China's New Tort Law: The Promise of Reasonable Care

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I. INTRODUCTION

In July 2010, the Tort Liability Law of the People's Republic of China went into effect. Trying to envision the consequence of this new law at the time of its inauguration, I remembered a story I heard in my youth. A version ascribed to the Lakota, a Native American tribe in the United States, is essentially as follows: A few young men questioned the wisdom of a tribal elder and decided that, to test him, they would catch a small bird in one of the men's hands. "'Grandfather,' one of the men would ask, 'I have a bird in my hand. You are wise. Is the bird dead or alive?'" If the old man answered "alive," the young man would crush the bird in his palms and show that it was dead. If, on the other hand, the old man said the bird was dead, the young man would open his hands and let the bird fly free. The young men proceeded with their plan and, in a large

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1 JOSEPH M. MARSHALL III, THE LAKOTA WAY: STORIES AND LESSONS FOR LIVING, NATIVE AMERICAN ETHICS ON WISDOM AND CHARACTER 197 (2002). This is but one version of the tale. This story has been attributed to different sources and told in multiple variations.
gathering of people, asked their question. “Grandfather, I have a bird in my hands . . . . Since you are wise, is the bird dead or alive?”\(^2\) The old man was silent for a time and then offered his response, “Grandson . . . the answer is in your hands.”\(^3\)

So too at this auspicious moment, the growth and flourishing of China’s young tort law lies in the hands of its judges and scholars, its government, and its people. Some American scholars question whether there can be meaningful civil law in China as long as the judicial system is not independent from the political system.\(^4\) Others counsel that experience from earlier Chinese legal reforms offers promise.\(^5\) Moreover, the tireless and continued work of so many eminent Chinese scholars to bring the new Tort Liability Law to fruition provides reason for optimism.\(^6\)

This paper enters the unfolding dialogue about Chinese and American tort law. The paper addresses some similarities and differences between the written provisions of China’s Tort Liability Law and U.S. tort law provisions. It then commends a principle that has become central to American tort law—building a tort system that functions to encourage reasonable care for the physical safety of others. Finally, the paper suggests a way in which American tort law could be improved by considering China’s adoption of uniform guidelines for certain issues that do not require individuation—an approach which could reduce litigation costs and increase consistency.

\(^2\) Id.

\(^3\) Id.

\(^4\) Stanley Lubman, Bird in a Cage: Legal Reform in China After Mao 2 (1999) (expecting law and the courts to be secondary to party policy); Benjamin L. Liebman, A Return to Populist Legality? Historical Legacies and Legal Reform, in Mao’s Invisible Hand 165 (Elizabeth Perry & Sebastian Heilmann eds., 2011) [hereinafter A Return to Populist Legality] (noting scholarship that portrays legal development as “constrained by China’s authoritarian system,” but also noting that innovations at times come from the ground up and constrain state behavior); Edward C.Y. Lau, Litigating Products Cases from China, 2 ANN. 2008 AAJ-CLE 1793 (2008) (counseling U.S. attorneys seeking to enforce American tort judgments against defective Chinese products: “The Chinese courts are not independent. They are very susceptible to political influence. If a gun factory is owned by the retired military pension groups, they can exert influence with the government to influence the judiciary if there was a judgment that threatened the existence of the factory”).


II. CHINESE AND AMERICAN TORT DOCTRINES

It is difficult to compare the plain language of China’s Tort Liability Law with that of American tort law. Some basic Chinese legal terms such as “bear tort liability,” for instance, are not terms routinely used in American law. Moreover, even when Chinese and U.S. terms are similar, as with the term “fault,” the Chinese terms are not fully defined in the text of the law,\(^7\) and may carry different legal and cultural understandings.\(^8\) In addition, only a limited number of background legal materials are available in English. Consequently, the potential for misunderstanding is ample.

Yet acknowledging these complications, many aspects of China’s Tort Liability Law would seem familiar to an American lawyer. While the structure of China’s law looks more like a European code than the judicial opinions that gave rise to the American common law of torts,\(^9\) the openness of China’s rules may permit additional common law development by Chinese courts.\(^10\) Moreover, many substantive provisions in China’s Tort Liability Law contain principles that resemble those found in American law, such as the idea that tort law’s goals are mixed,\(^11\) that fault produces potential liability,\(^12\) and that at times liability may be assigned even without proof of fault.\(^13\) American lawyers would recognize the role of contributory and comparative fault\(^14\) and

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\(^9\) Conk, supra note 6, at 935 (noting that the “People’s Republic of China is in the civil law tradition”).

\(^10\) See Oliphant, supra note 7 (discussing unresolved issues, for example, whether the standard of care is objective or subjective).


\(^12\) Compare Tort Liability Law of P.R.C., supra note 11, art. 6, with Dobbs, supra note 11, §§ 112-14 (2000).

\(^13\) Compare Tort Liability Law of P.R.C., supra note 11, art. 7, ch. IX (liability for ultrahazardous activities), with Dobbs, supra note 11, §§ 342-48 (2000).

\(^14\) Compare Tort Liability Law of P.R.C., supra note 11, art. 26, 27, with Dobbs, supra note 11, §§ 199-201 (2000).
contribution, as well as the categories of compensatory damages. Many of the subjects addressed in China’s law—including wrongful death, products liability, medical malpractice, and third-party liability—reflect similar areas of liability in U.S. tort law. Additionally, certain procedural aspects of Chinese tort law, including the reliance on an injured victim to set the legal process in motion and the potential for out of court settlement by the parties, are shared by American law.

Of course, even in the written law there are also significant differences between Chinese and American tort law. American tort law is more focused on liability for physical injuries, whereas China’s tort law broadly embraces protections against many property-related, dignitary, and economic harms. In some areas, the legal rights and interests mentioned in China’s Tort Liability Law receive little protection in the United States. For example, in the United States, legal protection of interests in name, reputation, and honor are quite limited. Similarly, the potential liability of internet service providers appears as broad in China as it is narrow in the United States. In other areas, rights and interests protected under China’s Tort Liability Law are protected in the United States, but by laws that are considered outside the tort law. For example, American law addresses rights to copyright and patents under separate legal doctrines concerning intellectual property, rather than through tort law.

Another significant difference between the two countries’ tort rules is that, in the vast majority of cases, American tort law can only be triggered by an injured victim. Thus, tort plaintiffs in the U.S. have

15 Compare Tort Liability Law of P.R.C., supra note 11, art. 14, with DOBBS, supra note 11, § 386 (2000).

16 Compare Tort Liability Law of P.R.C., supra note 11, art. 16, with DOBBS, supra note 11, § 377 (2000).

17 Compare Tort Liability Law of P.R.C., supra note 11, art. 37, with DOBBS, supra note 11, §§ 323-24 (2000).

18 Compare Tort Liability Law of P.R.C., supra note 11, art. 3, with DOBBS, supra note 11, § 17 (2000).

19 Compare Tort Liability Law of P.R.C., supra note 11, art. 25, with DOBBS, supra note 11, § 388 (2000).

20 Compare Tort Liability Law of P.R.C., supra note 11, art. 2, 36, with DOBBS, supra note 11, §§ 1-7 (2000).

21 The main protection of reputational interests in the United States is through the defamation tort. U.S. defamation law protections are far narrower than those in the United Kingdom, and the U.S. tort is subject to a number of constitutional restrictions. See Doug Rendleman, Collecting a Libel Tourist’s Defamation Judgment, 67 WASH. & LEE L. REV. 467 (2010).

apparently fewer prospects for relief to eliminate dangers before an injury has occurred, as recovery is generally restricted to liability rules. In the United States, situations in which risky conduct is prohibited before it leads to harm are generally handled by direct government regulation rather than by tort law. For example, a drug that may cause injury can be pulled from the market by regulators. By contrast, China’s Tort Liability Law seems to encompass both liability for damages after a risk has produced harm and prevention of risky conduct that might lead to future harm.

In some cases involving damages, a remedy would seem more readily available in China than it would be in the United States, specifically in cases in which the defendant’s fault has not been established. For example, in China, if neither plaintiff nor defendant is at fault, they can sometimes share the loss according to the circumstances. While the scope of China’s rule is not clear from the language itself, in the United States, situations in which the plaintiff can recover from a defendant who is not at fault are rare. The most vivid illustration of the difference between the two countries on the issue of no fault liability is China’s provision that makes building occupants collectively liable for objects that fall from a building when the specific tortfeasor cannot be identified. Under the fault principle in the United States, an occupant of a building would not be liable in tort for a falling object unless the plaintiff could show directly or by inference that the accident was linked to the occupant’s own fault.

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24 The United States Food and Drug Administration can conduct post-market surveillance of approved drugs and pull them off market if unsafe. See Neil F. Hazaray, Do the Benefits Outweigh the Risks? The Legal, Business, and Ethical Ramifications of Pulling a Blockbuster Drug Off the Market, 4 Ind. Health L. Rev. 115 (2007).

25 Tort Liability Law of P.R.C., supra note 11, art. 45.

26 Tort Liability Law of P.R.C., supra note 11, art 24, art. 32 (permitting reduced tort liability for a guardian who fulfills the obligations of guardianship when the ward causes harm).


28 Tort Liability Law of P.R.C., supra note 11, art. 87.

29 See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 49(d) (2009) (each tenant in a building has a duty of reasonable care "with respect to the portion of the premises controlled by the actor").

30 See id. § 17 cmt. f. (outlining the doctrine of res ipsa loquitur and suggesting that it would not impose liability where the harm was negligently caused by one of a number of potential actors unless there is some information to establish which party was
When applicable, however, American tort liability law may have more bite. Some types of damages, particularly pain and suffering and punitive damages, may be available in a wider range of cases in the U.S. than in China. For example, in China punitive damage awards are limited to certain products liability cases. In the United States, on the other hand, punitive damages can be awarded whenever a defendant is guilty of willful or malicious conduct, regardless of the subject matter of the lawsuit.

Mary smaller differences between the countries' substantive legal rules can be recounted. In the case of a single indivisible injury by two or more wrongdoers, wrongdoers in China will bear liability equally while in the United States the parties' responsibility is typically apportioned by percentages. Although joint and several liability, along with other newer apportionment approaches, is still favored by most American scholars, legislatures or courts in a majority of U.S. states have modified the rule of joint and several liability. In contrast, joint and several liability apparently governs in China. Employer liability, which applies in both jurisdictions, also appears to have a slightly different cast in the two countries. In the United States an employer is only liable for an employee's negligence if it occurs within the scope of employment. In China, it would seem that the employer is liable whenever the employee causes harm, even if the employee was not negligent. This is just the tip of the iceberg of small but important distinctions.

31 Tort Liability Law of P.R.C., supra note 11, art. 47. China seemingly permits punitive damages only in a subset of products liability cases.

32 RESTATEMENT (SECOND) OF TORTS § 908 (1979) (permitting punitive damages for "outrageous" conduct).

33 Compare Tort Liability Law of P.R.C., supra note 11, art 12, with THE RESTATEMENT (THIRD) OF TORTS: APPOIINTMENT OF LIABILITY § 23(b) (2000).

34 Compare Tort Liability Law of P.R.C., supra note 11, art. 8, with THE RESTATEMENT (THIRD) OF TORTS: APPOIINTMENT OF LIABILITY § 17, pp.151-59; see, e.g., Lewis Kornhauser & Richard L. Revesz, Sharing Damages Among Multiple Tortfeasors, 98 YALE L.J. 831 (1989).

35 In the United States, the National Commissioners on Uniform State Laws support a new approach—several liability with reapportionment of uncollectible shares. See UNIF. APPOIINTMENT OF TORT RESPONSIBILITY ACT (2002). This approach has also been recommended for China. See ZHU WANG, RESEARCH ON APPOIINTMENT OF TORT LIABILITY—A GENERAL THEORY OF APPOIINTMENT OF TORT LIABILITY AMONG MULTIPLE PARTIES (2009).

36 DOBBS, supra note 11, §§ 333-35.

37 Tort Liability Law of P.R.C., supra note 11, art. 34.
III. TORT LAW IN ACTION AND THE CENTRALITY OF REASONABLE CARE FOR THE PHYSICAL SAFETY OF OTHERS

The similarities and differences that appear on the face of tort law in the United States and China are much less important than the similarities and differences that will emerge over time as China’s Tort Liability Law is fully implemented. Just as a single day of sub-zero temperatures cannot produce three feet of ice, neither is a document of tort rules sufficient for understanding the full body of tort law that will unfold in China in the thousands (perhaps millions) of disputes to be resolved in the years ahead.38

Whether China’s tort law actually embodies the broad protections that appear on the face of the Tort Liability Law depends in large part on its implementation through legal institutions and procedures. In the United States, tort law litigation depends on an accessible market for independent lawyers and open access to public and private information about the decisions and practices that lead to particular injuries. From an American perspective, increasing the availability of legal representation to individuals and providing litigants with full access to the information necessary to determine legal issues like fault is central to putting a tort-liability system into effect. Thus, proposals for ensuring that tort victims have adequate representation and access to evidence seem vital to China’s tort law system.39 Another important procedural issue is who decides the central issues, like fault, in individual cases. One of the greatest differences between American tort law and tort law in many other countries is the American jury system. In the United States, many key issues of tort liability—including all factual issues related to fault, causation, and harm—are resolved by a jury of local citizens. In addition, if reasonable people could differ about whether conduct lacked reasonable care, the normative question of fault itself is left to jury decision.40 Who

38 See Benjamin J. Liebman, China’s Courts: Restricted Reform, 21 COLUM. J. ASIAN L. 1, 4 (2007) (noting that China’s courts reported hearing 8.1 million cases in 2006). To what extent these lawsuits will affect the legal rules themselves is unclear. China’s Supreme People’s Court can draft judicial interpretations for the Tort Liability Law for specific areas, such as traffic accidents, medical malpractice, and so forth.

39 For example, to sue in tort, medical malpractice victims must be able to access the evidence they need to build their case, otherwise the burden of proof must be placed on the institution that has that information. See Lixin Yang, Successes and Shortages in Reform of Liability Caused by Medical Treatment in Tort Liability Law of China (presentation at the International Symposium of the Implementation of Tort Liability Law in the People’s Republic of China, Chengdu, 2010). On the issue of access to representation, see Benjamin J. Liebman, Legal and Public Interest Law in China, 34 TEX. INT’L L.J. 211 (1999).

40 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARMs § 8 (2010).
decides these legal issues in Chinese tort law will influence the law’s development.

Even given an adequate understanding of the way the law should operate in conjunction with legal rules and procedures, in practice the tort law may develop in unexpected ways. The unforeseen path of expansion has been true in the United States as tort law has developed over hundreds of years, and as an independent body of law over the last one hundred and fifty years. Most notably, one might suppose that a system of negligence liability would produce less overall liability than would a system of strict liability; however, the vast expansion of American tort liability in recent decades has come about within the ambit of negligence, not strict liability. In hindsight, there are many reasons for these developments, particularly the widespread availability of liability insurance. However, a myriad of economic, political and cultural factors have influenced the law’s development. As Oliver Wendall Holmes, Jr. famously stated, “[t]he life of the law has not been logic, but experience.” Thus, more meaningful comparisons of the similarities and differences of the tort law of China and the United States will only be possible after litigants, lawyers, and judges across China put the Tort Liability Law into practice and through the litigation process transform the flat page of “law on the books” into a living structure of Chinese tort law.

Ultimately, the success of China’s tort law will not be measured by how closely it resembles the law of the United States or of any other country, but by how well it serves various goals. China’s Tort Liability Law defines those goals as follows: “to protect the legal rights and

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46 Oliver Wendell Holmes, Jr., The Common Law 1 (1881). The passage continues: “The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”

47 Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 15 (1910).
interests of civilian subjects, clarify liability, guard against and impose sanctions for tortious acts, and promote social harmony and stability.” Clear and consistent protection of individual civil law rights and interests in a way that deters tortious conduct and promotes general welfare is also important in the United States. However, whether the two countries’ tort law goals are actually similar is difficult to assess at this time. In the United States, the concept of guarding against and imposing sanctions for wrongful acts is particularly important. The core promise of American tort law is its ability to foster a culture of reasonable care for the physical safety of others, which in turn can internalize the costs of those harms and help deter them.

It is difficult to tell whether this American notion of fostering reasonable care for others to prevent harm is a core goal of Chinese law. Language in the first article of the Tort Liability Law states an interest in protecting against tortious acts, yet, much discussion during the symposium focused on harmony, stability, and compensation.48 To an outsider, the American notion of reasonable care for the safety of others seems compatible with the Chinese concept of “harmony,” particularly if the legal focus on reasonable care for the safety of others is seen as creating a norm that generates moral and cultural power in its own right, not just when sanctions are imposed after a breach.49 This norm of broad-based care for strangers, not merely for family and friends, seems quite consistent with the Chinese norm, “what you do not wish for yourself, do not do to others.”50 However, establishing this norm might require a break from the traditional Chinese notion of care for others, which has historically meant care for family members rather than for strangers.51 A norm of reasonable care for a broad group of others can be a particularly important cultural asset as social and commercial transactions increasingly extend across cities, regions, and nations.

A culture of reasonable care for everyone’s safety can aid a country’s external instrumental goals, such as increased reputation and sales. For example, to the extent that products liability law makes producers accountable for defective products that cause injury, not only in extreme cases with extreme punishments, but as a frequent norm of financial accountability, product consumers may reasonably develop more

48 This paper was originally presented at the International Symposium of the Implementation of Tort Liability Law of the People’s Republic of China, Chengdu, China 2010. The Symposium, sponsored by Sichuan University and the Research Center for Civil and Commercial Jurisprudence of Renmin University, included civil law scholars from all over China as well as one European and one U.S. perspective.

49 DANIEL L. BELL, CHINA'S NEW CONFUCIANISM 26-27, 52 (2008).

50 See Kozoichyck, supra note 8, ch. XVII.

51 Id.
confidence in the safety of those goods. A colleague who sits as a judge on a local tribal court counted this sort of concern as an important reason for assigning liability when he presided over a controversy involving a tribal group’s misconduct. If he had failed to sanction the tribe’s misconduct, outside entities might balk at future beneficial business relationships with the tribe. Indeed, while U.S. automakers were successfully lobbying against more stringent tort liability to avoid liability for injuries caused by their products in the United States, Japanese automakers were equally successful in complying, voluntarily, with far stricter safety requirements and capturing a large portion of the U.S. automakers’ domestic sales. Only recently have U.S. automakers begun to recover market share as they are increasingly perceived as manufacturing safer cars under more stringent legal regulations.

Tort law cannot only help consumers secure safer products, but it can also help honest and careful businesses to compete in open markets. For example, one business may gain a competitive advantage over another business by using substandard and risky ingredients in its products. The other business might then feel economic pressure to follow suit in order to compete. If, instead, courts force the first business to pay full damages in tort for the injuries caused, that business would lose the advantage it had unfairly gained with respect to its competitors. Moreover, other businesses would be able to compete without lowering their own standards. Accordingly, tort law rules can foster consumer confidence while aiding careful business practices by holding wrongdoers to account.

