable to compensate the child.⁹³

(i) *The Unborn Child*

One controversial topic in tort liability this century has been the right of a child to make a claim after birth for a prenatal injury. Courts in different jurisdictions have, not surprisingly, reached opposite conclusions on rights of the unborn child. The thalidomide settlements in the 1970s brought the same question into the product liability arena. What is the position likely to be in China? First, it

88. *Supra* note 12; Fujian Consumer Protection Regulations, *supra* note 33.

89. Product Quality Liability Regulations, *supra* note 12, art. 9, including factors such as design and manufacturing.

90. *Id.*

91. *Id.*; see also *Food Labelling Regulations Welcomed*, China Daily (Beijing ed.), Nov. 5, 1987, at 2.

92. Product Quality Liability Regulations, *supra* note 12, art. 9(4).

93. Zhang Peilin *supra* note 73, at 23.

should be noted that the capacity to enjoy civil law rights (*minshi quanli nengli*) is defined in article nine of the Civil Law and is possessed only by persons from the time of birth until death. Prima facie, then, an unborn child has no legal rights.⁹⁴ The Inheritance Law, however, provides that the appropriate share of a testamentary disposition must be reserved for an unborn child, but if the child is stillborn its share will be redistributed according to the rules of intestacy.⁹⁵ This means that the unborn child enjoys the right to inherit, a property right protected by article 76 of the Civil Law, even if it is never born alive.⁹⁶ This is difficult to reconcile with the definition of civil capacity provided in the Civil Law. The right of inheritance may be viewed as a legislative exception to the general principle. It is unlikely that Chinese courts could, or even would, create a second exception to allow the unborn child to make a claim for a prenatal injury in tort.⁹⁷ In China this kind of unfortunate occurrence will be left to the succour or indifference of social institutions.

(ii) *Who Owes the Duty?*

A tortious duty with respect to defective products is not merely owed by the manufacturer, but also the seller, persons who have stored or transported the goods, and even administrative departments. There is some disagreement amongst authorities regarding the scope of the duty owed. One view is that the manufacturer, distributor or retailer, and the administrative departments responsible for quality control and supervision each owe a duty not to allow goods of sub-standard quality to enter the market. For manufacturers and sellers this is clear from article 122 of the Civil Law itself.⁹⁸ The duty of administrative departments, however, was never contemplated in the drafting of the Civil Law. This duty arises instead by virtue of article

94. This is supported by the Chinese judicial view that civil legal capacity must be proven by documents showing the date of birth, e.g., household registration or birth certificate: *Zuigao Renmin Fayuan Guanyu Guanche Zhixing "Zhonghua Renmin Gongheguo Minfa Tongze" Ruogan Wenti de Yijian (Shixing)* (Views of the Supreme People's Court On Certain Questions Concerning the Implementation of the "General Principles of Civil Law" (for Trial Use)), *ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO*, June 20, 1988, at 17.

95. *Id.* at art. 28.

96. This is the law described by one writer, even though he concludes that it is apparently inconsistent with principle: JIANG LIU, JICHENGFA JIESHI (Annotated Inheritance Law of the PRC) 126 (1987); see also Law of Succession of the People's Republic of China (adopted Apr. 10, 1985, effective Oct. 1, 1985) *THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA* (1983-1986) (1987).

97. This seems to be confirmed by the Chinese Supreme Court's view on the determination of civil legal capacity. See *supra* note 94.

98. See also Product Quality Liability Regulations, *supra* note 12, arts. 11(4), 15.

four of the Product Quality Liability Regulations which provides that administrative departments "whose control and supervision [of quality] are slack shall bear joint and several liability."⁹⁹ Departments in charge of quality control and supervision are many and varied. They include administrative departments for standards and measurements, commodity inspection, quality supervision, industry and commerce, and the enterprise's own quality control departments, as well as standards bureaux, testing centers, labor bureaux, and the Certification Office under the State Economic Commission. Vicarious liability of state agencies for the torts of their workers is expressly provided for in article 121 of the Civil Law, and there are precedents for liability even though it is a relatively recent development in Chinese legal practice.¹⁰⁰ Liability arises only where control and supervision are slack, thus suggesting that the primary basis is fault.

