

# Marsh News China

News for Marsh clients in China

## New China Tort Law highlights liability for defective products and environmental pollution



Events such as medical accidents, product malfunctions and traffic accidents take place everyday. According to annual statistics in China, there were more than 870,000 tort liability lawsuits in 2007 while the number rose to 1 million in 2008. In 2009, some high profile cases such as claims for melamine contaminations and a residential building collapse in Shanghai have increasingly captured the domestic headlines.

*After four rounds of revisions in seven years, the new tort law, which takes effect in July this year, expands liability for defective products and environmental pollution.*

On December 26, 2009, the Tort Liability Law of the People's Republic of China (Tort Law) was passed during the 12th Session of the Standing Committee of the 11th National People's Congress and will take effect from July 1, 2010.

This landmark legislation, consisting of 12 chapters and 92 articles, aims to protect personal interests and civil rights in a comprehensive and holistic way. It covers a wide range of circumstances closely related to the public interest, including product defects, traffic accidents, medical damage, environmental pollution, internet infringement, harm caused by pets/animals, and damage caused by objects.

The new Tort Law helps fill a significant legal gap in civil rights. For instance, it is the first time Chinese legislation has made compensation available for severe mental distress. The law further includes, for the first time, rules in respect of unlimited punitive damages for defective products and also introduces a general product recall scheme. The law makes owners and builders of buildings jointly and severally liable for loss or injury caused by defective construction.

With the passage of the Tort Law, together with other recent laws and regulations, China has established a more complete civil law system.

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## Highlights of the new Tort Law

### **Point 1 Defines compensation for mental distress in legislation for the first time**

Article 22 of the Tort Law provides that in respect of infringements of a party's personal rights and interests that cause such party severe mental distress, the injured party may claim compensation for mental distress. It is the first time in legislation that compensation will be payable if a wrongful act results in severe mental harm. The law clearly defines how to calculate the compensation amount for death, disablement and mental distress.

### **Point 2 Product liability: first general product recall scheme introduced**

The Tort Law, for the first time, establishes a general recall scheme for defective products. Article 46 specifies the producer and seller's recall obligations if after circulation the product is found to be defective. Before the Tort Law, China only generated recall systems for the automobile and food industries. With the new Tort Law, a sophisticated general product recall system is established.

In addition, the law also introduces unlimited punitive damages provisions. Article 47 stipulates where any producer or seller knowingly produces or sells defective products causing 'injury' to life or health, the injured party has the right to claim punitive damages.

### **Point 3 Medical damage: Gives claimants option to seek compensation from medical institutions for any medical accidents caused by defective drugs**

The Tort Law provides that the patient may seek compensation either from the producer or from the medical institution for any damage caused by defective drugs or infected medical devices. After paying compensation, the medical institution may claim reimbursement from the 'liable' producer. This provision is in line with the Product Quality Law to safeguard the patient's civil rights.

### **Point 4 Environmental pollution: Shifting the burden of proof to the polluter**

The Tort Law further strengthens the environmental pollution liability scheme by shifting the burden of proof to the polluter. Where an environmental pollution is in dispute, the polluter bears the burden of proving that its emissions or discharges did not cause damage or demonstrate why it is entitled to exemption from or mitigation of liability.

In addition, a non-fault principle is applied to environmental pollution torts. Under the Tort Law, enterprises may still be found liable for environmental pollution or injuries to others caused by its discharges or emissions even when operating in compliance with environmental rules and regulations such as emissions standards. This significantly broadens previous environmental regulations where liability was primarily based on violation of environmental laws.

## Other key provisions:

- For any damage caused by collapsing buildings, structures or other facilities, the owner and the construction company will be jointly and severally liable.
- For any damage caused by high risk activities such as high altitude operations, high pressure operations, underground mining or high-speed rail transport, the operator is liable.
- Establishes a principle of 'same price for life'. In dealing with major transport and mining accidents, the same amount for death compensation will be payable according to this Law.
- Protecting personal privacy.
- Internet users and internet service providers will be liable if they infringe other people's civil rights and interests through the internet.
- Managers of public places and the organizers of mass activities will be liable for injury or damage done to others as a result of their failure to fulfill their duty of safety and care.
- Kindergartens, schools or any other education institutions likewise may be held liable under the Tort Law for injury or lack of safety for their students.

## Implications

This new Tort Law is 'consumer based' legislation, designed to provide a legal environment under civil law which is more in line with standards in the developed world. The law in particular expands liability for defective products and environmental pollution.

The new law expands protection against defective products and introduces punitive damages. This appears to be a response to various product scares in recent years such as the Sanlu tainted-milk incident in 2008 which reportedly left at least six infants dead and approximately 300,000 others suffering from lingering health problems. The law can potentially increase the power of consumers and significantly increase the management costs and litigation costs for manufacturers and sellers.

With regard to environmental hazards, the Tort Law shifts the burden of proof to the defendant which makes it easier for the plaintiff to bring an environmental claim. Defending against such claim can be costly. Companies also need to be aware that they may face increased exposure to environmental claims despite being in full compliance with China's environmental law requirements.

In light of these significant changes, companies operating in China should revisit their insurance program and other risk management measures to ensure that they have an effective liability transfer mechanism.

Marsh has dedicated Product and Environmental Risk practices providing innovative risk solutions to address your specific needs. With specialized claim experts, we are also able to provide powerful assistance in the event a claim occurs.

Since the new law is scheduled to formally come into effect on July 1, 2010, and relevant supporting judicial interpretations about the new Tort Law remain to be seen, we will continue to monitor the local Chinese insurance markets to evaluate to what extent they are prepared to broaden coverage to accept any or most of the increases in exposure to businesses and will keep you updated with our findings.

For more information please contact your Marsh Client Advisor or:

Mr. Simon Ran  
Product Risk Practice  
Vice President, China  
+86 21 6887 3118 ext 225  
simon.ran@marsh.com

Mr. Lionel Mintz  
Environmental Practice leader  
Asia Pacific Region  
Sydney, Australia  
+61 2 8864 8213  
lionel.mintz@marsh.com

[www.marsh.com.cn](http://www.marsh.com.cn)  
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