Aside from potentially improving business reputation and sales, perhaps the most important reason to embrace tort liability mechanisms that promote reasonable care is to promote the welfare of individuals.

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52 Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis (1970); Landes & Posner, supra note 42 (arguing that tort law is best understood as a means of inducing cost-effective precaution taking).


54 See A. Mitchell Polinsky & Steven Shavell, The Uneasy Market for Products Liability, 123 HARV. L. REV. 1437 (2010) (suggesting that market forces and extensive regulation have reduced the need for product liability law to encourage safety in widely-sold products such as automobiles).

55 Gary Schwartz, Reality in the Economic Analysis of Tort Law: Does the Tort
Human injury is a universal problem in all cultures and throughout time. We need look no further than the tragic collapse of school buildings during earthquakes in Sichuan to hear the cry of victims for accountability even when, as with the wrongful death of children, no adequate remedy is possible. Demands for a system to hold people accountable make sense not simply to extract monetary payments for tragic harms, but because we care so intensely about the precious and irreplaceable gifts of life and health—particularly the lives and health of our children—that we want systems to help safeguard those lives. We want reasonable care for safety to make these tragedies less frequent and to make the reasonable precaution it takes to prevent them more consistent and reliable.\textsuperscript{56} Indeed, as China experiences remarkable economic growth and increasing wealth,\textsuperscript{57} it seems natural to expect both demands for higher wages,\textsuperscript{58} and increased concern for the physical safety of its people.

If there is one distinct characteristic of United States tort law, it is the treatment of tort law not only as a vehicle for redress, but also as a vehicle for internalization of the costs of injuries and ultimately deterrence.\textsuperscript{59} Thus, ideally, U.S. tort law not only redresses injuries, but at least in part, prevents them. European tort principles also recognize the importance of harm prevention, not just victim compensation, though perhaps less strongly than the United States.\textsuperscript{60} In the context of tort law as


\textsuperscript{56} In the case of the Sichuan earthquakes, for example, if school buildings had been built to basic construction standards this could have prevented their easy collapse. See Yang Binbin et al., \textit{Why Did So Many Sichuan Schools Collapse?}, CAIJING MAGAZINE, June 17, 2008. Tort liability would make builders responsible for the low quality work pay damages and make other builders aware that cutting corners is not a profitable future building strategy.

\textsuperscript{57} Eric A. Posner & John Yoo, \textit{International Law and the Rise of China}, 7 CHI. INT'L. L. 1, 4 (2006) (addressing China's remarkable economic growth over the last quarter century. "Since 1978, China's gross domestic product has grown 9.4 percent per year; in a good year, the US economy might grow 4 percent").

\textsuperscript{58} David Barboza, \textit{As China's Wages Rise, Export Prices Could Follow}, N.Y. TIMES, June 8, 2010, at B1.

\textsuperscript{59} P.S. Atiyah, \textit{American Tort Law in Crisis}, 7 OXFORD J. LEGAL STUD. 279, 284 (1987) ("Deterrence is concerned with trying to prevent individuals from committing torts; cost internalization is concerned with trying to make individuals, through the marketplace, pay for the costs they impose on others. These are not the same thing—for instance, the latter goal would require costs to be imposed on individuals for many activities which nobody would wish to prohibit (such as using a marginally more dangerous car than others), and conversely, cost internalization may actually permit defendants, able to bear the costs, to do things which a deterrence policy would forbid outright. The cost internalization argument is sometimes called general (or market) deterrence, but it needs to be distinguished from deterrence").

\textsuperscript{60} \textbf{EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW} 10:101
a system that fosters accountability and deterrence, or as a pure compensation system, the potential for divergence between U.S. tort law and the Chinese Tort Liability Law becomes clear. Is China’s new tort system designed to provide general compensation for injuries from defendants who have greater wealth, or does it seek to encourage care for others’ safety by sanctioning wrongfully-caused harms?

The ease of liability for an object that falls from a building and injures another person highlights the potential difference between these two approaches. If a court in China imposes liability on all of the building occupants simply to provide compensation to an innocent injured party, and not because those building occupants should have acted differently, liability might be borne just as well by taxpayers or paid by personal insurance.\(^{61}\) In this instance, tort liability would simply be one possible form of social insurance, and it would not be designed to redress or sanction wrongfully caused harm. Indeed, in the United States, a taxpayer-funded social compensation system—called social security disability insurance—would provide monthly benefit payments to the victim of the falling object if the victim were completely disabled as a result of the injury and unable to work.\(^{62}\) If China’s Tort Liability Law becomes a means of providing compensation from defendants with resources and not also a way to sanction and deter wrongfully caused harms (not just in this unique, limited and historically-defined category of cases, but as an aspect of Chinese tort theory more generally) then China’s law will be quite different from U.S. tort law indeed.

If instead, China’s system is about holding defendants accountable for wrongfully caused harms, the system will be more akin to that in the United States. For example, if a court in China imposes liability on all of the building occupants for the falling object because all of the occupants’ conduct is viewed as socially deficient and their own better conduct would have avoided the falling object and subsequent injury, liability in that case would focus on the defendants’ own fault and would be more similar to third-party liability in the United States, which focuses on the idea that the defendant’s own better care can prevent harm.\(^{63}\)

Of course, the set of conduct considered wrongful such that it should warrant a legally-actionable tort claim is culturally contingent and subject to continual evolution. In the United States, for example, the extent to which businesses and landlords have an obligation to take

\(^{61}\) Other forms of insurance might be just as effective, however, that depends upon the functioning of first-party and other insurance markets in China.


reasonable precautions to protect against crime has increased in recent decades, with potentially salutary effects on U.S. crime rates.\footnote{See Robert L. Rabin, Enabling Torts, 49 DePaul L. Rev. 435 (1999); Philip J. Cook, Crime Control in the City: A Research-Based Briefing on Public and Private Measures, 11 Cityscape J. Pol’y Dev. & Res. 53, 80 (2009).} Similarly, although twenty years ago failure to wear a seatbelt would not have been considered negligent in most states, today eighty-five percent of the U.S. population wears seatbelts, and a failure to do so would be seen as unreasonable.\footnote{However, some state statutes bar plaintiff’s nonuse of a seatbelt as a defense. LaHue v. GM Corp., 716 F. Supp. 407 (W.D. Mo. 1989).} This change in behavior has effectively decreased the number of lives lost in traffic accidents.\footnote{See Highway Deaths Drop to Lowest Levels Since 1950s, Arizona Daily Star, Sept 10, 2010, at A14.} Thus, whether conduct creates a risk of harm is an important issue in tort liability as well as regulation in the United States.\footnote{Restatement (Third) of Torts: Liability for Physical and Emotional Harms § 7(a) (2010).}

In a many tort liability contexts, the risk of harm is easy to identify and the conduct is easily to define as normatively wrongful, such as a punch in the nose. Yet in other areas, like third-party liability, our moral intuitions are less certain and the need for liability to extend to this sphere more contested. One useful example is the case of drunk driving in the United States. In the United States, car accidents are the leading cause of accidental death for children above age one and for adults under age fifty.\footnote{Center for Disease Control, Injury—A Risk at Any Stage of Life (2006), available at http://www.cdc.gov/Injury/publications/FactBook/Injury—A_Risk_at_Any.Stage_of_Life2006-a.pdf.} Of these fatalities, approximately one-third are caused by drunk driving.\footnote{National Highway Traffic Safety Administration, Traffic Safety Facts, 2006 Data: Alcohol Impaired Driving 1 (2008).} Drunk driving is considered an unreasonable risk, and in the U.S., as in China, if a drunk driver causes injury, the driver can face criminal or tort liability.\footnote{Tort Liability Law of P.R.C., supra note 11, art. 33; Restatement (Third) of Torts: Liability for Physical and Emotional Harms § 2 (2010) (recklessness).} But most U.S. jurisdictions have gone further in terms of defining wrongful conduct for tort liability in the drunk driving context. Most U.S. jurisdictions, through their legislatures or courts, have adopted a form of third-party liability referred to as dram shop liability.\footnote{Dobbs, supra note 11, § 332.} Under dram shop liability, if a commercial seller of alcohol serves alcohol to a patron past the point at which the patron appears to be intoxicated, both the patron and the alcohol seller are liable for any injuries the patron may cause to others as a result of the intoxication
(typically as a result of a drunk driving accident). Under dram shop liability, bar owners no longer have an interest in selling patrons as much alcohol as they can, because they may be liable for harm caused by an intoxicated patron. Thus, sellers exercise more precaution in serving their patrons and more care in protecting others from harm. Dram shop liability also reduces specific practices that lead to intoxication and drunk driving, such as serving multiple drinks at a time. Ultimately, dram shop liability reduces motor vehicle fatalities. In this context, the tort law norm of reasonable care for the safety of others promotes behavior that saves lives.

The fact that American tort law can produce important benefits in terms of human welfare is its most salient feature. Norms change over time and tort law can influence them to change in a direction that increases incentives for safety. “[I]f—in order to deter by charging certain activities ‘their costs’—a society gives people the right to recover, such recoveries will surely affect what people think their rights are. And that in turn will surely affect that society’s notions of corrective justice.” The promise of a system of tort liability is that it will lead people “to behave more carefully” even in situations “that cannot, and should not, be reached by criminal law.”

From an American perspective, one hope for China’s Tort Liability Law is that in the application of its fault principles, even if enshrining different particular doctrines than those in the U.S, China’s Tort Liability Law will develop a broadly understood norm of reasonable care for the safety of others. Through this principle, the Tort Liability Law might not only compensate people who have suffered harms in a way that fosters social stability, but also encourage safer products and conduct and save lives.

75 LANDES & POSNER, supra note 42, at 14 (“Assume with Aristotle that the purpose of tort law is to do ‘corrective justice,’ that is to restore to a person what has been wrongfully taken from him rather than to improve the allocation of resources. It would still be necessary to inquire into the source of the norms on the basis of which certain conduct is deemed wrongful. That source might be economic.”)
76 Guido Calabresi, Toward a Unified Theory of Torts, 3 J. TORT L. 1, 7 (noting that social norms can adjust to accept a range of practices if those practices deter injuries).
77 Id.
IV. GUIDELINES—REDUCING THE COSTS OF LITIGATION

If the norm of reasonable care for others holds the promise of greater safety, a potential peril of such a system is cost. Individualized litigation regarding facts related to fault, damage and causation consume personal and public resources. In the United States, for every dollar paid out in tort liability approximately forty cents is paid for litigation costs.78 Thus, litigation itself can consume nearly a third of liability-related expenditures. If there were a way to encourage reasonable care at lesser cost, such an approach would be well worth consideration. China’s tort rules suggest one possibility. In the area of wrongful death, rather than calculate individualized damages in each case, Chinese tort law generally awards the decedent’s beneficiaries twenty times the average earnings in the decedent’s locality.79 This presumptive award can be decreased in certain circumstances, as in the case of old age, or increased in other circumstances, as when the decedent had been living in a city but was registered as living in a rural area. While some commentators have recommended that China consider America’s individualized damage awards,80 it is China’s approach that merits attention in the United States.

Despite criticism in China that its approach has led to unequal awards, such an approach might actually equalize awards in the United States. U.S. wrongful death recoveries can provide millions of dollars of damages in some cases and almost nothing in others.81 Because individualized damage determinations are primarily based on lost income, the family of a successful middle-aged person killed during peak earning years might receive a substantial award, while the family of a deceased child, teenager, homemaker, or retiree might receive a very low award.82 Under the U.S. system, the decedent’s race and gender, which are linked to


79 See SPC Interpretation on Compensation for Personal Injury, cited in THE CHINA LAW CENTER, YALE LAW SCHOOL, TORT LAW IN CHINA: HISTORICAL DEVELOPMENT AND SELECTED ISSUES (2006); Conk, supra note 6, at 946 n.61.


82 See Andrew J. McClung, Dead Sorrow: A Story About Loss and a New Tort Theory of Wrongful Death Damages, 85 B.U. L. REV. 1, 20-22 (2005) (discussing cases in which wrongful death awards produce zero or extremely low damage awards, as with the wrongful death of the author’s fiancée because at the time of her death she was an unmarried adult without children).
average earnings, may also lead to unequal awards, particularly in jurisdictions that cap noneconomic damages awards. These dramatically uneven recoveries undermine the idea that all life has value. Moreover, low U.S. awards for certain groups such as children may lead to suboptimal risk deterrence. A standard measure of damages could reduce the extent to which wrongful death recoveries are suboptimal and highly income-dependent in the U.S.

Applying China’s approach could reduce litigation costs. Although each party would still have to prove fault in order to establish liability, time-intensive inquiries that mark individualized damage calculations could be avoided. For instance, under the Chinese approach, it would be unnecessary for a judge or jury to hear testimony about whether the decedent, had he lived, would have worked at a minimum wage job or become a skilled laborer. Similarly, courts would not need to determine the present value of the particular worker’s future wages—a task that is not only time consuming but also speculative.

Indeed, an approach that softens the extreme damage award differences assigned in the American system and affords a simpler process for determining awards has been recently embraced in the United States. When the United States government established a fund to compensate the families of the victims of New York’s September 11th attacks, the Special Master of the September 11th Victim Compensation Fund (“9/11 Fund”) created uniform guidelines for calculating wrongful death recoveries. Despite the fact that damages were to be modeled on the tort system, the guidelines limited the recovery of lost wages for high income earners and raised recoveries for low income earners. The 9/11 Fund also allowed a lump sum recovery for pain and suffering damages, which had the effect of evening out damage awards across categories of victims. Some American scholars have suggested other fixed awards for certain aspects


85 Posner & Sunstein, supra note 81.

86 Cf. Eric Posner & Luigi Zingales, A Loan Modification Approach to the Housing Crisis, 11 Am. L. & Econ. Rev. 575 (2009) (suggesting a cram down plan in which housing valuations are not individually adjusted but determined on the basis of average home prices in a given zip code).


of wrongful death recoveries, such as for lost enjoyment of life. Of course, standardized damages, including compensation tables for particular types of injury, are a critical component of workers compensation systems in the United States.

With a uniform damages structure, some safeguards might be necessary to prevent moral hazard. For example, if a poor person’s family could recover more money for the person’s death than he or she would have received during his or her life, courts might put in place safeguards to ensure that deaths intended by the decedent or a decedent’s beneficiary would not be compensated. Wealthy persons concerned that they or their beneficiaries would receive too little compensation could purchase additional private insurance above the presumptive damages amount. To the extent that lower tort payments for the death of wealthy people might not generate adequate deterrence, mechanisms to deter risks disproportionately affecting high-income earners could be considered. Even with a more uniform approach to damages in wrongful death cases, modifications to recovery criteria could be made. For example, in addition to estimated wage loss, the 9/11 Fund factored in the number of dependents supported by each decedent. Similarly, actual expenses preceding death, such as hospital costs, might be added as another compensation factor. Rather than use China’s approach of applying the average earnings in each locality as the baseline for the compensatory award, another option would be to use the average value of a statistical life and adjust it based on the cost of living in the particular locality.

Not only would uniform guidelines for damages make awards more consistent and easily administered, but they might aid in combating special pleading by particular parties or classes of injurers. Wrongful death suits provide a useful window into the shared pressures that tort law faces when it requires powerful interests to compensate for harms. In the United States, those pressures typically come from well-organized private interests groups that plead their case to state legislatures. In light of these pressures, a number of United States jurisdictions have placed various caps on wrongful death recoveries, as in the case of medical malpractice. In both countries, it is important to think about legal mechanisms that can hold parties to liability for damages, even against powerful actors and in controversial cases. General norms about fair compensation amounts may be one aid. With respect to damage awards in individual cases, these norms may increase the crucial ability of judges to decide cases fairly and predictably and not be influenced by the power of individual parties or outside interests.

89 Posner & Sunstein, supra note 81.


91 See The China Law Center, Yale Law School, Tort Law in China:
V. CONCLUSION

None of us can see the future. Yet, together we will create it. Given the shared challenges countries face about ways to prevent injuries and fairly respond to them, it has been my great pleasure to participate in the conversation about China's new Tort Liability Law. Posted outside my office door is a quote attributed to artist Michelangelo, "I am still learning." Nowhere is the opportunity to learn more evident to me than when we share ideas across national borders. While countries' tort law expresses their societies' unique history and normative commitments, looking at ways in which different countries resolve and understand similar questions can expand our own understanding.92 While we Americans hope that we have valuable lessons to teach, we have just as much to learn.93 With the passage of the new Tort Liability Law, I am pleased to become a student of the tort law of the People's Republic of China. I look forward to our shared dialogue in the years to come.

92 See Eric A. Posner & Cass R. Sunstein, Response—On Learning from Others, 59 Stan. L. Rev. 1309 (2007) (addressing reasons that courts should be interested in the views taken by courts from other jurisdictions and suggesting that relying on the law of other states to constrain judicial policy preferences reduces courts' discretion to make errors).

93 Liebman, A Return to Populist Legality, supra note 4, at 43 (noting China's widespread study of foreign legal systems).
ARTICLES

Reshaping Private International Law in China: The Statutory Reform of Tort Conflicts

Zhengxin Huo*

This article reviews the statutory reform of Chinese private international law from the perspective of tort conflicts which concludes that notwithstanding the significant improvement, the new Private International Law Act of China are fraught with various defects. In the field of tort, Article 44 are problematic in three aspects: first, the key term 'habitual residence' lacks an objective definition; second, the rationality of an automatic preference to the law of the common habitual residence over the lex loci delicti is open to doubt; third, there is little, if any, practicability to introduce the notion that the parties may choose the applicable law after the tort has happened. Moreover, there are a number of defects or problems with Article 45, Article 46 and Article 50 of the Act, respectively. What's more, the Act neglects some other important types of torts which call for special treatment, say, unfair competition, and environmental pollution, nuclear damage and traffic accidents. In the end, the article puts forward the corresponding suggestions for improvement.

Keywords
China's New Private International Law Act, Tort Conflicts, Lex Loci Delicti, Double actionability, Common Habitual Residence, Party Autonomy, Particular Torts

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I. Introduction

The People’s Republic of China adopted its first statute on Private International Law titled, “Act on the Application of Laws on Foreign-related Civil Relationships” (hereinafter Private International Law Act) at the seventeenth Session of the Standing Committee of the Eleventh National People’s Congress (“NPC”) on October 28, 2010. It came into force on April 1, 2011. The enactment of the Private International Law Act is a historic event in Chinese legislative history, as it indicates China has modernized its conflict-of-law rules after many years of unremitting efforts made by legislators and scholars. More importantly, it represents a major political accomplishment in establishing “a socialist legal system with Chinese characteristics.”