Transporters and bailees, however, merely owe a duty not to mishandle goods in their care so as to render them substandard in quality. This idea hails from the Product Quality Liability Regulations which provide: "when damage [to goods] is caused by reasons clearly attributable to storage, transport, or loading and unloading, the storage or loading and unloading enterprise shall bear liability."¹⁰¹ It was added to the Civil Law only in its third major draft, and its object is clearly to allow the manufacturer or seller to claim *contribution* from the transporter or bailee whose fault is the real cause of the goods' substandard quality.¹⁰²

(iii) *Defenses and Contractual Exclusion of Liability*

Prima facie unlawful conduct may be lawful if it is justified by a valid excuse. Chinese legal scholars recognize five such defenses: first, the performance of a duty, such as a doctor performing emergency surgery, or a fireman who destroys some property in order to save other property from destruction by fire; second, the exercise of a right, such as the right to evict an unlawful tenant; third, a legitimate self-defense; fourth, the avoidance of difficulty in an emergency; and fifth, the consent of the victim, that is, *volenti non fit injuria*. In the absence of specific product liability legislation, there exist no specific

99. *Id.* art. 4.

100. Cf. Dicks, *Legal Opinion*, CHINA TRADE REPORT, Nov. 1981, at 11, cites a case of environmental pollution where the public health department and environmental protection department paid compensation to a fish farm. In a mediated agreement the Departments admitted fault for allowing a hospital to discharge water with dangerous chemicals which killed the fish.

101. Product Quality Liability Regulations, *supra* note 12, art. 13.

102. See Appendix.

product liability defenses such as the "development risk defense" or the "component defense." Liability for a substandard product in China is thus potentially wider than for a defective product in some other legal systems.¹⁰³

The *volenti* defense raises the question of the ability to contract out of tortious liability. How would a court in China deal with a contractual disclaimer, limitation, or exclusion clause purporting to restrict or exclude altogether tortious liability for damage or injury caused by a substandard product? The court would likely treat such a clause as invalid.

Textbooks on the common law of contract would not be complete without a discussion of exemption from civil liability. The English courts valued freedom of contract to such a degree that they would enforce contracts which included unfair or even unconscionable terms.¹⁰⁴ Less attention is devoted to contractual exclusions of liability under civil law. In France, terms excluding liability in tort are simply invalid on the grounds that they are contrary to the *ordre public*.¹⁰⁵ In Germany, the courts have held that liability in tort may be excluded by agreement, but exclusion clauses are subject to strict interpretation *contra proferentum* and expansive policy considerations including the German principle of honesty and good faith (*Treu und Glauben*).¹⁰⁶

In China, contract textbooks rarely discuss exemption clauses. The reasons for this may be rather varied. Excluding liability for breach of contract in China may mean contracts are not performed. This is anathema to the function of the "economic contract" which emphasizes specific performance because economic contract is itself a means of implementing the state economic plan. There is evidence, however, that exemption clauses are acceptable in principle if they "do not violate state laws, decrees, and the spirit of state policy,"¹⁰⁷ but no legislation exists on point.

Both the German Codes¹⁰⁸ and Civil Code of the R.O.C.¹⁰⁹ have

103. See, e.g., Consumer Protection Act, 1987, ch. 43, § 40(e) (specifically provides for the development risk defense) § 4(1)(f) specifically provides for liability for a component part where it was supplied according to the buyer's specifications or the final product is itself defective.

104. Hence modern statutory changes to the law, e.g., Unfair Contract Terms Act, 1977, ch. 50.

105. B. NICHOLAS, FRENCH LAW OF CONTRACT 227 (1982).

106. Markesinis, *supra* note 63, at 266-67.

107. QIYE JINGJI HETONG YU HETONG GESHI (Enterprise Economic Contracts and Contract Standards) 63 (Yan Ciqing ed. 1987).

108. BGB, *supra* note 22, art. 476.

109. CIVIL CODE OF THE R.O.C., *supra* note 22, art. 366.

specific provisions to control terms which limit or exclude the seller's warranty obligation but there is no equivalent provision in the Civil Law. There are, however, three general provisions for the control of unconscionable contract terms which represent principles common to Chinese civil law in both the PRC and the R.O.C. First, agreement is based on consent so that "a court may find that a disclaimer clause printed in relatively small print on a standard contract form is not part of the bargain, on the theory that unless the buyer reads and understands that clause, his consent is lacking."¹¹⁰ Second, rights and obligations must be performed according to honesty and good faith.¹¹¹ This "does not require good faith in contract formation [but] the spirit of the doctrine is such that hidden and unexplained disclaimer clauses may well be aborted."¹¹² The third and most analogous principle of German civil law is that a civil legal act (of which a contract is a primary example) which violates the law or public interest is void.¹¹³ In China this principle has been used to strike down contracts or parts of contracts¹¹⁴ which are illegal or not in the public interest.¹¹⁵

Under French law contractual exclusion of tortious liability is contrary to *ordre public*. In a similar vein, in Taiwan "liability for intentional acts or gross negligence cannot be released in advance."¹¹⁶ A similar attitude would be adopted in China if the courts were to hold that a disclaimer would defeat the protection conferred by the Civil Law or other legislation creating liability. Although there is no equivalent provision in the Civil Law, the principle is analogous to acts contrary to public policy. Therefore, if product liability is strict, a disclaimer would defeat the purpose of protection conferred by statute.

The adoption in China of the unequivocal French position on

110. Chung-sen Yang, *Liability of Sellers in Chinese Law*, in *TRADE AND INVESTMENT IN TAIWAN* 437 (H.H.P. Ma 2d ed. 1985). Cf. *CIVIL LAW*, *supra* note 23, arts. 4, 55(2), 59(1).

111. *Treu und Glauben*, BGB, *supra* note 22, art. 242; *Chengshi he Xinyong*, Civil Code of the R.O.C., *supra* note 22, art. 148(2); *CIVIL LAW*, *supra* note 23, art. 4.

112. Yang, *supra* note 110, at 438.

113. Civil Law, *supra* note 23, arts. 55(3), 58(5); *CIVIL CODE OF THE R.O.C.*, *supra* note 22, *supra* art. 72; BGB art. 138(1).

114. Void acts may be severable from valid acts. *CIVIL LAW*, *supra* note 23, art. 60.

115. See, Guojia Gongshang Xingzheng Guanli Ju Guanyu Queren he Chuli Wuxiao Jingji Hetong de Shixing Guiding (Provisional Regulations of the State Administration for Industry and Commerce on the Confirmation and Handling of Invalid Economic Contracts) (promulgated July 25, 1985) in *CHINA LAWS FOR FOREIGN BUSINESS* ¶5-560 (1987); arts. 2(a) (contracts contrary to law), 2(b) (prohibited goods specified in contract), 2(d) (damaging state, public or other interests).

116. *CIVIL CODE OF THE R.O.C.*, *supra* note 22, art. 222.

exemption clauses assumes that no distinction is drawn between consumer transactions on the one hand, and commercial transactions, such as between importers and retailers on the other.¹¹⁷ The object of article 122 of the Civil Law, however, limits protection to consumers, end-users, and innocent third parties. Since the scope of liability under the Product Quality Liability Regulations goes further than the Civil Law, it is predictable that the Chinese courts may allow enterprises to allocate liability according to contract but strike down any clause which purports to limit or exclude liability to the consumer.

d. Fault

Article 106(2) of the Civil Law makes clear that "fault" (*guocuo*) is the general standard of liability for tortious conduct. "Fault" is the attitude of the tortfeasor, and as used in article 106 must be understood in the sense of the French term "*la faute*," that is, including both intention (*guyi*) and negligence (*guoshi*).¹¹⁸ The Soviet and Chinese codes, however, have adopted a compendious expression of "fault" which probably reflects the French usage "*la faute*."¹¹⁹

Like its equivalent in all legal systems, the concept of fault is an attempt to make an assessment of the subjective blameworthiness of the tortfeasor's conduct according to objective standards such as the *pater familias* or ubiquitous "reasonable person." An examination of Chinese textbooks and cases discloses no obvious departure from these widely accepted principles. What deserves our attention is whether fault is an element of the tort of product liability at all.

It is clear from article 106(3) that the drafters of the Civil Law anticipated situations of tortious liability without fault. "Where there is no fault but the law provides that there must be civil liability, there must be civil liability." The troubling question is how to tell when the law provides liability without fault. Unfortunately, this is not easily discovered through a simple reading of the tort provisions in the Civil Law. The concept of tortious liability without fault was accepted by Chinese legal scholars in the 1950s.¹²⁰ Under the influence of the 1922 Soviet civil code, however, the scope of strict liability was limited to ultra-hazardous activities arising from technological development, as is now set out in article 123 of the Civil Law. In later years,

117. Such a distinction is drawn in consumer protection legislation in many common law countries. *E.g.*, U.K. Unfair Contract Terms Act, ch.50 (1977).

118. *E.g.*, BGB, *supra* note 22, art. 823; MINPÖ, *supra* note 40, art. 709; and CIVIL CODE OF THE R.O.C., *supra* note 22, art. 184. These codes all separate willfulness and negligence as elements of fault.

119. C. CIV., *supra* note 40, art. 1382.

120. Ma Qi, *supra* note 43, at 191.

in response to Western trends towards strict liability for a wider range of new, but analogous potentially harmful activities, Chinese legal scholars developed a category of "special torts" (*teshu qinquan xingwei*) which reversed the onus of proof or did not require proof of fault at all. This category first included torts committed by incompetents and animals, vicarious liability of the state and legal persons, ultra-hazardous activities, and environmental pollution.¹²¹ This provided the basis for the tort provisions in the 1982 draft civil code which expanded "special torts" to include defamation and traffic accidents. The "special torts" provisions were "special" only insofar as they reversed the onus of proof of fault or created a type of "deemed" fault by virtue of the unlawfulness of the activity. Nevertheless, the general principle in the 1982 draft code continued to be one of no liability without fault.