The Private International Law Act contains 52 articles arranged under eight chapters, with headings that are indicative of their respective scope. Among those 52 articles, there are four articles that deal with torts. In Chapter IV, Article 44 lays down the main rules on the law applicable to a tort claim, Articles 45 and 46 provide the choice-of-law rules for two particular torts respectively, i.e., product liability and internet defamation; In Chapter VII, Article 50 specifies the choice-of-law rules for infringement of intellectual property. Moreover, it is worth emphasizing that Article 51 in Chapter VIII states ambiguously that Article 146 of the General Principles of the Civil Law of the People’s Republic of China (“GPCL”) shall be replaced by the relevant articles of the Private International Law Act.

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2 At the 15th National Congress of the Communist Party of China, the rule of law principle was established as a fundamental principle for the administration of the country. In order to implement the principle, the Party put forward a legislative plan pursuant to which the socialist legal system with Chinese characteristics would be shaped up by 2010. To ensure the accomplishment of the legislative plan, the National People’s Congress, China’s supreme legislature, has accelerated legislation after 2005. See Zhonghua Gongheguo Dingxiang Quanguo Daxibianzai Weiyuan Huijian [Collection of Documents of the Fifteenth National Congress of the Communist Party of China], 6-6 (1997). See also Zhongxin Hao, China’s Codification of Conflict Law: Latest Efforts, 81 B.Y.L. J. 279, 283 (2010).

3 Chapter I (General Provisions), Chapter II (Civil Subjects), Chapter III (Marriage and Family), Chapter IV (Succession), Chapter V (Property), Chapter VI (Obligations), Chapter VII (Intellectual Property), Chapter VIII (Supplementary Provisions). For detailed discussion of the Private International Law Act, see Zhangxin Hao, An Imperfect Improvement: The New Conflict of Laws Act of the People’s Republic of China, 80 Int’l & Comp. L.Q. 1065-1093 (2011).

4 The GPCL was adopted at the 4th Session of the Sixth National People’s Congress on April 12, 1986, coming into force on January 1, 1987. It is still effective, assuming a prominent role in the area of civil law in China. The GPCL has devoted an entire chapter to regulating the conflict of laws (i.e., Chapter VIII, Application of Law in Foreign-related Civil Relations), where only Article 146 is dealing with tort. See Zhonghua Renmin Gongheguo Minfa Tongue ("GPCL") art. 146 (1986).
As carefully scrutinizing the above articles, one can observe that Chinese private international law in respect of tort is undergoing a fundamental transformation. First, the double actionability rule embodied in Article 146 of the GPCL was abolished. Second, and more strikingly, the Private International Law Act introduces party autonomy to the field of tort. Third, the Act switches to establish habitual residence, rather than nationality or domicile, as the connecting factor to determine the lex personalis. Last, but not least, particular rules for product liability, internet defamation, and infringement of intellectual property are laid down by the Private International Law Act. Furthermore, Article 51 of the Private International Law Act indicates that among the tort choice-of-law rules that have existed in various separate laws prior to the date of commencement of the Private International Law Act, only Article 146 of the GPCL was abolished. It therefore follows that the tort choice-of-law rules included in the Maritime Act and the Civil Aviation Act, remain unaffected by the new statutory code.5

As such, the purpose of this article is two-fold. First, it provides an examination of the statutory reform of private international law regarding tort conflicts that has happened in China. Second, after summarizing problems concerning the tort choice-of-law rules have surfaced in this process, it puts forward suggestions for improvement. This article is composed of four parts including Introduction and Conclusion. Part II examines the tort choice-of-law rules in Chinese law before the enactment of the new Private International Law Act. Part III provides an in-depth exegesis of the tort choice-of-law rules contained in the new Act, and critically analyzes the problems thereof. Part IV concludes the discussion with suggestions to improving the specific tort choice-of-law rules as well as Chinese private international law legislation as a whole.

II. Choice of Law in Tort prior to the Private International Law Act

A. The Main Rules on Torts

Before the enactment of the Private International Law Act, the main rules on the law applicable to a tort claim were laid down by Article 146 of the GPCL which provided that:

With regard to compensation for damages resulting from a tortious act, the *lex loci delicti* shall be applied. If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied.

An act committed outside the People's Republic of China shall not be treated as a tortious act if under the law of the People's Republic of China it is not a tortious act.

Additionally, in order to implement the GPCL, the Supreme People's Court, in its capacity as interpreter of the application of law as prescribed by the Organic Law of the People's Courts, issued the "Opinions of the Supreme People's Court on Implementing the General Principles of Civil Law of the People's Republic of China" (hereinafter Opinions on the GPCL) in 1988. Given the definition of the *lex loci delicti* is somewhat ambiguous, the Supreme People's Court set forth in Article 187 of the Opinions on GPCL that:

> The *lex loci delicti* may refer either to the law of the place where the tortious act was committed or to that of the place where the harm of the act occurred and that People's Courts may select either in case where these two laws are different.

The above articles indicated that Chinese conflicts law in tort before the Private International Law Act established a single general rule, containing two limbs, and a single exception thereto. Thus, the combined effect of Article 146 (1) of the GPCL and Article 187 of the Opinions on GPCL was to establish a general rule whose operation depended on the existence or otherwise of a domicile or a nationality common to the parties. If both parties were of the same citizenship or domicile, the *lex patriae* or the *lex domicilii* may apply. If no such common citizenship or domicile existed, the tort was governed by the *lex loci delicti* which included either the law of the place of occurrence of the tort or that of the place of the occurrence of the results of the tort. Then, Article 146 (2) of the GPCL provided an exception which meant that, in order for an act committed outside the PRC to be actionable in the PRC, it must necessarily be regarded as a tort in accordance with the domestic Chinese law. This exception was regarded by Chinese

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6 The Supreme People's Court may interpret points of law arising from the concrete application of law in the adjudicative work of the courts. This type of interpretation is known as 'judicial interpretation.' Documents of judicial interpretation issued by the Supreme People's Court have general binding force although they are not legislation archives in nature. See FENG LIN, CONSTITUTION LAW IN CHINA 221 (2000); ALBERT HONG-ZEE CHEH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 118-138 (3rd ed. 2004).


8 Id. art. 187.
scholars as a Chinese version of double actionability.9

1. Lex Loci Delicti

The *lex loci delicti* theory (the application of the system of law of the place where the tort was committed) is the orthodox doctrine in classic private international law which was prevailing in both civil law countries and some common law countries, such as the United States and Australia, until the first part of the twentieth century.10

The theory, dating back to the fourteenth century, is originally derived from the ancient Latin axiom "*locus regit actum*" which means the law of the locality regulates the thing to be done.11 In the first half of the twentieth century, it is further endorsed by the vested rights theory.12 Adherents suggest that the *lex loci delicti* reflects and protects the legitimate and reasonable expectations of the respective parties. Furthermore, it is contended that the jurisdiction in which the tort was committed is the place that has the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law.13

Chinese legislators enacting the CPCL accepted the *lex loci delicti* theory for the similar reasons who believed that the adherence to this theory in general avoided egregious forum shopping and led to certain, predictable, and uniform result.14 However, judicial practice suggested it was not infrequent that the tortious act and the harm of which the plaintiff complained occurred in different jurisdictions. Accordingly, the Supreme People’s Court empowered the courts to choose a law of either place at discretion should this situation occur.

Nonetheless, it should be noted that unlike the laws of many other civil law countries,15 Chinese law at this stage failed to provide any guideline for judges to follow when they have to choose one law between the law of the place of occurrence of the tort and that of the place of occurrence of the results of the tort; arbitrary selections and

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9 See Guoli Sifa [PRIVATE INTERNATIONAL LAW] 349 (Xiangzhao Zhai ed. 2011).
15 E.g., German courts hold that the most favourable law would apply to the victim in this case; Swiss private international law provides that if the defendant’s act occurs in one State, and harm occurs in another State, the latter’s law is applicable if the defendant could have foreseen that harm would occur in that State. See Morse, supra note 10 at 58, 76. See also 2003, supra note 10, at 436; Symons Symeonides, Rome II and Tort Conflicts: A Missed Opportunity, 56 AM. J. COMP. L. 173, 189, 222 (2008).
inconsistent decisions were, therefore, almost inevitable. Indeed, judicial practice in China suggested that the People's Courts under this circumstance tended to choose the law which would be more favorable to the Chinese parties. The following two decisions may serve as illustrative examples.

In *Tokizaki v. Beijing Hongyan Tianwaqian Restaurant Co. Ltd.* Case,\(^{16}\) decided in 2001, the plaintiff, a Japanese national, was injured in an assault by the employees of the defendant, a Chinese company, located in Beijing. The plaintiff brought an action in Beijing and sought compensation in the amount of 4,096,333.55 yuan (RMB) pursuant to Japanese tort law. The trial judge acknowledged that: (1) the alleged wrongful act was committed in China, and the damage was suffered primarily in Japan and continued to occur there; (2) Chinese tort law differed from Japanese tort law in assessing damages resulting from a wrongful act, and the latter provided a higher level of compensation. The judge went on to reason that as he was entitled to choose either Chinese law or Japanese law in such legal scenario under Article 187 of the Opinions on the GPCL, he thus chose Chinese law, *i.e.*, the law where the wrongful act was committed, as the governing law at his discretion. Regrettably, no detailed reasoning or further explanation in support of the choice was provided in the judgment. As a result, the judgment was rendered pursuant to the relevant Chinese law, under which the award of damages to the plaintiff was reduced to 229,612.85 yuan (RMB), a sum which was much less than he had expected.

In *Gansu Highway Administration v. Yokohama Rubber Co. Ltd.* Case,\(^{17}\) the plaintiff alleged that a defective tire manufactured by the defendant, Japan's third-largest tire maker, caused the death of its four employees. The plaintiff specified that four of its employees, including a driver, left Lanzhou on business in an automobile owned by the plaintiff. When the car was driven along a highway in Shaanxi Province, one of the car tires exploded which led to the accident, claiming the lives of the four. Gansu Highway Administration thus brought the action against Yokohama Rubber Co. Ltd. in Xi'an Intermediate People's Court, seeking compensation in the amount of 557,000 yuan (RMB) under Japanese Product Liability Law on the ground that it was the law of the place where the defective tire was manufactured. Nonetheless, the defendant argued that Chinese law, as the law of place where the accident happened, should apply. The judge of Xi'an Intermediate People's Court reasoned that under Article 146 of the GPCL, the dispute in question should be governed by *lex loci delicti*. Moreover, pursuant to Article 187 of the Opinions on the GPCL, either Chinese law or Japanese law may be selected as the applicable law, insofar as the injury occurred in China while the alleged

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\(^{16}\) See (2001) *Beijing Min-Chuan* No. 3311 (The first judgment of Beijing Second Intermediate People's Court).

\(^{17}\) See (2003) *Xi'an Min-Chuan* No. 074 (The first judgment of Xi'an Intermediate People's Court).
defective tire was manufactured in Japan. The judge emphasized that due weight should be given to the argument of the plaintiff in the present case, as its employees, the victims of the alleged defective products, was the weaker party whose legitimate interests should be protected. In this light, the judge chose Japanese Product Liability Law as the applicable law.

In both cases, the tortious act and the harm of which the plaintiff complained occurred in different jurisdictions; however, different People’s Courts chose different laws under the same conflicts rule, depending on which law would benefit the Chinese litigants. Such decisions demonstrated that the lack of guideline for selecting law in case that the place where tort was committed differed from that of the occurrence of the results of the tort has led to too much elasticity and flexibility in the application of the lex loci delicti, which undermined uniformity, predictability and certainty that private international law purports to safeguard.\textsuperscript{18}

2. The Common Personal Law

As indicated earlier, Article 146 of the GPCL stated that where the persons who inflicted the injury and the victim were nationals or domiciliaries of the same state, the law of that State may displace the lex loci delicti. The rationale for applying common personal law is based on the likelihood that where such a law exists, it will be more closely connected with the parties than the lex loci delicti, or its application better reflects the expectations of the parties.\textsuperscript{19} Indeed, recent private international law codifications and international conventions have adopted the notion that the common personal law of the parties normally prevails over the lex loci delicti. This notion is implemented either through a common domicile rule,\textsuperscript{20} or through an exception from the lex loci rule. The exception is phrased either in common-domicile or common habitual residence language.\textsuperscript{21} Thus, preference for the common

\textsuperscript{18} YONGFENG XIAO, ZHONGQIANG CHEN, YUTING LI, WEIWEI YANG [A STUDY ON THE LEGISLATIVE ISSUES OF CHINA’S CONFLICTS LAW] 941 (1996). See also Hsu, supra note 13, at 9768.

\textsuperscript{19} Moraw, supra note 20, at 91.


personal law over the *lex loci delicti* by the GPCL seems to reflect similar developments in contemporary conflicts law around the world.  

However, it should be noted that unlike the laws of many countries which provide a systematic and automatic preference of the common personal law over the *lex loci delicti*, Article 146 of the GPCL stated clearly that the application of the common personal law was discretionary rather than mandatory; differently expressed, judges were entitled to apply either the *lex loci delicti* or the common personal law of the parties. The reason for employing an alternative reference rule is that though the common personal law is likely to be more closely connected with the tort or better reflected the legitimate expectations of both parties, it is by no means the case that common personal law must in fact be so. In certain cases, the automatic displacement of the *lex loci delicti* in favor of the common personal law has been proved to unjustified. What is more, in contrast to the laws of many other countries which provide an exception in favor of the law of another country which has a manifestly closer connection with the tort, the GPCL did not include such exception. Therefore, it was submitted that the alternative reference rule adopted by Article 146 of the GPCL was a necessary arrangement to avoid the injustice that automatic displacement of the *lex loci delicti* by the common personal law may produce.

3. The Double Actionability Rule

Under Article 146(2) of the GPCL, in order for an act committed outside People’s Republic of China to be recognized as a tort in the PRC, it must necessarily be regarded as a tort under the domestic Chinese law. Apparently, this was the reflection of the double actionability rule. According to some Chinese scholars, Article 146(2) of the GPCL was based on the consideration that implementing open door policy often involved laws of many capitalist countries which often had strict liability principles in dealing with tort and which allowed the definition of tort to include a very broad range of acts; the double actionability rule would limit the adverse impact of the absolute liability doctrine in tort or of the broad coverage of tort being developed in the Western legal system.

Though such consideration was not irrational, the reflection of the double

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24 Moros, supra note 19, at 91-92.
25 Id. at 344-45. See also Symmesides, supra note 15, at 195-197; Huo, supra note 13, at 97.
26 Stone, supra note 33, at 351-354.
actionability rule in the GPCL had invited a lot of criticisms especially since the late 1990s. Many Chinese scholars have questioned the merits and rationality of the incorporation of this common law rule and rejected it as an outmoded remnant of the past. The debate on the double actionability rule among Chinese scholars will be introduced in more detail in Part III A.

B. Some Particular Torts

Though the GPCL contained only one article on the choice-of-law rules for tort in general, some other Chinese laws prior to the enactment of the Private International Law Act lay down particular rules for certain torts. The Maritime Act of the People’s Republic of China, effective as of July 1, 1993, makes the following conflicts rules for maritime torts in Article 273.26

The law of the place where the infringing act is committed shall apply to claims for damages resulting from collision of ships.
The law of the place where the court hearing the case is located shall apply to compensation for damages resulting from collision of ships on the high seas.
If the colliding ships belong to the same country, the law of the flag state shall apply to claims for damages resulting from collision between them, irrespective of the place where the collision occurs.

Adopted on October 30, 1995, the Civil Aviation Act of the People’s Republic of China contains conflicts rules for aerial torts, providing in Article 189 as follows29

The law of the place where the infringing act is committed shall apply to claims for damages to the third party on the ground by civil aircraft.
The law of the place where the court hearing the case is located shall apply to claims for damages to a third party on the high seas surface by civil aircraft from the air.

Echoing Article 146(1) of the GPCL, Article 273 of the Maritime Act, and Article 189 of the Civil Aviation Act confirm the status of lex loci delicti as the general rule; additionally, given the particularities of maritime and aerial torts, the two articles provide special conflicts rules respectively in case application of the lex loci delicti is not possible or appropriate.

Under Article 273 of the Maritime Act, the lex loci delicti is supplemented with one substitute and one exception. Pursuant to Article 273(2), where the collision occurs on

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26 Maritime Act, supra note 5, art. 273.
29 Civil Aviation Act, supra note 5, art. 189.
the high seas, the lex fori shall be applicable. This substitute is self-explanatory: as the high seas are subject to no State’s jurisdiction, the lex loci delicti is of no availability, the lex fori, the law of the place of jurisdiction chosen by the victim would, therefore, be the governing law.\textsuperscript{30} However, both Article 273(1) and (2) shall be displaced if the ships wear the same flag in which case the law of the flag shall be applied. The exception is based on the presumption that the law of flag in this case usually has a closer connection with such collision than the lex loci delicti, and that the rule in favor of the law of the flag States reflects and protects the legitimate expectations of both parties.\textsuperscript{31}

Pursuant to Article 189 of the Civil Aviation Act, claims for damages to the third party by civil aircraft is governed by: (1) the lex loci delicti if tort occurs on the ground; or (2) by the lex fori if tort occurs on the high seas, as it is impossible to determine the lex loci delicti in this case. However, a careful perusal of Article 189 of the Civil Aviation Act will reveal two problems: first, the article fails to provide the governing law in case where two aircrafts collide with each other; second, if literally interpreted, the article does not cover the situation where damages to the third party by civil aircraft occurs on the surface of the territorial waters.

As noted above, among the tort choice-of-law rules that have existed before the enactment of the Private International Law Act, only Article 146 of the GPCL was abolished. Then, Article 273 of the Maritime Act and Article 189 of the Civil Aviation Act will continue to apply to the issues that fall within their respective scope.

III. Choice of Law in Tort under the Private International Law Act

Abolishing Article 146 of the GPCL, the Private International Law Act prescribes relatively elaborate conflict rules for torts which contain both rules for torts in general and particular rules for certain torts. Generally speaking, the incorporation of various new choice-of-law rules in tort by the Private International Law Act is a response to the fact that more and more foreign-related tort cases are adjudicated by the Chinese People’s courts, and the existing conflicts rules were unable to provide proper solutions.\textsuperscript{32}

\textsuperscript{30} Huang, supra note 14, at 336-339.

\textsuperscript{31} Id at 339. See also Hao, supra note 13, at 98.

\textsuperscript{32} Hao, supra note 8, at 1669.
A. The Main Rules on Torts

The main choice-of-law rules on torts are provided by Article 44 of the Private International Law Act which applies to most torts. It specifies:

The laws applicable to tort liability shall be the law of the country in which the tortious act is committed. However, where the parties concerned have their habitual residence in the same country, the tort liability shall be governed by the law of that country. If the parties choose the applicable law by agreement after the tort occurred, their agreement shall prevail.