Product liability was only included in the category of special torts after drafting of the Civil Law had commenced. In his speech introducing the final draft to the National People's Congress,¹²² the chairman of the Committee for Law Building Work, Wang Hanbin, said that "in general we have adopted the principle of fault liability . . . but there are some occasions when the law provides that even though there is no fault there must be civil liability. . . ." He did not say which provisions these are, but afterward specifically mentioned product liability. This was most unclear and generated varying views on how the tort provisions should be interpreted.

Seven of the twelve works surveyed for this article clearly support the view that product liability means strict liability, at least between the consumer and the manufacturer or retailer.¹²³ But of the other five, only two assert that product liability is based on fault.¹²⁴ The acid test is reasoning and the view of the majority is let down by

121. MINFA YUANLI, PRINCIPLES OF CIVIL LAW, *supra* note 38 at 245-49.

122. Speech by Wang Hanbin, Chairman of the Committee for Law Building Work, at the Fourth Session of the Sixth National People's Congress, in Beijing (Apr. 2, 1986) (transcript on file with author).

123. See, e.g., SU CHI, MINSHI ZEREN (Civil Liability) 25-26 (1987); Lectures on the General Principles of Civil Law (Hu Shixiang ed. 1986); JIANG, *supra* note 55, at 336; MINFA JIAOCHENG *supra* note 38, at 449; ZHANG, *supra* note 73, at 20; ZHONGHUA RENMIN GONGHEGUO MINFA TONGZE JIANGHUA (Lectures on the General Principles of Civil Law of the PRC), *supra* note 55, at 218.

124. LIU SUZHEN, MINFA TONGZE JIESHUO (EXPLANATIONS OF THE GENERAL PRINCIPLES OF CIVIL LAW) 419 (1987); ZHONGHUA RENMIN GONGHEGUO MINFA TONGZE QIANLUN (Brief Commentary on the General Principles of Civil Law of the PRC) 264 (Tong Rou ed. 1987). See also, ZHONGHUA RENMIN GONGHEGUO MINFA TONGZE ZHUSHI (Annotated General Principles of Civil Law of the PRC) (Zhou Yuanbo ed. 1986); ZHONGHUA RENMIN GONGHEGUO MINFA TONGZE PINGSHU (Commentary on Civil Law of the PRC) (Wang Jianxin ed. 1986).

lack of textual support in the Civil Law itself. Wei Zhenying, civil law professor at Peking University, has expressed the only view in favor of strict liability based on statutory interpretation.¹²⁵ Professor Wei suggests that the Civil Law exhibits a drafting technique whereby, in effect, fault becomes an element of the tort only if it is mentioned in the provision, whether it is the fault of the tortfeasor, the contributory fault of the victim or the fault of a third party. All other provisions are based on strict liability. This is akin to *expressio unius est exclusio alterius* which Professor Wei called the "exclusory method" (*paichu fangfa*). Ingenious as this interpretation may appear, it is hard to imagine a more awkward drafting technique, if this is indeed what the drafters consciously adopted.

Other supporters of no-fault product liability refer to the policy considerations behind the "special torts."¹²⁶ First, strict liability is accepted in economically advanced countries which emphasize compensation of the victim rather than liability. Second, whoever engages in a potentially dangerous activity for profit should bear the risk of harm caused. Third, and closely related to the second reason, is that harm arising from this kind of activity can most easily be limited or avoided by the tortfeasor. Finally, in these kinds of potentially harmful activities fault is almost impossible to prove.

The proponents of fault liability argue that producing or selling a substandard product is in itself negligent.¹²⁷ There is powerful logic in this argument. In Germany, for example, jurists have recently recognized that the dividing line between unlawfulness and fault is finer than was previously believed.¹²⁸ Of course, if the German view is accepted, it is the defendant's burden to exculpate himself by proving that he took all due care and/or that the plaintiff was contributorily negligent. We shall consider the latter aspect in more detail below.

Professor Jiang Ping of the Chinese University of Politics and Law (Zhongguo Zhengfa Daxue) takes a novel approach in arguing that all the "special torts" provisions concern legal presumptions and the burden of proof. Thus, he contends, product liability provided in article 122 of the Civil Law is based on the irrebuttable presumption of fault. He calls this "deemed fault" (*shiwei guocuo*) and asserts that its effect is the same as other deemed provisions in the Civil Law.¹²⁹

125. Comment by Professor Wei Zhenying, at a private discussion with the author and Professor Whitmore Gray, School of Law, University of Michigan (May 1986).

126. See e.g., SU, *supra* note 123, at 26.

127. See *supra* LIU NOTE 124.

128. Markesinis, *supra* note 63, at 40-43.

129. E.g., CIVIL LAW, *supra* note 23, art. 66(1); Jiang Ping, *Minfa Zhong de Shiwei*,

The plain language of the text does not support such an interpretation.

So what is the answer? Fault liability? Strict liability? It should be pointed out that it is a long way to go from no liability for substandard products to strict liability. The commentary on the following case reflects the guidance offered to the courts.

Villager Ho was building a house and to this end purchased six concrete beams from a concrete factory. Ho engaged a construction team to build the house and was also assisted by his neighbor Zhou who acted as a laborer. During construction the six concrete beams fractured causing serious injuries to Zhou. The accident cost Ho 300 yuan in lost building materials. Zhou also sued Ho for 800 yuan as compensation for medical expenses and lost earnings. The court's investigation revealed that (1) the concrete beams were substandard because they had not been allowed enough time to set and (2) the construction team had not taken proper safety precautions.

A majority of the court held Zhou and Ho were properly first and second plaintiffs respectively, and that both defendants, the concrete factory, and the construction team, were liable to compensate Zhou for his losses. Apportionment of liability was not mentioned.¹³⁰

Commentary on the case reveals that blameworthiness is still at the back of some minds. The fact that the concrete factory sold substandard concrete beams "explains that it ignored the safety and interests of the consumer."¹³¹ So, too, the construction team was at fault because it failed to take proper safety measures. Ho was not to blame because he was not a professional builder and could not have foreseen that the concrete beams would fracture.

(i) Contributory Fault

In the discussion of causation above, it was noted that damage may be attributed to several causes — such as a defect in the product itself or misuse by the end-user. This is different from apportionment of contributory negligence, since causation is based on objective criteria and not the subjective blameworthiness of the parties. Article 131

Tuiding Yu Juzheng Zeren (Deeming Presumptions and Burden of Proof in Civil Law), 4 ZHENGFA LUNTAN 1 (1987).

130. Guo Yujun & Yang Biao, *You Shui Chengdan Peichang Zeren* (Who Should Bear Liability to Compensate), *Zhongguo Fazhibao*, Aug. 24, 1987, at 3.

131. *Id.*

of the Civil Law provides that the tortfeasor's civil liability may be reduced if the victim is also at fault with respect to the damage which occurs. This odd statement of contributory fault suggests that the drafters carefully avoided using the word "cause" and that the victim's fault and the damage are linked merely by an objective chain of causation. They are not.

Chinese¹³² and Soviet¹³³ texts show that, like fault itself, contributory fault is a subjective element of liability which measures blameworthiness and not causal connections. The Soviet Civil Code makes this quite clear by providing that only the victim's gross negligence will reduce the tortfeasor's liability. Thus, even if an act of the victim contributes to his injury, the tortfeasor's liability is not reduced unless the victim was also at fault, that is, in some way blameworthy for his acts.¹³⁴ In practice, causation and fault are often inextricable factors in contributory fault. Nevertheless, it is not sophistry to distinguish between them as is illustrated by the following example.

Suppose the plaintiff, an ordinary consumer, accepts delivery of a new refrigerator. The refrigerator is installed by the deliveryman who removes the grounding prong from the plug so that it will fit into the wall socket, telling the plaintiff "not to worry about it." Suppose further that the plaintiff subsequently receives an electric shock from the refrigerator and that it can be shown that the shock was caused by a manufacturing defect which would not have occurred had the appliance been properly grounded.¹³⁵ Since the appliance was not grounded, the plaintiff has unquestionably contributed to his injury. As to fault, however, the victim may be exonerated from blameworthiness because he was misled by the deliveryman and should not be expected to know the dangers of using appliances which are not grounded. If, on the other hand, the consumer is a qualified electrician, he is partly to blame for his injury because he should have been aware of the danger of removing the grounding prong from the refrigerator.

As previously mentioned, most Chinese legal scholars argue that product liability is strict. If fault is not an element of the tort, then what relevance is contributory negligence in apportioning the victim's liability? If, as shown by the example above, the tortfeasor's resulting liability may be different when one considers the subjective fault of

132. MINFA YUANLI, *supra* note 38, at 244-45; JIANG, *supra* note 55, at 332-33.

133. SULIAN MINFA, *supra* note 54, at 398.

134. This is the same result as under U.K. Law Reform (Contributory Negligence) Act (1945), which requires the court "to consider not only the causative potency of a particular act but also its blameworthiness." HEUSTON, *supra* note 51.