Under Article 44 (1) of the Private International Law Act, tort liability, as a general rule, is governed by the *lex loci delicti*. However, this rule is subject to two exceptions: (1) if both parties are habitually resident in the same country, the tort shall be governed by the law of that country; (2) if the parties reach an agreement on the applicable law after the tort occurred, the tort is governed by the law chosen by them. Such triple structure manifests that the Chinese legislators take pains to maintain equilibrium between the orthodox doctrine and modern ones: on the one hand, the general rule of Article 44 is nothing but a restatement of the traditional *lex loci delicti*; on the other hand, the Private International Law Act attempts to substantively reform Article 146 of the GPCL by abolishing the double actionability rule, introducing party autonomy and choosing habitual residence to replace domicile and nationality as the connecting factor to determine the *lex personalis*.

As the *lex loci delicti* remains to be the general rule, a question naturally arises: where a tortious act and the ensuing damage occur in different places, which one shall be determinant? Though Article 44 *per se* fails to provide any guiding principle, one can find the solution by virtue of Article 2(2) of the Private International Law Act. Included in Chapter I (General Provisions), Article 2 provides in the second paragraph that a foreign-related civil relationship is governed by the law most connected to it, where neither this Act nor any other law designates the applicable law. Thus, the law keeping the closer connection with tort, between the law of the place of conduct and that of injury, shall be applied under such a circumstance. Compared with the GPCL which did not provide any guideline for courts to choose between the two laws, the Private International Law Act, obviously, represents an improvement.

Another issue which should be mentioned is that the reference made by Article 44 is

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34 Private International Law Act, supra note 1, art. 3.
always the substantive law of the relevant country. *Removis* is excluded by Article 9, which stipulates that the foreign law applicable to a foreign-related civil relationship does not include the conflicts law of that foreign country.35

As regards the reform made by the Private International Law Act, there are several points worth drawing attention to. First, the double actionability rule reflected in the GPCL has been abolished.36 As mentioned above, Chinese scholars have questioned the merits and rationality of the incorporation of the double actionability rule since the late 1990s. They argued that the rule operated in favor of the defendant and to the disadvantage of the plaintiff, and could lead to absurd and anomalous results;37 therefore, even in the United Kingdom, the double actionability rule in *Phillips v. Eyre* Case had been abolished in respect of all torts except defamation committed after May 1, 1996;38 furthermore, they contended that with the development and improvement of Chinese economy and legal system, the differences between Chinese tort law and the Western tort law were no longer substantive.39 In fact, the Tort Liability Act of the PRC enacted in 2009 has incorporated many doctrines in torts developed in the Western legal system.40 Accordingly, there was neither theoretic justification nor practical necessity for the Chinese law to retain this out-dated rule. For these reasons, they advocated that Chinese law should abolish the rule as soon as possible.41 In response to their suggestions, the Private International Law Act does not include the out-dated rule.

Second, Article 44 (2) of the Private International Law Act ensures that the law of the country where the parties are habitually resident will prevail over the *lex loci delicti*. What merits particularly strong emphasis is that habitual residence has been elevated to a fundamental status by the Private International Law Act; or to be more specific, habitual residence, rather than nationality, has been established as the principal connecting factor to determine *lex personalis*, family law and succession law.42 There are three reasons for China to deviate from the orthodox position of civil law.43 First, in a

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35 Id. art. 9. For a detailed discussion on Article 9, see Huo, supra note 3, at 1074-1075.
36 GPCL, supra note 4, art. 1400(2).
37 For details on the academic objection to the double actionability rule, see Reed, supra note 10, at 428-441; John O’Brien, CONFLICT OF LAWS 397-406 (2d ed. 1996).
39 Huo, supra note 3, at 1089.
42 Huo, supra note 3, at 1077.
43 Id.
globalized world where human affairs freely cross national boundaries, the connection between a person and his nationality is not as close as it used to be. Second, lawsuits are usually brought where parties live, the nexus of habitual residence favors application of the *lex fori*, whereas reliance on the *lex patriae* tends to increase foreign law problems.\textsuperscript{44} Third, China comprises more than one jurisdiction, under the model of "One Country, Two Systems"; Hong Kong and Macau possess the status of "Special Administrative Regions" which exercise a "high degree of autonomy" and enjoy independent executive, legislative and judicial power. As a result, there are actually three legal systems that now exist concurrently in China. Hong Kong still retains the common law system inherited as a former British colony, and Macau employs a legal system based on that of Portuguese civil law. Within such a setting, nationality cannot determine the internal law to which a Chinese national is subject. As habitual residence enjoys such a fundamental status in the Private International Law Act, it is not surprising that the law of the country where the parties are habitually resident replaces both the *lex patriae* and the *lex domicilii*.\textsuperscript{45}

Third, and more strikingly, Article 44 (3) of the Private International Law Act gives preference to the law chosen by the parties after the tort has occurred notwithstanding paragraphs 1 and 2.\textsuperscript{46} The introduction of party autonomy to tort represents a paradigm shift: in tort, achieving the public interests of justice had traditionally been considered to be paramount but adjusting the private interests of the parties is increasingly considered to be also important.\textsuperscript{47} The new rule imposes no restriction on the range of legal systems to choose from. Nonetheless, it does not permit a choice before a tort takes place, as the parties usually do not contemplate a future tort, and allowing pre-tort agreements may lead to the consequence that the socially stronger party imposes its unilateral choice on the weaker party.\textsuperscript{48}

Though Article 44 of the Private International Law Act represents some progress compared with Article 146 of the GPCL, it produces several problems simultaneously, which can be analyzed as follows:

First, despite the vital importance of habitual residence, neither the Private International Law Act nor other Chinese legislation provides a definition of this term.

\textsuperscript{44} See also FRIEDRICH JUENGER, CHOICE OF LAW AND MULTILATERAL JUSTICE 42 (2005).
\textsuperscript{45} See Zhongyin Hua, Shengwangguan Zhizhi de Faizhiyong-yi 7.33 Yongwenxian Tezhiphongda Tielu Juwenzhongzhong Waiguanwuzhangde de Pidang we Shiji Applicable Law to Torts - A Commentary on the Dispute between the Dead and Injured Foreign Passengers and China's Railway Ministry in the Wenzhou Train Collision of July 23, 6 FAHANG YANZU (STUDIES IN LAW & BUSINESS) 19(2011).
\textsuperscript{46} Private International Law Act, supra note 1, art. 44(3).
\textsuperscript{47} Koji Takashiki, A Major Reform of Japanese Private International Law, 2 J. PRIV. INT'L L. 311,322 (2005). See also Symeonides, supra note 22, at 998-999.
\textsuperscript{48} Hua, supra note 3, at 1089.
The application of the law of common habitual residence, therefore, depends on the arbitrary interpretation of this term by judges. Given the fundamental status of habitual residence in the Private International Law Act as well as the unsatisfactory judicial environment in China, the author believes that this is a serious defect.

Second, the merit of an automatic preference to the law of the common habitual residence over the lex loci delicti is open to doubt. Certainly, there are many situations in which it seems clear that the law of the common habitual residence should prevail, as it reflects both the most significant relationship and the legitimate expectations of the parties; nevertheless, preference of the common habitual residence is not justified in some other situations. As a matter fact, this is the reason why Article 146 (2) of the GPCL provided that the displacement of the lex loci delicti in favor of the common personal law is in any case a matter of discretion, rather than mandatory, as noted earlier. Given Article 44 of the Private International Law Act, like Article 146 of the GPCL, does not include an escape from the common-residence rule, i.e., a closer connection exception, the author submits that the automatic preference given by Article 44 (2) of the Private International Law Act to the common habitual residence is problematic. In this respect, Article 44 (2) of the Private International Law Act is regressive, rather than progress vis-à-vis Article 146 (2) of the GPCL.

Last, but not least, the practicability of allowing the parties to choose the applicable law after the tort has happened may be challenged. The reason is almost self-evident; after the tort has occurred, the parties are in a position to know of their rights and obligations. As reasonable persons, they naturally desire to apply the law that would lead to the result more favorable to them. After the occurrence of the tort, each party knows the result of the application of the relevant laws, thus, "the veil of ignorance" is pierced, and it follows that it is very difficult for the parties to reach an agreement at this stage. Such situation is vividly represented by the following case.

On July 23, 2011, two high-speed trains collided in the suburbs of Wenzhou, Zhejiang Province, China. Forty people were killed and more than two hundreds were injured, twelve of whom were fatal. Among the dead, there were two U.S. citizens and

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49 Huang, supra note 33, at 4.
50 Stone, supra note 23, at 364-365.
51 Hao, supra note 13, at 97.
52 Xue Song, Qinghua Chongzhi Yishuqiu Zhiqiuji, Jiny Luoma II yu Zhongguo Qinghua Chongzhi de DaBi Fenzi [On the General Rule of Tort Conflict, A Comparative Analysis on Rome Convention II and Chinese Tort Conflicts], 3 FAXUNFA (JOURNALS) #156-166 (2010).
53 For detailed information of the train accident, see Li Yang, Shengxi Yongwzitao [A Tragedy on the Railway], 28 ZHENGZHOU XINHUA ZHISHUAN [CHINA NEWS WEEKLY] 23-26 (2011).
one Italian citizen. After the accident, China's Ministry of Railways announced that the families of each victim would be compensated 915,000 yuan (around USD145,000). As regards the compensation to the foreigners who were killed in the train collision, the Ministry of Railways reiterated on various occasions that the families of the foreign victims would be compensated pursuant to the same standard under the Act on the Application of Laws on Foreign-related Civil Relationships of the PRC and the Tort Liability Act of the PRC. Nevertheless, the families of the foreign victims refused to accept the solution offered by the Ministry of Railways who argued that the law of their home country, rather than Chinese law, should be applied. Up to the end of 2011, no agreement had been reported to be reached between the families of the foreign victims on the one hand, and the Ministry of Railways on the other. This case graphically illuminates that after a tort happened, each party usually aspires to apply the law to favor its particular condition. It is by no means easy for the parties to reach an agreement on the applicable law. In this sense, the feasibility and necessity of introducing party autonomy to tort in this manner is highly arguable.

B. Particular Torts

With the increasing complexity of tortious liability, the legislators of many countries today share the view that there is a need to indicate particular conflict rules for particular types of torts apart from providing conflict rules for tort in general. This is the case for Switzerland, Belgium, Spain, Italy, Germany, Austria, Japan, and European Union's Rome II Regulation, etc. The Private International Law Act, in response to such need and the international trend, incorporates special conflict rules for product liability, internet defamation and IPR torts.

1. Product Liability

In recent years, there have been many cases in China concerning the liability for the harm caused by defective products manufactured in foreign countries. However Chinese People's Courts have not adopted a consistent approach to solving the choice-of-law issues in those cases due to the lack of clear guidance from law. Therefore, it is of

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55 Hao, supra note 45, at 12.
56 Id. at 12-13.
58 Takahashi, supra note 47, at 299.
59 Rome II, supra note 21, arts. 58.
60 Hao, supra note 3, at 1090.
considerable significance for the Private International Law Act to provide specific conflict rules for product liability.\footnote{Id. See also Huo, supra note 2, at 317.}

Article 45 of the Private International Law Act provides that the claims for damages relating to product liability shall be governed by the law of the habitual residence of the victim. However, if the victim chooses the law of the principal place of business of the tort-feasor or that of the place where the damage occurred, or if the tort-feasor did not engage in any soliciting activities in the place in which the victim is habitually resident, the law of the principal business place of tort-feasor or that of the place where the damaged occurred, shall be applied.\footnote{Private International Law Act, supra note 1, art. 45.}

Hence, under Article 45, the applicable law shall be ascertained in the following order of priority. First, if the plaintiff chooses to apply the law of the principal place of the defendant or that of the place where the damage occurred, the choice of the plaintiff shall be respected. Second, if the plaintiff does not choose a law, or his choice is not valid, the applicable law shall be determined according to whether the defendant engaged in soliciting activities in the country where the plaintiff is habitually resident or not. If the defendant did not, then the law of his principal place or that of the place where the damage occurred shall be applied. Third, in case neither of the above situations occurred, the law of the habitual residence of the plaintiff shall be applied.\footnote{Huang, supra note 33, at 254.}

Thus, the combined effect of the three limbs of Article 45 is to establish a general rule plus two exceptions; or to be more specific, the law of the habitual residence of the plaintiff shall be applied is the general rule, which is subject to the following two exceptions: (1) if the customers choose to apply the law of the principal place of the defendant or that of the place where the damage occurred, their choice shall prevail; (2) if the defendant did not engage in any soliciting activities in the country where the plaintiff is habitually resident, the law of the principal place of the defendant or that of the place where the damage occurred shall be applied.

Basically speaking, the primary objective of Article 45 is to protect the interests of the consumers, as they are usually the weaker party compared with the manufacturers. Therefore, the claims for damages relating to product liability are generally governed by the law of the habitual residence of the customers, inasmuch as they are usually familiar with this law and they will normally expect to be protected under it. If they find that the law of the principal place of the defendant or that of the place where the damage occurred, is more favorable to the protection of their interests, however, they can choose either law to replace the law of their habitual residence.
Additionally, certainty and reasonable balance of interests are also among the concerns of Article 45. Therefore, Article 45(3) ensures that if the defendant did not engage in any soliciting activities in the country where the plaintiff is habitually resident, the law of the principal place of the defendant or that of the place where the damage occurred shall replace the law of the habitual residence of the customers. The reason underlying this exception is that in the context of Article 45(3), the consumer is referred to as an 'active consumer', rather than a 'passive consumer.' Such a consumer is not eligible for the protection under the law of the country of his habitual residence; it would also be beyond the foreseeability of the manufacturer should the law of the habitual residence of the customers be applied in this case. Thus, it concludes that the general rule, together with two exceptions, is a balanced solution in regard to these objectives.

However, there is one question which needs to be answered, i.e., which law, between the law of the principal place of the defendant and that of the place where the damage occurred, shall be applied, if the defendant did not engage in any soliciting activities in the country where the plaintiff is habitually resident and the plaintiff did not make a valid choice of law or did not make a choice at all? Regrettably, Article 45 does not contain an answer. The only solution seems to be offered by Article 2(2) of the Private International Law Act. As noted above, Article 2(2) provides that a foreign-related civil relationship is governed by the law most connected to it in case of a legal vacuum.

2. Internet Defamation
Special rule is also considered necessary for defamation via internet, as such torts do not happen in a 'real place.' Under Article 46 of the Private International Law Act, infringements of right of personality, including the right of personal name, portraiture right, privacy, and reputation, via internet or other means, shall be governed by the law of the victim’s habitual residence. Therefore, a single law will apply even if the victim’s personal right is harmed in more than one jurisdiction. Taking the characteristics of internet defamation into consideration, this rule avoids the complexity of applying different laws to a single, and usually inseparable, tortious act.

The victim’s habitual residence is established as the connecting factor for the following reasons. First, as it is often in the place where the victim is habitually resident that his personal right is harmed most seriously, such provision is helpful to protect the

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64 Id. at 234-236.
65 Id. at 238.
66 For a detailed discussion on Article 2(3), see Hsiao, supra note 3, at 1071-1072.
67 Private International Law Act, supra note 1, art. 46. See also Hsiao, supra note 3, at 1080.
interests of the victim. Second, it may also provide the alleged tortfeasor a certain degree of predictability.68

However, there are two problems with Article 46. First, as emphasized earlier, in spite of the importance of habitual residence, neither the Private International Law Act nor any other Chinese legislation provides the definition of this term. The application of Article 46, therefore, depends on the arbitrary interpretation of the term by judges. Second, the wording of Article 46 indicates that it governs infringements of right of personality via the internet or `other means.’ No guidance is, however, given as to the exact meaning of `other means’ used herein. Given the quality of Chinese judges and the legal atmosphere in China is far from perfect, the author submits that the vagueness of Article 46 as to its core concepts would lead to uncertainty and unpredictability in judicial practice.69

3. Infringement of Intellectual Property

Intellectual property rights ("IPRs") have been acknowledged and protected in the PRC since the late 1970s when the Party adopted a new policy of reform opening up to the world. Since joining the World Trade Organization ("WTO"), China has further amended the legal framework of the IPRs and its related laws and regulations to comply with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs”).70 In the existing Chinese law prior to the Private International Law Act, however, there were no conflicts rules for the IPRs which, to a considerable degree, led to the consequence that most Chinese judges and lawyers were not well aware that the disputes involving the IPRs pose conflict-of-law issues.71

In order to correct the lack of understanding and to establish a complete conflict of laws regime, the Private International Law Act has devoted an entire chapter, i.e.,

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68 See HUANG, supra note 33 at 363; HUO, supra note 3, at 1000.
69 So far, there are various problems when Chinese courts deal with the cases involving foreign elements. The first major problem is that China is short of the rule of law in general and there is a long way to go for accomplishing the task of building a modern legal system. In particular, judicial corruption has not been effectively checked at the present stage. The removal of Sunyou Huang, Vice President of Supreme People’s Court in 2008, out of office due to corruption may serve as a typical case. Second, Chinese judges, especially in backward regions, are not well qualified and have not been ready to handle the complicated civil cases involving foreign elements. See ZHENGXIN HUAO, PRIVATE INTERNATIONAL LAW IN CHINA 107-108 (2010).
70 China amended the Patent Law in 1982 and 2008, respectively, the Copyrights Law in 2001; the Trademark law in 1985 and 2001, respectively. Despite stronger statutory protection, it has to admit that China continues to be a haven for counterfeiters and pirates. According to one copyright industry association, the piracy rate remains one of the highest in the world. For detailed information, see Protecting Your Intellectual Property Rights in China, available at http://www.mge.doc.gov/chinat/Doc/Businesesguides/IntellectualPropertyRights.htm (last visited on Jan. 1, 2011).
71 HUO, supra note 2, at 368.
Chapter VII, to regulating the IPRs which consists of three articles, covering the ownership and the content of the IPRs (Article 48), the assignment and the licensed use of the IPRs (Article 49), and the infringement of the IPRs (Article 50). To be more specific, Article 50 provides that:

The tort liability arising from an infringement of an intellectual property right shall be governed by the law of the country where protection is claimed; the parties concerned may also choose the lex fori as the governing law after the tort has happened by agreement.

Similar to the law of many other countries,72 the Private International Law Act establishes that the lex loci protectionis is the general rule to govern the infringement of an intellectual property right. This is because the law under which an alleged infringement occurs usually has a greater interest in governing the protection of intellectual property. Additionally, in the majority of cases, given the territorial character of intellectual property protection, other law can hardly govern the issue effectively. Therefore, Chinese scholars believe that Article 50 preserves the universally acknowledged principle in favor of the lex loci protectionis and territorial character of an intellectual property right granted or recognized in a given country.73

Moreover, it is important to note that Article 50 permits the parties to an IPR tort case to choose the lex fori as the governing law after the tort has happened. This is not only the reflection of a limited party autonomy, but also the manifestation of the legislative intent to expand application of the lex fori.