135. The facts are based on *Smith v. Ingalls Ltd.*, 83 D.L.R.3d 215 (Can. 1978).

the victim. Allowing contributory negligence to reduce the tortfeasor's liability will defeat the object of setting a strict standard of liability.¹³⁶ A number of Chinese textbooks have addressed the issue of willful self-infliction of harm as a defense to product liability and conclude that only where the product is willfully misused may the tortfeasor be relieved of liability.¹³⁷

D. Procedural Issues

1. Parties

There are four possible defendants provided in article 122 of the Civil Law: the manufacturer, the retailer, the transporter, and the bailee. The plaintiff can elect to sue either the manufacturer or the retailer to bear full liability for his losses. He cannot, however, sue the transporter or bailee since article 122 provides that only the manufacturer or retailer has a right to claim against the transporter and/or bailee whose conduct has caused the substandard quality of the goods. Action against the transporter or bailee is by way of contribution only.¹³⁸ The right of contribution also arises between the manufacturer and retailer because they bear joint and several liability. If, as in most cases, the plaintiff elects to sue the retailer, it seems that the retailer can seek contribution from the manufacturer either by joining him in the action or by bringing a separate action as is illustrated by the following case:

Au-yang bought a black and white television set from the Fengfu City Household Electrical Goods Store in Anhui Province. Two days later Au-yang's twelve year old son plugged it in and used his left hand to pull the TV aerial, whereupon he received a bad electrical shock and was hospitalized at a total cost of more than 2,000 yuan. The electrical goods store paid 800 yuan and the TV factory 400 yuan, but both refused to bear any further expenses. Au-yang sued

136. This is a problem which also faces the Hong Kong courts. The solution in one case was to restrict severely the extent to which the victim's own negligence was taken into account in reducing the tortfeasor's liability. *Chung Kei v. So Yiu*, 1983 H.C.A. 9864. Note also that the defense of contributory negligence has been expressly preserved in product liability claims under U.K. Consumer Protection Act, ch. 43, § 6(4) (1987).

137. MINFA JIAOCHENG, *supra* note 38, at 449.

138. This is reflected in the Supreme People's Court view on art. 122 of the CIVIL LAW: "Where consumers or end-users themselves or third parties have sustained personal injuries or property damage by using a substandard product, the person suffering damage can claim compensation from the manufacturer or seller . . . [W]here transporters or bailees are responsible for the quality of the product, if the manufacturer or seller requests compensation for the loss this can be handled as a separate case [or] alternatively the transporter or bailee can be added as third parties and handled together [with the main case] art.153(2)," see *supra* note 94.

the electrical goods store for 30,000 yuan in his capacity as guardian, but it accepted liability for only a further 500 yuan. The Fengfu Basic People's Court collected evidence. Inspection of the TV revealed that it was substandard in many respects and that the poor quality caused the aerial to carry an injurious current. Therefore, the court held that the electrical goods store was liable to compensate the plaintiff for expenses totalling 6,614 yuan, and that the store should bring a separate action against the factory for contribution.¹³⁹

The decision of the court not to join the manufacturer in the same action seems inconsistent with article 47 of the Code of Civil Procedure which provides that persons with coterminous rights or obligations must be joined in the same action.¹⁴⁰ If the manufacturer and retailer both bear full liability for damage caused by substandard goods, as the court suggests, then they must be joint tortfeasors who bear joint and several liability and must therefore be joined in the same action.¹⁴¹

There will also be some cases with multiple plaintiffs. Food-poisoning poses a likely possibility, but as yet there have been no reported tort cases involving food cases. China has no specific rules on class actions, but article 47 of the Code of Civil Procedure provides that parties with coterminous rights or obligations can entrust the conduct of the litigation to one of their number. The acts of the "class" representative and the final outcome of the case then bind the whole "class". This is not quite the same as a "class action", but the courts have developed their own means to achieve the same result as is illustrated by the following case:

From July 1984 to April 1985 nineteen consumers each bought a sofa-bed or spring bed from the retail outlet of the Tianjin East Sea Cotton Furniture Factory. They were all dissatisfied with the quality of the beds. After the factory refused to refund the price, they brought suit in the Hexi

139. *Shou Falu Zhicai* (Accept Legal Punishment), RMRB, July 21, 1987, at 1.

140. *Zhonghua Renmin Gongheguo Minshi Susong Fa (Shixing)* (The Provisional Code of Civil Procedure of the People's Republic of China) [hereinafter Code of Civil Procedure] (promulgated Mar. 8, 1982, effective Oct. 1, 1982) in *ZHONGHUA RENMIN GONGHEGUO FALU HUIBIAN* (1979-84) (Collection of Laws of the People's Republic of China (1979-1984), 283 (1985) [hereinafter THE COLLECTION].

141. This was the result in another case where a basic level court in Jinan City ruled that both the manufacturer and retailer of a tractor with a substandard steering rod were liable to the driver for the injuries he suffered after the steering failed. CHINA LAW AND PRACTICE (May 2, 1988) at 30.

Basic People's Court against the furniture factory and the business enterprise.

Investigation by the court revealed that the sofas had not been made according to state standards. The court mediated an agreement whereby the defendants would refund the price to the plaintiffs and bear the costs of the litigation.

In order to settle further disputes and avoid litigation, the court further ordered the furniture factory to settle all claims concerning the quality of its furniture with consumers who had not yet brought suit.¹⁴²

Legal commentators observed that the court's order was binding on all consumers with claims concerning the quality of furniture from the defendant factory.¹⁴³

The emergence of Chinese consumers' associations and their role in mediating consumer claims has already been mentioned.¹⁴⁴ The Fujian Consumer Protection Regulations provide for consumers' associations to bring or support suits on behalf of consumers of an unspecified class.¹⁴⁵ As yet, no procedural rules exist to allow this provision to work in practice, but changes to the Code of Civil Procedure are now being formulated to allow this type of class action.

It should also not be forgotten that China's Code of Criminal Procedure allows the victim of a crime who suffers personal injury or damage to property to bring a civil action supplementary to the criminal prosecution.¹⁴⁶ Therefore, where putting a substandard product into circulation constitutes a crime and causes damage to third parties, for example poisonings caused by fake maotai liquor, the victim's families can bring supplementary civil actions which will usually be heard at the same time as the criminal trial.¹⁴⁷

2. Burden of Proof and Expert Evidence

Although Chinese civil proceedings are inquisitorial with the judges taking charge of collecting evidence, the Code of Civil Procedure places on the plaintiff the burden of proving that the goods were

142. Jiang Wei & Jia Changcun, A Discussion of Class Actions (Jan. 1987) (unpublished manuscript) (on file with author).

143. *Id.*

144. *See supra* note 30-33 and accompanying text.

145. *See supra* note 30.

146. Zhonghua Renmin Gongheguo Xingshi Susong Fa (Shixing) (The Provisional Criminal Procedure Law of the People's Republic of China) art. 53 (promulgated July 7, 1979, effective Jan. 1, 1980) in THE COLLECTION *supra* note 140, at 133.

147. *Id.* art. 54.

substandard and that this caused the damage.¹⁴⁸ Specialists in product liability are painfully aware that proof of a defect can be a difficult technical matter. In China, this is further complicated because, as we have seen, liability turns on an administrative determination of whether the product was of substandard quality. Judges are no better qualified than the parties to make judgements about the quality of goods and the causal link between the substandard quality and the subsequent injury. For this reason two special procedures are available to assist the court.

The first is a form of expert evidence on the quality of the goods in dispute. In litigation such expert appraisal of the goods may be sought by the court according to the Provisional National Measures for the Arbitration and Inspection of Product Quality.¹⁴⁹ Although the measures originally conceived for the resolution of disputes over the sale of industrial and agricultural products in arbitration or litigation, there appears to be no obstacle to their use in other cases where the quality of a product is in dispute. The court sends a form to the product quality arbitration inspection organ of the standards bureau which then inspects and tests the product according to the appropriate standards and issues a certificate as to its quality. Certificates of notarization (*gongzheng*) or verification (*jianzheng*) are treated as prima facie evidence in Chinese procedural law and thus shift the onus of proof to the opponent. No law says that a certificate issued by a product quality arbitration inspection organ is irrebuttable proof, but it should, in practice, be even more persuasive than a notarized or administratively authenticated statement as to quality, such as that issued by commodity inspection authorities before the goods are put into circulation.

Secondly, judges may call upon specialists in technical matters to assist in deciding the question of causation. In ordinary civil proceedings, at first instance, the court consists of a collegiate bench of three persons, usually judges or assistant judges, but sometimes also a judge and two assessors. Assessors are something akin to lay magistrates, that is, not legally qualified but able to decide questions of fact as well as law. Before legal education recommenced in earnest in the early 1980s there was a grave shortage of legally trained judges and the assessor system was relied on heavily by the courts. It is still common for minor criminal offences to be tried by a judge and lay assessors but since amendments to the Organic Law of the People's Courts in

148. Code of Civil Procedure, *supra* note 140 art. 56.

149. Quanguo Chanpin Zhiliang Zhongcai Jianyan Zanxing Banfa (Provisional National Measures for the Arbitration and Inspection of Product Quality) (National Standards Bureau, issued Jan. 31, 1985) 5 FAGUI XUANBIAN (Selected Laws and Regulations) 470 (1986).