Nevertheless, one special problem may arise in the following case: if the infringements occur in different countries, and the parties do not reach the agreement on applying the lex fori, should the court apply different laws to what is essentially a single wrong perpetrated by a single infringer? Suppose that a case concerns multiple infringements in different countries, and the claimant has brought proceedings in China, as the country of the infringer’s domicile.74 In principle, each infringement is a separate wrong, each subject to the law of the country where each infringement occurs — a conclusion required by the lex protectionis rule. Although this is unproblematic in concept, it has serious practical consequences: It may be both unfair and unrealistic to expect the claimant to sue upon each and every infringement, not least because of the cost and delay involved in seeking to apply the laws of several different countries. The

72 See INTELLECTUAL PROPERTY RIGHT AND PRIVATE INTERNATIONAL LAW: HEADING FOR THE FUTURE 144 (Josep Drux ed. 2008).
73 Huang, supra note 33 at 292.
burden involved in applying numerous different laws falls also upon the court. There is also a kind of absurdity in applying numerous different laws to what is essentially a single wrong perpetrated by a single infringer. Fairness and efficiency and to some degree common sense suggest that one law should govern in such a case.75

IV. Conclusion

The enactment of the Private International Law Act has been observed by many Chinese scholars as a benchmark that China has systemized and modernized its conflict rules.76 In the field of tort, the improvement is reflected in the following two aspects. First, the Private International Law Act provides a more comprehensive choice-of-law system of tort which includes not only the main rules on torts, but also particular rules for certain specific torts. Second, strongly influenced and much inspired by modern foreign and international legislation, the Private International Law Act abolishes the out-dated rules and incorporates a number of advanced doctrines that have been developed in western legal system.77

 Nonetheless, Chinese private international law is still in a period of transition, as the progress represented by the enactment of the Private International Law Act is but “an imperfect improvement.”78 There is still a long way for China to go towards accomplishing the task of building a modern, mature private international law system. The current crossroads at which Chinese private international law finds is graphically illustrated by the legislative development of torts conflicts. Notwithstanding the significant improvement, the rules contained in the Private International Law Act are fraught with various defects. For this reason, the statutory reform of the tort conflicts in China may be compared to “two steps forward, one step back.”

After providing a thorough introduction and systematic review of the statutory reform of torts conflicts that has happened in China, the author now summarizes the problems that have surfaced in this process, and puts forward the corresponding suggestions. It is the author’s hope that these suggestions will be helpful to Chinese authorities in improving the legislation in the future, which both China and foreign countries would stand to benefit from.

75 Dunn, supra note 72 at 145.
77 Hao, supra note 3, at 1092.
78 Id at 1063-1069.
A. The Main Rules on Tort

As analyzed in Part III A, the main rules on tort reflected in Article 44 of the Private International Law Act are problematic in three points. First, habitual residence lacks an objective definition. Second, the rationality of an automatic preference to the law of the common habitual residence over the lex loci delicti is open to doubt. Third, there is little, if any, practicability to introduce the notion that the parties to a tort may choose the applicable law after the tort has happened. In this light, the author puts forward the following suggestions.

First of all, the Supreme’s People’s Court should spell out the precise meaning of habitual residence to close the statutory loophole. Though the existing Chinese legislation prior to the Private International Law Act does not contain the expression of habitual residence, a similar term, i.e., “constant residing place” has been used by the Chinese law. For instance, Article 15 of the GPCL provides that (1) the domicile of a person shall be the place where his household is registered (“Huji”), (2) where his constant residing place is different from the place of his household registration, his constant residing place shall be regarded as his domicile. Moreover, in the Opinions on GPCL, the Supreme People’s Court interprets in Article 9 that the constant residing place of a person is the place inhabited continuously by him for more than one year after he left his domicile, except the case of hospitalization. Given that there is no material difference between the two terms, and that the Chinese judges have been familiar with the definition of constant residing place, the author suggests that the Supreme’s People’s Court should state that habitual residence has the same meaning as constant residing place. In view of the vital importance of habitual residence throughout

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79 According to the Law on the Organization of the People’s Court, the Supreme People’s Court has the authority to give judicial interpretation under the following two circumstances: (1) the Supreme People’s Court can provide interpretation when it actually tries a case, if there is a request for interpretation submitted from a Higher People’s Court; and (2) when a new Act is enacted, the Supreme People’s Court is entitled to give a general interpretation about how the legislation should be implemented in adjudication. See Liu, supra note 6, at 221.

80 In Chinese, habitual residence is pronounced as ‘jīnghuāng jiūzì,’ while constant residing place as ‘jīnghuāng jiùhùdǐ’

81 ‘Huji’ or ‘júhuì’ is a unique term used in China, which is usually translated as ‘household registration.’ A household registration record officially identifies a person as a resident of an area and includes identifying information such as the name of the person, date of birth, the names of parents, and name of spouse, if married. The modern household registration system dates back to 1958 when the Chinese government began using it to control the movement of people between urban and rural areas. Individuals were broadly categorized as a ‘rural’ or ‘urban’ worker. A worker seeking to move from the countryside to urban areas to take up non-agricultural work would have to apply through the relevant bureaucratic. There were controls over education, employment, social welfare and so on. See XINTAO HAN & CEJIN (MODERN CHINESE DICTIONARY) 536 (China Academy of Social Sciences ed., 2004).

82 GPCL, supra note 4, at 15.

83 For the opinions on GPCL, see supra note 7, art. 9.
the Private International Law Act, the author argues that the Supreme People's Court should interpret the meaning of habitual residence as soon as possible.

Second, as the automatic preference to the law of the common habitual residence over that lex loci delicti is not always justified, it is submitted that Article 44 of the Private International Law Act should restore the alternative reference rule employed by Article 146 of the GPCL in this context. To be more specific, where the parties have their habitual residence in the same country, the tort liability may be governed by the law of that country [Emphasis added]. As noted earlier, the principle of closest connection has been established as a supplementary rule to determine the applicable law by Article 2(2) of the Private International Law Act. Judges are, therefore, entitled to choose a law between the lex loci delicti and the law of common habitual residence depending on the judgment which one is more closely connected with the tort liability.

Third, insofar as the parties can hardly reach an agreement on the applicable law after the tort has happened, the introduction of party autonomy by Paragraph Three of Article 44 is highly debatable. In the author's opinion, if the Chinese legislators do intent to introduce party autonomy into the field of tort in order to promote predictability and efficiency, they should permit the parties to choose the law governing not only their contract but also the tort liability which would not have occurred but for that contract. Many arguments can be made in support of application of the law chosen by the parties under such a circumstance. First, it is convenient to have all issues which arise out of what is essentially a single relationship governed by one law. Second, and more importantly, application of the law chosen by the parties is in conformity with the parties' expectations or intentions. In the practice of international business, the parties often agree that the law chosen by them will govern all disputes between them which arise in connection with the contract. Indeed, it is unrealistic to assume that the non-lawyers understand the distinction between contract and tort. Even if this distinction were appreciated, it is also inconceivable that the parties would expect another law to apply to tort which arises out of the contract, and they may well have relied on the assumption that the same law covers both types of liabilities. Third, application of the law chosen by the parties to the contract to tort liability can increase uniformity of decisions. As "the parties can choose the law governing their contract" is a universally accepted principle, the same law will be applied regardless of whether an issue which arises out of a contractual relationship is characterized as one of contract or tort. Last, but not least, the worry that allowing pre-tort agreement would put the weaker party in danger is unnecessary, insofar as Article 58 (3) of the GPCL states unambiguously that civil acts performed by a person against his true intentions as a result of cheating,

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84 See Restitution and the Conflict of Laws 124 (Frances Rose ed.1996).
coercion or exploitation of his unfavorable position by the other party shall be null and void.\textsuperscript{85} Under the Chinese scholarship and judicial practice,\textsuperscript{86} this is a mandatory rule, which, therefore, should be applicable to foreign-related civil relationships directly irrespective of the applicable law.\textsuperscript{87} In the light of all above analysis, the author submits that the suggested choice-of-law rules for tort in general are:

The laws applicable to tort liability shall be the law of the country in which the tortious act is committed. However, where the parties concerned have their habitual residence in the same country, the tort liability may be governed by the law of that country. Where the tort occurred in the performance of a commercial contract between the parties, the law chosen by the parties to govern the contract shall also govern the tort liability between them which arise in connection with the contract.

B. Particular Torts

After the implementation of the Private International Law Act, particular choice-of-law rules for certain specific torts are scattered among the three different acts: the Maritime Act, the Civil Aviation Act and the Private International Law Act. Since the Maritime Act and the Civil Aviation Act have been existed for nearly two decades which are unaffected by the Private International Law Act, this section will focus on the new rules incorporated by the Private International Law Act.

As analyzed in Part III (B), apart from providing conflict rules for torts in general, the Private International Law Act lays down special conflict rules for product liability, internet defamation, and the IPR torts. Considering that those three categories of torts have occurred in China in quantity in recent years, most Chinese scholars argue that the enactment of the rules represents a historic progress.\textsuperscript{88}

Nevertheless, it should be noted that the progress made by the Private International Law Act in this field is rather limited. As examined above, there are a number of defects or problems with Article 45, Articles 46 and 50, which need to be solved in one way or another. Moreover, the Private International Law Act neglects some other important types of torts which call for special treatment, such as unfair competition, environmental

\textsuperscript{85} GPCL, supra note 6, art. 58 (5).
\textsuperscript{86} JUN LI, MA & YUNSHAN GU, MINSHAIZUGUAN [CIVIL LAW 203-203 (4th ed. 2011)].
\textsuperscript{87} Article 4 of the Private International Law Act introduces the notion of 'Mandatory Rules,' which in view of its legislative purpose may not be derogated from, even if a law of another country is designated as the applicable law. This article provides that: "The laws of the People's Republic of China which are primarily applicable to foreign-related civil relationships shall be applied directly." See Private International Law Act, supra note 1, art. 4.
\textsuperscript{88} HUANG, supra note 83, Preface.
pollution, nuclear damage and traffic accidents, despite the scholars' calls.98

Indeed, as early as in the late 1990s, when the Chinese Society of Private International Law drew up the "Model Law of Private International Law of the People’s Republic of China" (hereinafter the Model Law) which was expected to serve as a blueprint for the NPC’s Standing Committee to enact the Private International Law Act, the scholars have reached a consensus on the pressing need to enact particular rules for those specific categories of torts. Therefore, the Model Law contains specific choice-of-law rules for not only product liability, internet defamation, IPR torts but also unfair competition, environmental pollution, nuclear damage, and traffic accidents.99 The judicial practice during the past decade has shown that there is greater need to enact particular rules for those special torts. Hence, the scholars advocated that the Private International Law Act should include those rules to establish a systematic and elaborate regime of tort conflicts and to meet the demand of judicial practice.100 Unfortunately, such suggestion was rejected by the legislators for reasons unknown.

Because the Private International Law Act has been newly enacted, it is improbable for the Chinese legislature to revise it in near future. The author argues that the improvement of the Private International Law Act may take two steps. First, the Supreme People’s Court should interpret the Private International Law Act as soon as possible, so that minor defects of the rules contained in the Private International Law Act can be overcome. Second, in the long run, when the judicial interpretation cannot satisfy the judicial practice any longer, the National People’s Congress should revise the Private International Law Act substantively to build a modern, sophisticated system of private international law in a real sense.101

99 Id note 121-126.
101 Huo, supra note 3, at 1592-1593.
COMMENTS

Seeking Justice for Pollution Victims in China: Why China Should Amend the Tort Liability Law to Allow Punitive Damages in Environmental Tort Cases

Jason E. Kelley*

I. INTRODUCTION

On July 16, 2010, an oil pipe exploded in Dalian, People’s Republic of China (PRC), releasing oil into the nearby harbor and Yellow Sea.1 The official report from the Chinese National Government was that 1500 tons (400,000 gallons) of oil was released.2 Greenpeace China, however, estimated that it could have been as much as 60,000 tons of oil.3 At least one person died during cleanup efforts, wildlife was severely damaged, and Chinese fishermen lost an estimated $17 million USD in revenue because of contaminated waters.4 Just one week earlier, on July 10, 2010,

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2. Id.

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China’s new Tort Liability Law (TLL) went into effect. The National People’s Congress’s (NPC) Standing Committee (SCNPC) had passed the law on December 26, 2009. Articles 65 through 68 of the TLL outline specific provisions regarding liability for environmental pollution. The TLL is an important step because for the first time a law “explicitly and formally addresses liability for environmental pollution.” Moreover, this codification clarifies ambiguous and benefit[s] plaintiffs.”


6. The National People’s Congress (NPC) is China’s primary national legislative body and functions as the “supreme organ of state power.” JIAPU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 113 (2008) (citation omitted). The NPC meets only once per year for several weeks at a time and is composed of nearly 3000 deputies who are elected for five-year terms. Id. Jiapu Chen summarizes the NPC’s role as follows:

The powers of the NPC are provided by Articles 62 and 63 of the Chinese Constitution, and include the powers to revise the Constitution and to supervise its implementation, to make fundamental laws, to appoint and remove top government officials (including all officials at the rank of minister), to examine and approve government budgets and economic and social development plans, and to supervise their implementation, and to exercise all other (undefined) supreme powers of the state. The structures, functions and operations of the NPC are governed by the Organic Law of the NPC (1982), the Procedural Rules of the NPC (1989), and the Law on Deputies of the NPC and the Local People’s Congress (1992).

Id. at 114 (citation omitted).

7. The Standing Committee of the National People’s Congress (SCNPC) is defined in the Chinese Constitution as the “permanent body of the NPC” and is granted “extensive powers.” Id. at 115. The SCNPC is composed of 175 members and has the power to interpret the Constitution and to supervise its implementation, to make laws and revise laws other than those that must be made by the NPC itself, to interpret laws, to examine and approve, when the NPC is not in session, partial adjustments to the plans for national economic and social development, and to the state budget that are necessitated during their implementation . . . .

Id.


9. TLL, supra note 5. Article 65 provides: “Where any harm is caused by environmental pollution, the polluter shall assume the tort liability.” Id. Article 66 provides: “Where any dispute arises over an environmental pollution, the polluter shall assume the burden to prove that it should not be liable or its liability could be mitigated under certain circumstances as provided for by law or to prove that there is no causation between its conduct and the harm.” Id. Article 67 provides: “Where the environmental pollution is caused by two or more polluters, the seriousness of liability of each polluter shall be determined according to the type of pollutant, volume of emission and other factors.” Id. Article 68 provides: “Where any harm is caused by environmental pollution for the fault of a third party, the victim may require compensation from either the polluter or the third party. After making compensation, the polluter shall be entitled to be reimbursed by the third party.” Id.

10. Moser & Tseming Yang, supra note 8, at 10,897.

11. Id.
By enacting the TLL, the SCNPC has made two bold policy statements. First, Article 1 of the General Provisions chapter sets forth the purpose of the TLL and states, "In order to protect the legitimate rights and interests of parties in civil relationships, clarify the tort liability, prevent and punish tortious conduct, and promote the social harmony and stability, this Law is formulated." Although China has followed the continental European civil law approach in the development of its laws, the "punish" language in the TLL is a grand departure from one of the core principles of continental European civil tort law, where the purpose of tort law is to compensate a victim for his loss and to prevent future harm, but not to punish the violation.

Second, in addition to holding the polluter strictly liable under Article 65, the SCNPC drafted the environmental tort liability articles as a precautionary statute. Specifically, Article 66 states, "Where any dis-

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12. TLL, supra note 5, ch. 1, art. 1 (emphasis added). The term "punishment" in the statute is a translation of the Chinese term zhanci (制裁). It is worth noting that the term could also be translated as "sanction," and it is most commonly seen in conjunction with economic implications such as United Nations sanctions. Nevertheless, either translation retains a punitive connotation, and for the purposes of this Comment, I will use the term "punishment."


14. Koziol & Yan Zhu, supra note 13, at 336. Specifically, Koziol & Zhu note: (1) it seems very modern when [one] points out that tort law has a preventive function and aims to promote social harmony and stability. On the other hand, the rule deviates from common opinion in European civil law countries as it does not mention compensation as the main aim of tort law but stresses as a purpose of tort law the punishment of tortious acts.

Id. United States tort theory follows this same principle—that the purpose of tort law is to compensate a plaintiff in order to make him or her whole and prevent future harm, but not to punish the wrongdoer. W. PAGE KEeton ET AL., PROSSER & KEeton ON TORTS 6 (5th ed. 1984) (emphasis added).

15. The precautionary principle is designed to prevent harm in the face of scientific uncertainty. Robert V. Percival, Who’s Afraid of the Precautionary Principle?, 23 Pace ENVTL. L. Rev. 21, 22, 24 (2006); see also Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir. 1976). The court in Ethyl summed up the precautionary principle best when it described it as follows:

Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not
pute arises over an environmental pollution, the polluter shall assume the burden to prove that it should not be liable or its liability could be mitigated under certain circumstances as provided for by law or to prove that there is no causation between its conduct and the harm." Thus, rather than placing the burden of proof on the plaintiff in environmental tort cases, the TLL shifts the burden of proof to the defendant. This burden shift is a significant departure from the general rule of Chinese law, which places the burden of proof on the plaintiff to prove causation of damages based on the defendant’s act.

Although the SCNPC made a strong policy statement under Article 1 that the goal of the TLL includes punishing tortious conduct, it provided for punitive damages for only products liability causes of action that arise under Article 47 of the Product Liability chapter. Punitive damages for environmental pollution torts were part of the discussions but were ultimately not included. Thus, the TLL does not identify a mechanism to enforce this stated purpose of punishing tortious conduct for environmental pollution torts.

While burden shifting and strict liability will help citizens obtain redress for environmental pollution torts after they occur, the TLL can achieve its objectives of preventing environmental disasters and punishing wrong-doers only if punitive damages are included as a remedy. In this Comment, I argue that to be effective, the environmental pollution torts provision of the TLL should be amended to include a punitive damages remedy because the stated purpose of the TLL is to prevent and punish, but the SCNPC did not identify a mechanism to achieve this stated purpose. In addition to providing a monetary remedy as an ex post facto retributive measure, the awarding of punitive damages serves as an ex ante deterrent. Because punitive damages were developed in the Anglo-

demand rigorous step-by-step proof of cause and effect. Such proof may be impossible to obtain if the precautionary purpose of the statute is to be served.

Id.

16. TLL, supra note 5, art. 66 (emphasis added).
18. TLL, supra note 5, art. 47. Article 47 provides: “Where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation.” Id.
19. Xu Hua (徐华), Qiuquán zézhèn fā cǎo‘ān zhōng chéngfá xíng pēicháng zhídū yǎnjiǔ (侵权责任草案中惩罚性赔偿制度研究) [Punitive Damages in the Draft Tort Law], in Qiuquán zézhèn fālǐ zhídū bǐjiào yǎnjiū (侵权责任法律制度比较研究) [COMPARATIVE STUDIES IN TORT LAW] 70, 70–71 (Yóu Guānqíng (余功荣) ed. 2010). Also, prior to the enactment of the TLL, punitive damages were not available in environmental pollution compensation cases. Alex Wang, The Role of Law in Environmental Protection in China: Recent Developments, 8 VT. J. ENVTL. L. 195, 210 (2007).
American common law system, I base my analysis of punitive damages on U.S. tort theory and argue that China can draw from the U.S. experience in formulating a punitive damages scheme appropriate for torts caused by environmental pollution.