1983,¹⁵⁰ the assessor system is rarely used in civil cases. One important exception exists in cases requiring technical expertise in which the Supreme People's Court has endorsed the practice of forming a collegiate bench comprising a judge and two expert assessors.¹⁵¹

3. Rights of Subrogation and Indemnity.

The People's Insurance Company's standard form products liability policy provides that an insured shall subrogate his rights to the insurer if the latter elects to defend or settle the claim in the name of the insured.¹⁵² However, there is no special provision in the Code of Civil Procedure for joining the insurer as a party to the action. The same effect may be achieved by the insured's simultaneously bringing of an action against the insurer for an indemnity and the court's joining the two actions together under article 47 of the Code of Civil Procedure.

III. CONCLUSION

Amidst rapid industrial development, China has recognized the importance of product quality. Like many other aspects of economic reform the task of raising and controlling product quality has been left mainly to a plethora of vertically orientated administrative legislation. Some of these laws have also created civil liability in both contract and tort to allow consumers themselves to redress the harm caused by defective products. As a result, manufacturers now feel the economic impact of producing goods of substandard quality. This horizontal form of redress represents a significant change in China's traditional vertically integrated economic system. The provision of tortious liability for damage caused by substandard goods in article 122 of the Civil Law is a key to this important reorientation.

The Civil Law does more than provide a source of civil liability. It also defines and co-ordinates liability created in many other laws and regulations. The Civil Law must, therefore, be read together with other legislation concerning product liability, such as, the Product Quality Liability Regulations.

Product liability is a new topic of study and legislation in China. In this respect the Civil Law is innovative rather than merely the con-

150. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai "Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa" de Guiding (Amendment to the Organic Law of the PRC People's Courts by The Standing Committee of the NPC) in THE COLLECTION, *supra* note 140 at 477.

151. See MINSHI ANJIAN (Civil Cases) 160 (Peking University Law Department Materials Section ed. 1981).

152. See H. ZHENG, CHINA'S CIVIL AND COMMERCIAL LAW 153 (1988).

solidation of previous practice. Thus, there are many questions which have not yet been definitively examined in the law and commentaries, such as, liability without fault, recoverability of pure economic loss, contractual exclusion of product liability, and the rights of unborn children. Many of these issues overlap with tortious liability in general, and some guidance may be found in comparing China's principles of tort with other civil law systems such as those of Germany, Taiwan, and the Soviet Union. The Civil Law and the scholars who interpret it will not have the final say on product liability in China. It took a giant step to create strict liability where there previously was little or no liability at all and, ultimately, the final say will lie in future Chinese practice and the continual development of product liability legislation.

APPENDIX

DRAFT ARTICLES ON PRODUCT LIABILITY¹⁵³

1. GENERAL PRINCIPLES OF CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA (DRAFT FOR COMMENTS) October 15, 1985.

Article 91J

Where because the *quality of goods do not conform with provisions* damage is caused to the person [or] property of another, the manufacturer [and] seller *who knows* [of the substandard quality] must bear civil liability.

Article 102

The period of limitation for civil suits arising from the following acts or events is one year:

1. . . .
2. . . .
3. a suit for damage to person or property brought about by food poisoning, drug poisoning, *product liability accident*, industrial injury or other reasons;
4. . . .

2. DRAFT PRESENTED TO THE 13TH SESSION OF THE STANDING COMMITTEE OF THE SIXTH NATIONAL PEOPLE'S CONGRESS by Wang Hanbin, November 13, 1985.

153. The English is, as far as possible, consistent with the translation by Gray and Zheng, *supra* note 23 (emphasis added).

Article 97E

Where because of the question of quality of goods damage is caused to property or person of another, the manufacturer [and] seller must bear civil liability.

Article 108

(see Article 102 above)

Article 125

[In cases of] product liability, the law of the *producer's* domicile applies.

3. DRAFT DATED February 20, 1986.

Article 126J

Where because of the substandard quality of goods damage is caused to the property or person of another, the manufacturer *and* seller of the goods must bear civil liability. Where transporters [and] bailors are responsible for this [damage], [they] must also bear civil liability.

Article 135

The period of limitation for the following lawsuits is one year:

1. . . .
2. A suit [based on] sale without notice of products of substandard quality;
3. . . .
4. . . .
5. . . .

Article 145

Where because of the substandard quality of goods damage is caused to the property or person of another, the law of the domicile of the *producer* of the goods applies; *except where the contract specifies otherwise.*

4. DRAFT PASSED BY THE 15TH SESSION OF THE STANDING COMMITTEE OF THE SIXTH NATIONAL PEOPLE'S CONGRESS dated March 8, 1986.

Article 121

Where because of the substandard quality of goods damage is caused to the person of property of another, the

manufacturer *and* seller of the goods must bear civil liability according to law. Where transporters and bailors are responsible for this [damage], the manufacturer and seller have the right to demand compensation for loss.

Article 135

(see article 135 above)

Article 146

(see article 145 above)