There are three assumptions that must be considered in this Comment. First, when referencing environmental torts where the underlying liability scheme is strict liability, I am referring only to torts caused by environmental pollution. In the American common law system, "environmental torts" fall broadly into two categories—products liability and abnormally dangerous activities. The TLL separates environmental torts into three separate chapters: Chapter V, Product Liability; Chapter VIII, Liability for Environmental Pollution; and Chapter IX, Liability for Ultrahazardous Activity. Thus, the focus of this Comment is on Chapter VIII, Liability for Environmental Pollution. Second, I premise this Comment on cases in which the polluter has violated environmental laws or regulations and is aware of those violations, but has continued to conduct activities that cause pollution. This Comment does not take into account cases in which a defendant has complied with environmental laws and regulations outside the TLL, but has nonetheless caused personal injuries due to polluting activities as this topic is beyond the scope of the arguments made here. Third, when making comparisons to U.S. tort law, I do not adhere to or distinguish between various modern tort theories. In other words, my arguments do not fall into one specific category of modern American tort theory; rather, I pull salient ideas from multiple

20. Nathan R. Hoffman, Comment, The Feasibility of Applying Strict-Liability Principles to Carbon Capture and Storage, 49 WASHBURN L. J. 527, 539 (2010). In the United States, the term environmental tort includes harms to a person, property, or the environment as a result of the "toxicity of a product, a substance, or a process." GERALD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS 1 (2d ed. 2001). There are multiple theories of recovery for environmental torts, including negligence, strict liability for abnormally dangerous activities, trespass, and nuisance. Id. at 4. The theory of recovery at issue in this Comment is strict liability for abnormally dangerous activities. See RESTATEMENT (SECOND) OF TORTS § 519 (1977). In its official comment d, the American Law Institute states in part: The defendant is held liable although he has exercised the utmost care to prevent the harm to the plaintiff that has ensued. The liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity. It is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.

Id. § 519, cmt. d.

21. TLL, supra note 5.

22. The various modern tort theories include the following: social justice theory, civil recourse, and law and economics. For an overview of the various tort theories, see Michael L. Rustad, Torts as Public Wrongs, 38 PEPP. L. REV. 433, 1-17 (2011).
theories because each theory provides viable arguments relevant to the punitive damages discussion.

This Comment proceeds in six parts. In Part II, I review China’s environmental, public health, and economic crises. In Part III, I examine that while China has had environmental laws and tort laws on the books, the laws are not enforced because of ambiguities in the law and efforts to protect local industry. Additionally, the Chinese have not historically favored litigation as a means of resolving disputes. In Part IV, I argue that the TLL offers the possibility of fixing these problems through its aggressive liability structure implementing strict liability and burden shifting. In Part V, I propose that in order to fulfill the TLL’s stated purpose of preventing and punishing tortious conduct, the TLL must be amended to include the imposition of punitive damages. Punitive damages are a great means of both empowering citizens and deterring environmental tortfeasors from future misconduct. Further, I respond to the principal counterarguments to my proposal. Finally, in Part VI, I conclude that imposing punitive damages is the appropriate mechanism to achieve the purpose set forth in the TLL. Punitive damages will not only provide a remedy for victims of environmental pollution torts but also punish and deter polluters, thus having a net positive benefit on public health and the environment.

II. CHINA’S ENVIRONMENTAL AND PUBLIC HEALTH CRISIS

China’s economic boom has come at the expense of its environment.\(^{23}\) China is at a crossroads, and the practical reality calls for aggressive reform. Some scholars argue that if China does not take aggressive measures, the consequences will be dire.\(^{24}\) Because of the massive economic boom since the “reform and opening” (gaige kaifang),\(^ {25}\) China has


\(^{25}\) Id. The term “reform and opening” refers to the new era of political and economic thought beginning in 1978, when China opened its doors to the rest of the world after being isolated in the previous regime under Mao. See Wang Guiguo, The Legal System of China, in CHINESE LAW 1, 2–3 (Wang Guiguo & John Mo eds., 1999). As Wang Guiguo notes, “Having been isolated from the rest of the world for several decades . . . China neither had the needed capital nor technology or management skills to revitalize its economy.” Id. at 3. The initial reform policies were implemented between 1978 and 1984. JIANFU CHEN, supra note 6, at 55. The reform and opening is a politico-economic theory with pragmatic policies directed to attract foreign investment. Alex Wang, supra note 24, at 3. Included in the fabric of this political and economic reform was the “liberalization of legal thinking.” JIANFU CHEN, supra note 6, at 55. Under the “Two-Hands Policy,” the economy was to be developed on one hand, while the legal system was to be strengthened on the other. Id. at 51.
done in twenty years what it took the U.S. one hundred years to do.\textsuperscript{26} Now, China faces environmental problems such as flooding, desertification, water scarcity, and massive deforestation.\textsuperscript{27} Also, sixteen of the world’s twenty most polluted cities are in China,\textsuperscript{28} and 70% of China’s lakes and rivers are polluted.\textsuperscript{29} As noted by Alex Wang, China has followed the “pollute first, control later” model of development like now-developed countries\textsuperscript{30} and “economic development has invariably prevailed.”\textsuperscript{31} The effect on the environment has been profound.

China’s rapid economic growth has resulted in staggering damage to human health. For example, in 2007, the World Health Organization (WHO) estimated that 656,000 Chinese die annually as a result of air pollution.\textsuperscript{32} In addition, the WHO estimated that 100,000 Chinese die each year from polluted drinking water.\textsuperscript{33} Also, pesticides poison be-

\begin{footnotesize}
\begin{enumerate}
\item Under the reform and opening, “[n]o country has moved up the economic ladder as quickly as China,” Phillip Stalley, Foreign Firms, Investment, and Environmental Regulation in the People’s Republic of China 1 (2010). A major thrust of the reform and opening has been for China to become open to foreign direct investment. Id. As noted by Stalley, “By 2007 China was receiving almost [$]75 billion in FDI per year.” Id. at 1–2.
\item Alex Wang, supra note 19, at 201. Additionally, Wang notes the following quote by the State Council in December 2005, when the State Council issued its Decision on Implementation of Scientific Development and Strengthening of Environmental Protection:
\begin{quote}
The environmental situation remains extremely grim. Although environmental protection in China had made positive progress, the grim environmental situation has not changed . . . . Developed countries experienced environmental problems in stages along their 100 year industrialization process. China has seen all of these problems appear in a concentrated 20 year period . . . . Environmental pollution and ecosystem destruction have caused enormous economic losses, harmed the health of the masses, and affected societal stability and environmental safety . . . .
At present, some places emphasize GDP growth and pay short shrift to environmental protection . . . . Environmental protection should be placed in a more significant strategic position.
\end{quote}
Id.
\item Id. at 251 n.2. Additionally, a 2005 statistic showed that 360 million Chinese lacked access to safe drinking water. Id.
\item Alex Wang, supra note 19, at 198.
\item Id.
\item Percival, supra note 23, at 3.
\item Id. These are just a few statistics. Elizabeth Economy provides a snapshot of the public health crisis plaguing China. The following are a few of the examples that she provides: (1) citizens living in the Zhejiang region are five to eight times more likely to die from intestinal cancer because of microcystin toxins; (2) citizens living in the Binzhou village in the Shandong province suffer from “brittle and cracking bones” because of contaminated water; (3) liver and esophageal cancer rates among citizens living in the Baiyangdian area south of Beijing are three times higher because of contaminated water; (4) those living in the suburbs of Beijing are in danger of high mercury because of the high level of mercury in the rice; and (5) those living in the zinc mining area in southern China have higher rates of anemia and kidney and bone disorders because the rice and shellfish are
\end{enumerate}
\end{footnotesize}
between 53,311 and 123,000 Chinese annually. \textsuperscript{34} The World Bank estimates that every year air pollution results in 6.8 million visits to the emergency room, 346,000 hospital admissions, and 178,000 premature deaths. \textsuperscript{35} Alex Wang summed up China’s public health crisis when he said the following:

The numbers here are so uniformly large that they become a bit numbing; the numbers are too abstract in their largeness. Anyone who has ever been to China can attest to the very tangible ways in which environmental pollution reduces quality of life—the dank atmospheric haze, the way the air hurts the lungs and eyes, the way white shirts turn brown after a day outside. \textsuperscript{36}

Perhaps the most vivid story of the effects on human health is that of the Huai River. In the mid-1990s, numerous factories dumped their wastes directly into the river, producing a “toxic mix of ammonia and nitrogen compounds, potassium permanganate, and phenols” and causing massive contamination of the river. \textsuperscript{37} There was such heavy pollution that the river turned black, thousands of people were treated for illnesses, and nearly 26 million pounds of fish were killed. \textsuperscript{38} The water from the river flowed through irrigation channels. \textsuperscript{39} The pollution of the Huai has created “cancer villages,” and in some villages, the cancer rate is as high as 1-in-100. \textsuperscript{40}

In addition to the environmental and public health concerns, China also faces a growing economic crisis because of environmental degradation. For example, in 2003, there were eighty registered marine pollution incidences that polluted up to 90,262 hectares, causing an estimated loss of more than $354 million USD. \textsuperscript{41} In 1997, the World Bank estimated that total air and water pollution costs in China were $54 billion annual-

\textsuperscript{34} \textit{Economy, supra} note 27, at 84–85. \textsuperscript{35} Alex Wang, \textit{supra} note 24, at 2. \textsuperscript{36} \textit{id.} \textsuperscript{37} \textit{Economy, supra} note 27, at 3–4. \textsuperscript{38} \textit{id.} \textsuperscript{39} \textit{China from the Inside: Shifting Nature} (PBS television broadcast transcript 2006), available at http://www.pbs.org/kqed/chinainside/pdf/pbchina-ep3.pdf. \textsuperscript{40} \textit{id.} \textsuperscript{41} Wang Canfa, \textit{Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms}, 8 \textit{VT. J. ENVTL. L.} 159, 165 (2007).
ly—8% of China’s GDP. Even more shocking, the World Bank estimates that health costs resulting from exposure to particulates alone will triple to $98 billion USD by the year 2020 unless aggressive action is taken.

III. CHINESE ENVIRONMENTAL LAWS HAVE NOT BEEN SUCCESSFUL

China has had environmental and tort laws on the books, but they have not achieved their stated goals, as shown by the ongoing stories of environmental and public health issues. The laws have been ineffective because Chinese laws are often ambiguous, and there is a widespread history of local protectionism. In addition, the Chinese have not traditionally used litigation as a means to resolve disputes and are even encouraged by the government to mediate at the outset of a dispute rather than litigate in a court of law. Thus, polluters often are not challenged in a court of law.

In section A of this Part, I give a brief overview of China’s environmental law system. In section B, I examine the problem of weak enforcement of environmental laws because of ambiguous legislation, weak administrative enforcement, and a weak court system. Finally, in section C, I review the historical preference for mediation in China.

A. China’s Environmental Law System

China has an extensive set of environmental laws and regulations. As noted by one scholar, “China’s environmental protection regime . . . is comprised of approximately twenty laws, forty regulations, five hundred standards, and six hundred other legal norm-creating documents related to environmental protection and pollution control.” In addition,

42. ECONOMY, supra note 27, at 88. Some experts opine that when the water and air pollution statistics are combined with the problem of resource shortages, the portion of GDP increases to 12%. Id.
43. Id. at 89–90.
44. See Qun Du, The People’s Republic of China, in THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 411, 441–42 (Louis J. Kotsb & Alexander R. Paterson eds., 2009); see also Wang Canfa, supra note 41, at 164–79. In addition, other authors have argued for various legal reforms that could benefit environmental litigation as a whole. See, e.g., Goldman, supra note 28, at 258–69 (arguing that one of the greatest impacts in making positive changes to U.S. environmental litigation was the recognition of citizen standing resulting from the U.S. Supreme Court’s decision in Sierra Club v. Morton, 405 U.S. 727 (1972), and that China could draw from the United States’ experience); see also Green, supra note 13, at 152 (arguing that China should encourage class actions and that the adoption of contingency fees in civil litigation would encourage tort actions and give access to justice to more Chinese tort victims who would otherwise not be able to bring a suit because they cannot afford attorneys).
45. STAlLEY, supra note 25, at 22.
46. Id. at 23.
there are approximately one thousand local environmental regulations.\textsuperscript{47} Because China is a vast country, local governments tend to have a great deal of autonomy, which creates decentralization in law and policy.\textsuperscript{48}

China adopted its first environmental laws in 1979.\textsuperscript{49} It then passed the Law on Water Pollution Prevention and Control in 1984 and the Law on Prevention and Control of Atmospheric Pollution in 1987.\textsuperscript{50} In 1989, China adopted the Environmental Protection Law, which is the “fundamental legislation” on environmental protection in China.\textsuperscript{51} China initially followed U.S. models of environmental law.\textsuperscript{52} But over time, China has leaned more heavily on the “precautionary principle” from the European approach.\textsuperscript{53} The present progress in environmental law in China has been likened to what occurred in the United States in the 1970s.\textsuperscript{54}

\textbf{B. The Problem of Weak Enforcement}

The legal system in China has come under criticism “for its lack of transparency, ill-defined laws, weak enforcement capacity, and poorly trained advocates and judiciary.”\textsuperscript{55} In addition, the Chinese have shown a historic preference for mediation,\textsuperscript{56} and thus, more often than not, polluters do not have to defend themselves in court.

\textbf{1. Ambiguity in Legislation}

The laws often read like policy statements.\textsuperscript{57} Although China has extensive environmental laws on the books, the laws have been poorly

\begin{itemize}
\item \textsuperscript{48} STALLEY, supra note 25, at 28.
\item \textsuperscript{49} Lin Feng, \textit{Law on Environmental Protection}, in \textit{CHINESE LAW}, supra note 25, at 557, 560 n.16; \textit{see also} STALLEY, supra note 25, at 24 (showing historical chart of China’s primary environmental protection laws).
\item \textsuperscript{50} STALLEY, supra note 25, at 3.
\item \textsuperscript{51} Lin Feng, supra note 49, at 560. This set of laws replaced the preexisting set of environmental laws. Percival, supra note 23, at 3.
\item \textsuperscript{52} Percival, supra note 23, at 3.
\item \textsuperscript{53} id.
\item \textsuperscript{54} id. at 6.
\item \textsuperscript{55} ECONOMY, supra note 27, at 101.
\item \textsuperscript{57} ECONOMY, supra note 27, at 101. Economy notes that “to many environmental protection officials and experts in both China and the West, most Chinese environmental protection laws are too broad, providing local officials with little guidance on implementation.” \textit{Id.} As a specific example, Economy cites to China’s Water Pollution Prevention and Control Law and excerpts a passage from an article by U.S. environmental law scholar John Nagle. There, Nagle states the following: China’s Water Pollution Prevention and Control Law states that “enterprises and other undertakings which cause serious water pollution must eliminate pollution within a stipu-
enforced both administratively and judicially. Of the environmental claims that are brought to court, some are settled by administrative measures. Most claims, however, are not settled, resulting in “pollution victims suffering silently.” Additionally, although some citizens complain to authorities, there is often no resolution. In 2005 alone, authorities at the State Environmental Protection Agency (SEPA) received more than 50,000 complaints. But because of the lack of enforcement and because polluters are not hurt financially, there is no motivation for them to be in compliance, and they will continue to pollute. Elizabeth Economy calls this “conscious exploitation.”

2. Weak Administrative Enforcement

Although China has a “relatively well-crafted environmental legal system,” there is a lack of administrative enforcement. Indeed, “barely ten percent of China’s environmental laws and regulations are actually enforced.” As noted in the previous section, the national agency empowered to administer environmental regulations is the Ministry of Environmental Protection (MEP) (formerly SEPA). The MEP has been de-
scribed as a "relatively weak agency." The MEP is ineffective because it is a tiny organization. As of 2007, the MEP (then SEPA) had only 219 full-time professional staff in Beijing and approximately 2000 staff scattered in other parts of the country for a population of several billion, thus making it nearly impossible to regulate and monitor industry.

Because the MEP is tiny, enforcement in China is left to the local Environmental Protections Bureaus (EPBs), which are understaffed and also subordinate to local government. Benjamin van Rooij argues that the "root of enforcement problems lies with the institutional arrangement" that gives environmental enforcement authority to the local governments. The EPBs "lack authority, administrative rank, and financial and human resources." In addition, local officials place economic interests above environmental pollution enforcement. In some rural communities, the local factory may be the primary source of tax revenue. Thus, at the local level, environmental protection is regarded as an obstacle.

Another problem that leads to weak enforcement is that the fines that administrative agencies may impose are "very limited." As former SEPA director Zhang Kunmin recently noted in an interview, it is like a "game of cat and mouse." Polluters know when regulators are going to show up and turn on the pollution control equipment. But once the regulators are gone, they turn off the equipment and continue to pollute.

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69. Alex Wang, supra note 19, at 199 n.11.
70. By contrast, in 2007, the U.S. Environmental Protection Agency (U.S. EPA) had nearly 18,000 total employees across the country. Id. at 199 n.12. The U.S. EPA had a staff of almost 9000 in Washington, D.C. alone. Economy, supra note 67, at 51.
71. McElwain, supra note 65, at 89–90.
73. Id.
74. Id. Economy notes: Local governments also turn a blind eye to serious pollution problems out of self-interest. Officials sometimes have a direct financial stake in factories or personal relationships with their owners. And the local environmental protection bureaus tasked with guarding against such corruption must report to the local governments, making them easy targets for political pressure.
77. Id.
78. Id.
79. Id.
Zhang also notes that the fines for environmental pollution are not severe enough. Specifically, Zhang laments:

With limited fines and low compensation, breaking the law is often cheaper than following it, and that further emboldens some irresponsible firms.

... That's what happens when polluters don't pay an appropriate price for the damage they cause and neither criminal or civil punishments follow. The costs of breaking the law are too low. \(^{80}\)

Thus, Chinese citizens often do not find recourse using administrative means because of the lack of enforcement.

3. Weak Court System

China has four levels of courts: Basic Courts, Intermediate Courts, Provincial High Courts, and the Supreme People's Court. \(^{81}\) The judiciary has long been criticized as being ineffective and "institutionally weak." \(^{82}\) A longstanding problem with the judiciary is its lack of training. \(^{83}\) For example, prior to 2002, judges were not required to have a Bachelor's degree. \(^{84}\) Additionally, prior to 2005, less than 50% of Chinese judges had university degrees. \(^{85}\)

Another longstanding problem with the judiciary is that it protects local industry. That is, local judges are often unwilling to enter a judgment against a local company that provides substantial economic benefits to the local community. \(^{86}\) Additionally, because national laws tend to be broad and ambiguous, \(^{87}\) local judges find loopholes that benefit local industry. \(^{88}\) The problem of local protectionism is of such concern that the Supreme People's Court even noted this issue as part of its analysis in a

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80. *Id.*
82. *Id.* at 281. Peerenboom states, "Rule of law requires a judiciary that is independent, competent, and enjoys sufficient powers to resolve disputes fairly and impartially. China's judiciary falls short on each of these three dimensions." *Id.* at 280. Peerenboom also explains that "[a]s in some civil law countries, the courts are supposed to apply the law rather than make it or even interpret it." *Id.* at 281.
83. See Benjamin Lieberman, *China's Courts: Restricted Reform*, 21 Colum. J. Asian L. 1, 10–18.
84. *Id.* at 12.
85. *Id.*
86. *Id.* at 16.
87. See supra notes 57–58 and accompanying text.
88. *Economy*, supra note 27, at 102–03.
March 2010 high-court decision. In the context of environmental pollution cases, the courts have not met the standards expected by the citizens.

Although the judiciary has been rife with problems, the Chinese government has taken measures to improve it. In 2001, the Supreme People’s Court announced its “century theme” to achieve “Impartiality and Efficiency” in the people’s courts. In March 2002, the President of the Supreme People’s Court announced at the Annual Conference of the National People’s Congress that the people’s courts would continue the ongoing judicial reform under the theme of impartiality and efficiency. Over the past decade, “court reform” has been a major priority in China. China now requires new judges to pass the national bar exam. Between 2000 and 2005, however, the bar passage rate by judges was a mere 10%. Thus, while China has focused on improving the judiciary, the courts are still seen as ineffective.

C. Mediation in China

Mediation is relevant to the discussion of enforcement of environmental laws in China because the focus on prelitigation mediation does not force polluters to defend themselves in court. Mediation, an intricate system with multiple tiers, has traditionally been the preferred means for resolving most civil disputes in China. The roots of seeking media-

89. In Zhao Ziwén v. Pan Riyang, No. 17 [2010] Civil Division 1, Final, a property infringement case, the Supreme People’s Court concluded that a civil or commercial trial in which the amount in controversy is more than 50 million yuan (7.86 million USD) should be held outside the local courts to avoid local protectionism. Zhào zìwén yě pān rìyáng cāiháng qínquán jūfēn án (繆文與潘日陽財產侵權糾紛案) [Zhao Ziwén v. Pan Riyang], 2010 Mín yì zhí qí 17 ((2010民二審字第17号), translated in LAWINFOCHINA (2010), available at http://www.lawinfochina.com/display.aspx?id=806&lib=case&SearchKeyword=Zhaoziwen&SearchCKKeyword= (considering disputes over property infringement).

90. Qun Du, supra note 44, at 440 (“The role of the people’s courts in environmental civil tort justice has lagged behind the public’s expectation of what it should or could be . . . . [It seems fair to conclude that the judiciary requires more time and experience . . . .].”)


92. Id.

93. Id.


95. Id. at 13.

96. Id.

97. See PEERENBOOM, supra note 81, at 280–82.

98. Yuhong Zhao, supra note 59, at 158–73. Mediation is the primary method of resolving disputes in China. Id. at 161. Zhao explains that the levels of mediation fall into the following categories: people’s mediation; administrative mediation; judicial mediation; and extra-judicial mediation. Id. at 158–73.

tion over litigation are deeply rooted in Confucianism, and historically, the Chinese have had a preference for "informal and non-adversarial means of dispute resolution." Indeed, there is a Chinese proverb that states, "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit." In addition, as noted by American legal scholar and American Law Institute member George Conk, "The Chinese approach departs from our often atomistic view of rights that emphasizes rights as either sword or shield, rather than as organically linked with responsibilities."

Although mediation has historically been the preferred method of dispute resolution in China, litigation statistics over the past two decades show that the Chinese are embracing the rule of law and are now litigating in significantly greater numbers. One author explains that between 1990 and 2002, there was a 144% increase from 1.8 million civil cases to 4.4 million cases. As the Chinese embrace the rule of law and environmental tort victims bring additional claims, there will be more pressure on the judiciary to render justice and to refrain from local protectionism.

IV. THE TLL IS A PRECAUTIONARY STATUTE AND ITS STATED PURPOSE IS TO "PREVENT AND PUNISH" TORTIOUS CONDUCT

With its aggressive strict liability and burden-shifting approach, the enactment of the TLL is an important step in the development of law in China. First, the TLL is the final set of laws after the Law of Contract and Law of Property in China's development of a Civil Code. Second, the TLL is an additional recognition of individual civil rights for Chinese

100. Stanley Lubman, Mao and Mediation: Politics and Dispute Resolution in Communist China, 55 CAL. L. REV. 1284, 1290 (1967); see also J. Robert F. Uter, Dispute Resolution in China, 62 WASH. L. REV. 383, 385 (1987) (describing "jiang" in China, which translates to "yielding" and leads to compromise between the parties); Yuhong Zhao, supra note 59, at 101. Zhao explains, "The Confucian tradition emphasizes moral values and moral instructions as a basis for guiding behavior and maintaining social order. Law is not seen as a proper mechanism to shape human behavior." Id.


103. Conk, supra note 13, at 940.

104. Yuhong Zhao, supra note 59, at 174.


106. Mingjin You & Ke Huang, supra note 17, at 10,485.
citizens.\textsuperscript{107} Third, using tort law to protect the environment has been a hot topic for many years in China.\textsuperscript{108}

Without a stronger enforcement mechanism, however, the TLL could fall into the same traps as past laws. Within the framework of environmental tort litigation, punitive damages could play a vital role. In section A of this Part, I give a brief overview of the TLL. In section B, I discuss the importance of the burden-shift provision in Article 66 of the Liability for Environmental Pollution chapter. In section C, I examine the prevention and punishment language in the introduction to the TLL.

\textbf{A. Brief Overview of the TLL}

The TLL consists of ninety-two articles broken into twelve chapters.\textsuperscript{109} Article 1 of the General Provisions chapter sets forth the purpose of the law,\textsuperscript{110} and Article 15 of the Constituting Liability and Methods of Assuming Liability chapter sets forth the various remedies that can be sought.\textsuperscript{111} The provisions for Liability for Environmental Pollution are outlined in Articles 65 through 68 under Chapter VIII.\textsuperscript{112} Specifically, Article 65 provides that the environmental pollution tortfeasor will be held strictly liable.\textsuperscript{113} Article 66 provides that the burden of proof is on the defendant rather than the plaintiff.\textsuperscript{114} Article 67 provides for joint and several liability if there is more than one polluter.\textsuperscript{115} And Article 68 pro-

\begin{itemize}
\item[107.] Long-awaited Civil Rights Law Gets Nod, LAWINFOCHINA (Dec. 29, 2009) (P.R.C.), available at http://www.lawinfochina.com/News/News_Detail.asp?id=7880 (last visited Feb. 13, 2011). When the TLL was enacted, Wu Bannuo, the Chairman of the NPCSC noted that the law was significant in "protecting civil rights and people's interests, preventing and punishing infringement acts, reducing conflicts, and promoting social stability." Id. Additionally, Chinese lawmaker Hu Zhengpeng noted, "It is one of the key laws within China's legal framework of civil rights protection, reflecting a people-oriented society." Draft Tort to Protect Civil Rights, LAWINFOCHINA (Dec. 29, 2009) (P.R.C.), available at http://www.lawinfochina.com/News/News_Detail.asp?id=7878 (last visited Feb. 13, 2011).
\item[108.] Mingxin You & Ke Huang, supra note 17, at 10,485.
\item[109.] TLL, supra note 5. The TLL chapters are as follows: Chapter I, General Provisions; Chapter II, Constituting Liability and Methods of Assuming Liability; Chapter III, Circumstances to Waive Liability and Mitigate Liability; Chapter IV, Special Provisions on Tortfeasors; Chapter V, Product Liability; Chapter VI, Liability for Motor Vehicle Traffic Accident; Chapter VII, Liability for Medical Malpractice; Chapter VIII, Liability for Environmental Pollution; Chapter IX, Liability for Ultrahazardous Activity; Chapter X, Liability for Harm Caused by Domestic Animal; Chapter XI, Liability for Harm Caused by Object; and Chapter XII, Supplementary Provision.
\item[110.] Id.
\item[111.] Id. The remedies are set forth in Article 15 and consist of the following: (1) cessation of infringement; (2) removal of obstruction; (3) elimination of danger; (4) return of property; (5) restoration to the original status; (6) compensation for losses; (7) apology; and (8) elimination of consequences and restoration of reputation. Id. The remedy of punitive damages is not mentioned. Id.
\item[112.] Id.
\item[113.] Id.
\item[114.] Id.
\item[115.] Id.
vides that if a third party is at fault for the release of pollutants from a facility, then the injured party may bring an action against the third party or the facility. Additionally, the facility may bring an indemnity action against the third party.

Chinese environmental law scholar Yang Sujuan argues that the new tort law resolves the prior conflict between provisions on environmental tort liability provided by General Principles of Civil Law Article 124 and Environmental Protection Law Article 41. Specifically, Yang argues that Article 124 of the General Principles of Civil Law and Article 41 of the Environmental Protection Law were seemingly at odds. While both laws provided recourse for victims of environmental torts, the laws differed on who had the burden of proof. Article 65 of the newly enacted TLL is consistent with the first paragraph of Article 41 of the Environmental Protection Law and resolves this apparent conflict in that it shifts the burden of proof to the polluter in environmental tort cases. Next, Yang submits that Article 65 clarifies that a polluter can be found liable in tort even if it does not violate a separate environmental law or regulation as long as it causes harm. Thus, Yang argues that it should be easier for plaintiffs to bring tort claims for harms resulting from environmental pollution.

B. Shifting Burden of Proof Under Article 66

Shifting the burden of proof from the plaintiff to the defendant is based on the precautionary principle, a western European model of environmental policy that is used to protect health and the environment when there is uncertainty about cause and effect. It originates from the early

116. Id.
117. Id.
118. Yang Sujuan, Qíngquán zérèn fēi dui huánjìng sūsòng yǒu hé zuóyàng? (《侵权责任法》对环境诉讼有何作用?) [How Does Tort Liability Law Affect Environmental Proceedings?], (Env’t & Natural Res. Law Research Inst. of China, Univ. of Political Sci. & Law), Jan. 7, 2010 (on file with author). Article 124 of the General Principles of Civil Law (enacted in 1986) provides the following: “Any person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall be subject to civil liability in accordance with the law.” Id. The first paragraph of Article 41 of the Environmental Protection Law (enacted in 1989) provides: “A unit that has caused an environmental pollution hazard shall have the obligation to eliminate it and make compensation to the unit or individual that suffered direct losses.” Id.
119. Id.
120. Id.
121. Id.; see also Moser & Tseming Yang, supra note 8, at 10,897.
122. Id.
123. Id.
1970s and is based on the German principle of Vorsorge, which means foresight. The basic rationale of the precautionary principle is that "[t]hose who have the power, control, and resources to act and prevent harm should bear that responsibility." Additionally, the precautionary principle encourages governments to address issues concerning human health and the environment in advance of science proving the causal link.

The TLL legislation is not the first time that China has used the burden-shifting principle. This principle is noted in Article 86 of China’s Solid Waste Pollution Control Law, enacted in 1996 and amended in 2004, as well as in Article 87 of the Water Pollution Control Law, enacted in 1984 and amended in 1996 and 2008. Because it is difficult to prove causation in environmental tort cases, this shift alleviates pressure on victims and places a heavy burden on defendants. Robert Percival, a leading American environmental law scholar, argues that the common law liability for environmental torts is "too crude a vehicle to compensate those exposed to environmental hazards" and that China’s burden-shifting mechanism is a way to overcome the "causation conundrum," which is a major hurdle in environmental tort law cases.

C. The Purpose of the TLL Under Article 1 is to "Prevent and Punish"

Article 1 of the General Provisions chapter of the TLL states that in addition to promoting “social harmony and stability,” the purpose of the TLL is to “prevent and punish tortious conduct.” The TLL does not specifically address this purpose or reference back to Article 1 within the specific articles that follow the General Provisions chapter. Additionally, the SCNPC did not provide any notes or comments regarding the TLL legislation. Thus, a critical issue going forward is that courts do not have a mechanism to enforce the punishment purpose set forth in Article 1 of the General Provisions.

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125. Id.; see also Percival, supra note 15, at 23.
126. Ticknor et al., supra note 124, at 4.
129. Id.
130. Id.
131. Id. at 42.
132. Id. at 45.
133. TLL, supra note 5, art. 1.
134. Id.
135. Koziol & Yan Zhu, supra note 13, at 337.
V. CHINA SHOULD AMEND THE TLL TO ALLOW FOR THE REMEDY OF PUNITIVE DAMAGES IN ENVIRONMENTAL POLLUTION CASES

In this Part, I argue that China should amend the TLL to add a punitive damages remedy for environmental pollution torts cases in which the polluter has knowledge that its activities does not meet environmental regulations yet continues to pollute. In section A, I provide an introduction to the proposal. In section B, I argue that the SCNPC should use Article 47 in the Products Liability section as its guide because Article 47 addresses the "punish" language set forth in the purpose section of the TLL and provides an ex ante deterrent mechanism that is more effective than compensatory damages alone. In section C, I provide support for this proposal by arguing the following: (1) adding punitive damages would fix the lack of continuity between the stated purpose of the TLL and the environmental torts chapter; (2) the availability of criminal sanctions as punishment in previous environmental laws has not sufficiently punished and deterred polluters; (3) allowing the remedy of punitive damages will encourage litigation and serve as a check on corporate polluters; and (4) amending the already-existing TLL with a punitive damages provision for environmental pollution torts would be more efficient and more cost-effective than starting from scratch and drafting an environmental compensation law. In section D, I recognize the potential rebuttal arguments and respond to each.

A. Introduction to Proposal

Punitive damages are an effective means of empowering individual citizens by punishing and deterring tortious actors.136 Also, punitive damages are not mutually exclusive with strict liability systems.137 Although the SCNPC relied heavily on continental European law in drafting the TLL,138 the punishment language detailed in the General Provisions falls under the Anglo-American tradition.139 While Article 47 under the Products Liability chapter expressly gives victims the right to claim punitive damages in a products liability tort action,140 Articles 65 through

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136. Rustad, supra note 22, at 461.
138. See supra note 13.
140. TLL, supra note 5. Article 47 provides: "Where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any
68 of the Liability for Environmental Pollution chapter are silent regarding punitive damages.\textsuperscript{141} Article 15, the remedies provision under the General Provisions chapter, is also silent regarding punitive damages.\textsuperscript{142}

Helmut Koziol and Yan Zhu are critical of the punishment language in the TLL.\textsuperscript{143} Specifically, Koziol and Zhu argue that punitive damages should not be awarded where the underlying theory of liability is strict liability and that "[m]entioning the goal of punishment increases the risk of accepting punitive damages..."\textsuperscript{144} I take the opposite position and argue that the remedy of punitive damages is an appropriate tool and propose that because the TLL does not identify a mechanism to fulfill the punishment purpose of the TLL, the SCNPC should clarify the TLL's purpose and amend the TLL to allow for punitive damages for environmental pollution torts.

\textbf{B. The SCNPC Should Amend the TLL to Include Punitive Damages as a Remedy for Environmental Pollution Torts}

The SCNPC should amend the TLL to address how the prevention and punishment language in the General Provisions corresponds to the environmental tort liability articles.\textsuperscript{145} In clarifying how the prevention and punishment provision should apply to the environmental tort liability articles, the amendment by the SCNPC should apply the language from Article 47 of the Products Liability chapter to the language of the Liability for Environmental Pollution chapter because the underlying liability scheme—strict liability—is the same.\textsuperscript{146}

As to the punitive damages remedy, Article 47 provides the following: "Where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation."\textsuperscript{147} Thus, a

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\item serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation." \textit{Id.} art. 47.
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} \textit{Id.} art. 15.
\item \textsuperscript{143} Koziol & Yan Zhu, \textit{supra} note 13, at 336.
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} Alternatively, the SCNPC or the Supreme People's Court should consider issuing an interpretation regarding how the language of prevention and punishment in the general provision should correspond to the environmental tort liability provisions in Articles 65 through 68. For an overview of interpretive authority in China, see JIAFU CHEN, \textit{supra} note 6, at 198–201. Because China follows the Civil Law Tradition and major judicial opinions do not carry precedential weight, the Supreme People's Court often releases statements to advise the lower courts how certain laws should be interpreted.
\item \textsuperscript{146} See TLL, \textit{supra} note 5, art. 47, Product Liability ("Where a defective product causes any harm to another person, the manufacturer shall assume the tort liability.").
\item \textsuperscript{147} See TLL, \textit{supra} note 5 (emphasis added).
\end{itemize}

\end{footnotesize}
manufacturer’s knowledge plus a failure to act allows for the imposition of punitive damages.\textsuperscript{148}

This equation is similar to how the courts in the U.S. have interpreted the failure to act, which gives rise to the imposition of punitive damages in strict liability cases.\textsuperscript{149} In determining whether there is liability for punitive damages in tort actions under U.S. law, American legal scholar Gerald W. Boston has stated,

\begin{quote}
[T]he essential tests boil down to two basic groupings: (1) punitive liability based on express malice, ill will, or intent to cause harm to the plaintiff; and (2) recklessness, the creation of a high probability of harm to others when the defendant knows or has reason to know of the risk and remains consciously or flagrantly indifferent to the risk.\textsuperscript{150}
\end{quote}

Boston has further noted that for strict liability cases, the appropriate grouping is the second. The “knowledge” plus “continuance” formula set forth in the TLL Article 47 aligns most closely with the “consciously . . . indifferent” language of Boston’s second set of criteria.

Imposing punitive damages will encourage attorneys and citizens to bring more lawsuits. The fear of litigation and the potential for punitive damages will give citizens a voice, punish polluters, and deter future polluting activities.\textsuperscript{151}

\section*{C. Support for Proposal}

1. Lack of Continuity in Statutory Language

A lack of continuity exists between the stated purpose of the law to “prevent and punish” and the specific guiding statutory language in the Liability for Environmental Pollution Torts chapter: the TLL as written does not provide a mechanism to punish and deter polluters. This lack of continuity between the stated purpose of the law and the specific articles fulfilling that purpose is representative of what leading Chinese environmental expert and advocate Professor Wang Canfa (Professor Wang) calls “superficial” legislation.\textsuperscript{152} Professor Wang notes that Chinese leg-

\begin{footnotes}
\item[148] Id.
\item[149] GERALD W. BOSTON, PUNITIVE DAMAGES IN TORT LAW, Part II, ch. 19, 25 (1993).
\item[150] Id. at 25.
\item[151] Rustad, supra note 22, at 461. Rustad argues that tort law “serves a public purpose beyond those of the immediate parties to the lawsuit.” Id. He further argues, “[O]nly punitive damages can establish that ‘tort does not pay’ by hitting the rich and powerful in the bank account.” Id.
\item[152] Wang Canfa, supra note 41, at 170.
\end{footnotes}
islation is sometimes "presented in an attempt to meet international trends and results in superficial influence." He further states,

[W]ith this frivolous legislation comes an emphasis on substantial, subject-driven legislation, ignoring the needed procedural and implementation mechanisms. There are many substantial environmental laws in China with inadequate procedural laws. These laws contain many general provisions with a few liability provisions, incorporating small fines that do not deter violations. From this statement, Professor Wang recognizes that the environmental laws in China lack an appropriate deterrent mechanism.

2. Criminal Sanctions Have Not Adequately Punished and Deterred

In 1997, China amended its criminal law and made major changes in its special provisions. Articles 338 to 346 define environmental crimes, and of particular importance in the context of environmental pollution by industrial facilities are Articles 338 and 339. Article 338 covers violations for the "discharge, dumping, or treating of radioactive waste . . . toxic substances, or other hazardous waste on land or into the water bodies or the atmosphere."

Article 339 covers violations for dumping, storing, or processing solid waste from abroad in China in violation of state regulations.
Criminal fines or imprisonment are available depending on the severity of the crime. In addition, in 2006, the Supreme People’s Court issued an interpretation “setting a relatively low threshold for the application of Articles 338 and 339 in the case of ‘major environmental pollution accidents.’”

But Articles 338 and 339 have been inadequate in punishing and deterring polluters. Professor Wang notes that for the years 1998 to 2002, for example, of the 387 serious environmental accidents deserving criminal punishment, less than twenty cases were prosecuted. Thus, if the laws providing punishment for environmental crimes are not working and the purpose of the TLL is to prevent and punish tortious conduct, the imposition of punitive damages in environmental tort litigation could provide a viable alternative for punishing polluters.

3. Punitive Damages Will Encourage Litigation

Bringing a lawsuit is costly. Additionally, many pollution victims are unaware of their rights. To help overcome these hurdles, punitive damages in environmental pollution cases should be allowed to incentivize citizens to bring lawsuits against polluters.

Chinese legal scholar Yuhong Zhao argues that civil environmental litigation serves an essential function in the dispute resolution process and has three positive effects. First, it helps improve environmental law-making. Zhao notes that legislation is “at best imprecise” and “often contain[s] ambiguities, irreconcilable provisions and indefinite standards.” Significantly, Zhao offers that “litigation produces far more
significant impact than conciliation or mediation on the society as a whole, but especially on policy makers, by exposing openly and substantively the defects or problems of existing environmental law and its implementation.”

Alex Wang echoes Zhao and offers that lawsuits “put the spotlight on gaps in legislation and drive legal reform.”

Second, litigation “creates ripple effects that help raise[e] public awareness.” When the media reports stories of pollution victims being compensated through the judicial process, other victims will pursue litigation because they are then aware of their environmental rights.

Third, litigation puts pressure on the polluting industry. Zhao argues that until the costs can be shifted from the victims of pollution to the polluters through litigation, the industry will not take pollution prevention seriously. Specifically, Zhao states that most in the industry are “not serious about the consequence of their polluting activities because the current legal mechanisms do not seem to hold them fully liable for the pollution caused and the resultant loss suffered by the victims.”

Within the framework of litigation, allowing for the remedy of punitive damages would encourage more citizens to bring suits, thus holding industry accountable for pollution prevention and regulating corporate behavior.

Moreover, litigation gives the masses a voice: it provides an outlet for people to seek redress for harms caused and helps alleviate the potential for social unrest. Environmental problems have led to greater social unrest, which has been an issue of concern in China. According to Alex Wang, there were 50,000 disputes over environmental issues in 2005 alone. Additionally, “[f]rom 2001 to 2005, Chinese environmental authorities received more than 2.53 million letters and 430,000 visits from 597,000 petitioners seeking environmental redress.” In certain cases, citizens have taken to the streets and some protests have turned violent. For example, in 2005, in the Zhejiang Province, some 30,000 to 40,000 villagers “swarmed 13 chemical plants, broke windows and overturned buses, attacked government officials, and torched police cars.”

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166. Id.
168. Yuhong Zhao, supra note 59, at 174-75.
169. Id. at 175.
170. Id.
171. Id.
172. Id.
173. Xu Hao, supra note 19, at 71.
174. Id.
175. Alex Wang, supra note 19, at 200.
176. Id.
In addition to making tort victims whole for harm suffered, environmental tort litigation achieves a broader social goal of impacting the behavior of polluters by putting pressure on them to cease polluting activities or to innovate with new technologies that lessen harm to human health. The pressure from litigation ultimately has a net positive impact on the environment. Thus, environmental tort litigation not only achieves China’s purpose of recognizing individual rights but it also has a positive impact on the environment.

Litigation statistics show that Chinese citizens are litigating in greater numbers. Specifically, the number of environmental tort claims has been increasing 25% each year. These statistics show that the Chinese want to use litigation as a tool to seek redress for environmental wrongs.

4. Efficiency of Amending the TLL

It would be costly and inefficient to require the SCNPC to draft entirely new procedures that implement more effective deterrent mechanisms. But amending the TLL to allow for punitive damages in environmental pollution cases would give judges a straightforward mechanism in which to administer justice to victims of environmental pollution. There has been discussion among legal scholars in China to legislate a specific environmental compensation law. That process, however, could take years. Former MEP leader Zhang claims that it would take ten years to draft an environmental compensation law. Furthermore, when polluters are punished and have to pay punitive damages, they will be deterred from polluting in the future and will be forced to innovate in order to curb future pollution. Ultimately, imposing punitive damages will provide a remedy for victims of environmental pollution torts and also improve the environment.

D. Response to Potential Counterarguments Against Allowing Punitive Damages in Strict Liability Cases

The majority of legal theorists, in both continental Europe and the U.S., speak against allowing punitive damages in cases of strict liability. Specifically, the punishment and prevention language of the gener-

177. Qun Du, supra note 44, at 428.
178. Meng Si, supra note 76.
179. Id. As further proof that it could take upwards of a decade to draft an environmental compensation law, it took the NPC eight years to draft the TLL. See Long-awaited Civil Rights Law Gets Nod, supra note 107; see also Draft Tort to Protect Civil Rights, supra note 107.
180. Koziol, supra note 139, at 308 (arguing that “pure strict liability should not be accepted under the law of punitive damages” because in comparison to U.S. law, for example, the imposition
al provisions in the T.L.I. raised concerns from Helmut Koziol and Yan Zhu. In their article, *Background and Key Contents of the New Chinese Tort Liability Law*, Koziol and Yan Zhu warned that the general provisions should have emphasized that "compensation should be the basic aim of tort law in order to avoid potential misunderstanding and controversies" and that "[m]entioning the goal of punishment increases the risk of accepting punitive damages and this should be avoided as quite a number of weighty arguments speak out against them." In particular, they spoke against punitive damages where there is a strict liability scheme.

The primary theoretical argument against allowing punitive damages in a strict liability claim is that strict liability and punitive damages are "incompatible." Central to the incompatibility argument is the notion that imposing punitive damages is not appropriate because the theory of strict liability is not fault-based. Opponents argue that while misbehavior is not a prerequisite to the finding of guilt under strict liability, the imposition of punitive damages relies on the guilty party's misbehavior; thus, punitive damages as a remedy for tortious conduct fits more squarely under negligence principles.

But American legal scholar David G. Owen rebuts the incompatibility argument and argues that punitive damages are an appropriate legal tool in strict liability tort cases, especially in the case of intentional or reckless conduct. While he writes in the context of products liability litigation, he readily notes that this rationale can be applied to other causes of action, including nuisance, trespass to land, and ultra-hazardous activities. Owen's thesis is that strict liability deals appropriately with the "innocent" manufacturer because "liability is imposed even though the manufacturer has exercised due care." He also argues

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of punitive damages is predicated on culpability, intent, or recklessness); see also Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263, 273–74 (2008) (arguing that unlike fault-based principles, strict liability does not 'specify how safely the duty-holder should behave,' and thus, punitive damages should not be afforded); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 879 (1998) (arguing that damages should equal harm under strict liability and thus a punitive damage award would overcompensate); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEOR. L.J. 285, 310 (1999) (arguing that "compensatory damages alone provide adequate deterrence").

182. Id.
183. Id.
184. Owen, supra note 137, at 1268–70.
185. Koziol & Yan Zhu, supra note 13, at 337.
186. Id.
188. Id. at 1259.
that “the principles of strict liability are ill-equipped to deal with problems at the other end of the culpability scale” when the manufacturer is intentional or reckless regarding consumer safety. 189 Owen argues that the appropriate legal tool to combat this second scenario is the punitive damages remedy. 190

To support his thesis, Owen offers two primary supporting points. First, he argues that strict liability tort theory is not a delimiting factor on other remedies that might be available if the manufacturer is shown to have acted with aggravated fault. 191 Second, Owen argues that the incompatibility argument is premised on the faulty assumption that the claim for punitive damages must be established by facts “identical to those supporting the underlying claim for compensatory damages.” 192 Gerald Boston echoes Owen’s arguments, submitting that “[t]he reason why punitive damages are recoverable in strict liability cases is because the availability of punitive damages does not turn on the essential character or nature of the underlying tort.” 193

Additionally, in contrast to what legal theorists have opined, U.S. courts have generally upheld punitive damage awards in the context of strict products liability cases. 194 Indeed, Boston argues that in the context of products liability “the majority of courts have held that punitive damages may be recovered when the plaintiff’s underlying claim is founded on strict liability.” 195 Courts have also upheld punitive damages in environmental pollution cases in which strict liability is the underlying theory of liability. 196

189. Id.
190. Id. at 1269.
191. Id.
192. Id.
193. BOSTON, supra note 149, at 24–25.
194. Id.; see, e.g., Masaki v. General Motors Corp., 780 P.2d 566, 572–73 (Haw. 1989) (“We see no reason why punitive damages may not also be properly awarded in a products liability action based on the underlying theory of strict liability where the plaintiff proves the requisite aggravating conduct on the part of the defendant. Although strict liability dispenses with the need to prove fault in order to find the defendant liable, it does not preclude consideration of the defendant’s aggravating conduct for the purpose of assessing punitive damages . . . . Thus, we find no logical or conceptual difficulty in allowing a claim for punitive damages in a products liability action based on strict liability.”); see also Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 710–11, 713–15 (1967) (holding that defendant was strictly liable in tort because it failed to properly warn of its product’s dangerous effect and that punitive damages were available to plaintiff because defendant’s conduct “showed an utter disregard of possible injury to others” but continued to market and sell its product); Fischer v. Johns-Mansville Corp., 103 N.J. 643, 655 (1986) (“Despite their differences—one [strict liability] going to the theory of liability, the other [punitive damages] bearing on the form and extent of relief—they are not mutually exclusive nor even incompatible.”).
195. BOSTON, supra note 149, at 23.
196. See, e.g., Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309, 316 (Tex. Civ. App. 1974), aff’d, 524 S.W.2d 681 (Tex. 1975) (concluding that strict liability was the appropriate liabili-
The Oklahoma Supreme Court, in Thiry v. Armstrong World Industries, an asbestos case, summarized this argument best:

Punitive damages may be assessed against the manufacturer of a product injuring the plaintiff if the injury is attributable to conduct that reflects reckless disregard for the public safety. "Reckless disregard" is not to be confused with inadvertent conduct. To meet this standard the manufacturer must either be aware of, or culpably indifferent to, an unnecessary risk of injury. Awareness should be imputed to a company to the extent that its employee[s] possess such information. Knowing of this risk, the manufacturer must also fail to determine the gravity of the danger or fail to reduce the risk to an acceptable minimal level. "Disregard for the public safety" reflects a basic disrespect for the interests of others. 197

Thus, a company’s failure to act when it has knowledge that its risky activities will cause harm is the critical factor in allowing punitive damages in strict liability actions.

Second, opponents argue that imposing punitive damages unjustifiably awards the plaintiff with a windfall. 198 This argument goes as follows: if a company is forced to pay exemplary damages above and beyond compensatory damages to one plaintiff, then subsequent plaintiffs will not be compensated for their injuries. 199

China, however, could identify a creative solution to overcome what some perceive as a windfall. First, it could take the punitive award and create a trust for restoration or compensation. Second, since enforcement at the administrative level has been criticized as ineffective,
China could give the punitive award to the MEP or EPBs to assist with administrative enforcement of environmental regulations.

Third, opponents argue that under strict liability, the plaintiff has already been made whole by compensatory damages. Mitchell Polinsky and Steven Shavell argue that under strict liability, damages should equal harm, and thus, punitive damages are inappropriate because they overcompensate. Specifically, they opine that “various socially undesirable consequences will result” if a defendant does not pay damages that are equal to the harm that the defendant has caused. Damages should equal harm caused because potential injurers will, in theory, have socially correct incentives to take precautions.

But Polinsky and Shavell’s examples and explanations fail to recognize the special harm in environmental pollution cases. Specifically, their argument does not take into account the effects of pollution on natural resources and the significant costs that result from pollution—both for remedial efforts and public health problems. Missing in their calculation are the permanent costs to human health and the environment. Additionally, as noted earlier in this Comment, China faces an extraordinary financial burden to deal with environmental harms.

Fourth, legal theorists and commentators argue that punitive damages allow for runaway awards that could bankrupt a particular industrial defendant. This argument is of particular importance in the context of China because China has generally placed economic development ahead of the environment with a “pollute now, pay later” mentality.

China, however, could resolve this issue by instituting a cap with a single-digit ratio, similar to how the U.S. Supreme Court has shaped limits on punitive damage awards in the U.S. The idea of caps was discussed during the legislative process of the TLL. Xu Hua argues that punitive damages should equal double the compensatory damages.

201. Id. at 878.
202. Id. at 879.
203. See supra text accompanying notes 41–43.
204. Stalley, supra note 25, at 38–40.
205. In BMW of North Dakota, Inc. v. Gore, 517 U.S. 559 (1997), the Court held that punitive damage awards should be subject to three guideposts: (1) degree of reprehensibility; (2) the ratio of the amount of the punitive damage award to the damage suffered; and (3) consideration of civil penalties that could be enforced for the defendant’s conduct. Subsequent to Gore, in State Farm Mutual Auto Insurance v. Campbell, 538 U.S. 408 (2003), the Court built on the Gore decision and held that punitive damages awards should be only in a single-digit ratio to the compensatory damages awarded. In Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008), the Court affirmed its holding in State Farm by limiting the damages in the context of environmental tort action to a single-digit ratio.
206. Xu Hua, supra note 19, at 73.
207. Id.
Moreover, all trials in China are bench trials.\textsuperscript{208} Thus, the fear of runaway punitive damage awards by over-sympathetic juries would not be a concern in China.

Finally, American legal scholar Kip Viscusi argues that punitive damages do not have a deterrent effect and do not accomplish the goal of efficient deterrence in environmental and safety cases.\textsuperscript{209} Specifically, punitive damages are not needed for deterrence, and compensatory damages are generally adequate for deterrence.\textsuperscript{210} Government regulation provides additional incentives for safety.\textsuperscript{211}

But Viscusi recognizes an exception to his argument, noting that punitive damages can be effective deterrent measures when there are enforcement errors.\textsuperscript{212} The enforcement error exception is of particular relevance to China. As noted earlier in this Comment, the principle problem in China’s environmental protection regime is the lack of enforcement of environmental statutes.\textsuperscript{213} Although a complex set of environmental laws exist, they are not properly enforced.\textsuperscript{214}

Because of the poor implementation and enforcement of other environmental legislation, tort law could be used as a means to benefit Chinese society. An amendment is a simpler, straightforward way of giving local judges the tools they need to administer justice. Not only will the administration of justice remedy victims of tort but it will also have a positive impact on the environment.

In sum, China must consider amending the TLL to address the punishment and prevention purpose in the general provisions of the TLL. If industry fears the imposition of punitive and preventative measures, it will be less inclined to pollute. Not only will this decrease in pollution improve human health but it will also have a residual effect on the environment as a whole. Additionally, by addressing environmental concerns, China will benefit economically in the long run because future costs associated with environmental harm will decrease.

VI. CONCLUSION

By enacting the TLL, the SCNPC has put into place national laws for victims of environmental torts to seek recovery. The TLL is an aggressively written statute because it implements strict liability and bur-

\textsuperscript{208} JIANFU CHEN, supra note 6, at 151.
\textsuperscript{209} See generally Viscusi, supra note 180, at 288–90.
\textsuperscript{210} Id. at 310.
\textsuperscript{211} Id. at 317.
\textsuperscript{212} Id. at 311–12.
\textsuperscript{213} See Wang Canfa, supra note 41, at 164–73.
\textsuperscript{214} See supra Part III.
den shifting and its stated purpose is to prevent and punish tortious conduct. But as currently written, the TLL does not provide a mechanism to achieve its stated purpose to punish. In order to achieve this stated purpose, the SCNPC should amend the TLL to include the remedy of punitive damages in environmental pollution cases. In drafting the amendment, the SCNPC should model the punitive damages remedy on Article 47 of the Product Liability chapter because the “knowledge” plus “continuance” formula set forth in Article 47 reflects the appropriate punishment mechanism that also can be applied to environmental pollution cases.

The recent Dalian oil spill is an example of how Chinese citizens seeking compensation for environmental torts still have to overcome barriers to justice even though the SCNPC has enacted laws to protect them. Claims for damages related to the spill face political, administrative, and legal challenges. 215 In September 2010, two months after the spill, a Beijing attorney noted in an interview that China has provisions in place for compensation for environmental torts. 216 He went on to state the following: “Our state-owned companies are spoiled over and over again by the government. They unabashedly transfer huge environmental costs to society . . . . Ordinary people are like a small skiff in the ocean against the aircraft carrier PetroChina.” 217

The ultimate success of the TLL depends on the use of the punitive damages remedy. While China has made great strides toward using the law to control harmful behaviors and empower citizens, the SCNPC could make an even stronger statement by amending the TLL to include the remedy of punitive damages for environmental pollution torts. As noted previously in this Comment, one of the major reasons that China faces an environmental and public health crisis is that environmental laws and regulations are not properly enforced. Polluters who ignore laws and regulations must be held accountable. By amending the TLL, the SCNPC could meet its goal of punishing polluters by allowing for punitive damages in cases in which the polluter has knowledge of its polluting activities but continues to pollute and disregards the harm created to others. Ultimately, allowing punitive damages in environmental pollution cases under the TLL is one step that could have a major impact in providing justice for victims of environmental pollution torts.

216. Id.
217. Id.