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Made in China: Who Bears the Loss and Why?

Elizabeth Ann Hunt*

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2009; B.A., Cornell University. This Comment is dedicated to my parents and my grandparents, to whom I am eternally grateful.

3. See id.
4. Id.

I. INTRODUCTION

"The bottom line is: If you’re worried about Chinese exports, rest assured the local stuff is without doubt many, many times worse." CNN correspondent John Vause, who has continued to reside in Beijing during China’s product safety crisis, states the heart of the matter. "When ordering at restaurants, I wonder: Is that drug-tainted fish and shrimp? Did that pork come from a pig that was force-fed wastewater? Any melamine added to those noodles?" A blatant disregard for safety within China has caused widespread concern on the part of the United States and China’s other trading partners. Among the first major
indications of a problem with Chinese products was the March 15, 2007 discovery by the Food and Drug Administration ("FDA") that Chinese wheat gluten contaminated with melamine had been processed into North American pet products and was killing cats and dogs. The consequent pet deaths resulted in over one hundred lawsuits being filed against companies that had sold the tainted products, including one lawsuit against a Chinese supplier.

Melamine proved to be just the beginning of the scare, as Chinese-made toothpaste, seafood products, tires, and toys were recalled in masse. Most notably, Mattel Inc. was forced to recall over twenty-one million Chinese-made toys in a five-week period. Many of the toys were defective in design, including Polly Pocket dolls that were

9. See Brandon Bailey, Lawsuit Targets Chinese Supplier: Tainted-Pet-Food Case Seeks Damages from Chemical Firm, SAN JOSE MERCURY NEWS, Aug. 9, 2007, available at http://www.mercurynews.com/ (click the Help tab, then the Past Articles tab; enter “Lawsuit Targets Chinese Supplier” into the “Enter Search Terms” box; select “in headline” from the “Appearing” box; select “2007” in the “Choose articles from” section; hit "Search").
10. See Oversight and Analysis, supra note 7.
11. See Bailey, supra note 9.
12. See Wild West Imports, supra note 5.
13. See Oversight and Analysis, supra note 7.
14. See id.

The magnets in these popular toys may look innocuous: they are only 1/8-inch in diameter and are embedded in the hands and feet of some dolls and in plastic clothing, hair pieces and other accessories. But they are very dangerous if they fall out and are swallowed or aspirated. When more than one magnet is
manufactured with unsafe magnets.\textsuperscript{19} Other toys were coated with excessive amounts of lead paint,\textsuperscript{20} causing controversial medical monitoring class action lawsuits to be filed.\textsuperscript{21} If what John Vause says is true, and Chinese products in China are “many, many times worse”\textsuperscript{22} than the Chinese products exported to the United States, an exploration of the Chinese tort system and the recourse available to Chinese plaintiffs may provide some provocative answers as to how the “Made in China” scare was allowed to happen and how another scare can be prevented. This Comment will explore the effectiveness of litigation as a tool for protecting both United States and Chinese consumers when regulatory enforcement proves inadequate.

II. BACKGROUND

The acting chair of the Consumer Product Safety Commission (“CPSC”), an independent federal regulatory agency,\textsuperscript{23} has indicated that ensuring the safety of Chinese-made toys for United States consumers is one of her highest priorities and is the subject of “vital talks currently in place between CPSC and the Chinese government.”\textsuperscript{24} This statement provides some comfort for United States consumers, but it does not reveal who or what is ensuring that Chinese-made toys are safe for

\hspace{1cm} swallowed, they can attract each other and cause intestinal perforation, infection or blockage and be fatal. The CPSC said that it knows of three reports of serious injuries to children who swallowed more than one magnet. All three suffered intestinal perforations that required surgery.

\textit{Id.} Mattel, Inc. has since improved the design of its Polly Pocket dolls, ensuring that magnets are properly embedded and sufficiently secured. \textit{Id.}

\textsuperscript{19.} See \textit{id}.

\textsuperscript{20.} See Lloyd, supra note 8.


\textsuperscript{22.} Vause, supra note 2.


Chinese consumers. The issue is compounded by the lack of adequate incentives for Chinese manufacturers to make safe products for consumers of either country. Product liability statutes and judicial precedent provide such incentives in other countries.

Product liability insures "that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves."25 Legal scholar Judge Guido Calabresi, of the United States Court of Appeals for the Second Circuit, discusses theories of liability in The Costs of Accidents.26 Calabresi’s analysis involves identifying the “acts or activities” that will most cheaply allow for accident avoidance.27 He points out that one party to a transaction may be in a superior position to evaluate expected accident costs.28 Calabresi illustrates his point with a discussion of rotary mowers.29 Based upon the assumption that the rotary mower industry is best informed about the expected accident cost of mower use, the cost will be placed upon the industry.30 Mower prices will reflect the expected cost, thus informing the public, who will be able to buy a higher priced mower or abstain from buying and indirectly force the mower companies to make safer products.31

As applied to the recent situation with China, it is clear that the Chinese companies are the cheapest cost avoiders. United States consumers cannot reasonably be expected to consider the costs of melamine and lead paint, or a skipped safety measure, if they are completely unaware and unadvised. Furthermore, it would seem that the Chinese companies have not reflected increased accident costs in their pricing.

It cannot be denied that Chinese pricing is extremely low when compared to United States pricing.32 A study conducted by Morgan Stanley estimates that the low pricing of Chinese products saved United States consumers six hundred billion dollars during the period of 1996 to 2006.33 Additionally, the fact that some Chinese companies use

27. See id. at 135-73.
28. See id. at 163.
29. See id.
30. See id.
31. See CALABRESI, supra note 26.
dangerous ingredients and skip necessary steps to increase profits\(^3\)\(^4\) is evidence that there is a lack of consideration for the increased costs associated with such activities. Assuming the validity of the assertion that Chinese pricing does not accurately reflect accident costs, United States consumers have been rendered unable to make informed decisions about Chinese product safety based upon market prices.

The "Made in China" scare is a complex situation with multidimensional players and responsibilities. The plaintiffs involved in the litigation are American; the defective products are Chinese; the defendants are American.\(^3\)\(^5\) It appears that the Chinese companies will not be held liable to the United States consumers in tort,\(^3\)\(^6\) so it must be answered whether they will be held liable at all, and to what extent, for the products they manufacture. Legal theorist Judge Richard Posner, of the United States Court of Appeals for the Seventh Circuit, has developed a theory about accident reduction.\(^3\)\(^7\) His approach suggests that economic actors will forego preventative measures when the cost of accidents, and therefore the cost of liability, is less than the cost of prevention.\(^3\)\(^8\)

Although Judge Posner's theory is relevant in the United States, it has limited impact in China. With China's tort system and damage scheme as they currently stand, Chinese manufacturers may be able to avoid both the cost of prevention \textit{and} the cost of liability.\(^3\)\(^9\) It is questionable whether some Chinese manufacturers are made to bear any of the losses they cause.\(^4\)\(^0\) The Chinese civil law system supports the idea that victims are to be fully compensated by tortfeasors.\(^4\)\(^1\) However, a system of insufficient access to the courts, compensatory damage awards that are not truly compensatory, and no punitive damage awards has left Chinese tort victims with little recourse.\(^4\)\(^2\)

While United States citizens have access to competent attorneys and state and federal courts that will allow arguments for damages related to

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34. See Barboza & Martin, supra note 15.
35. See Roger Parloff, China's Newest Export: Lawsuits, FORTUNE, July 5, 2007, available at http://money.cnn.com/2007/07/05/news/international/chinese_lawsuits.fortune/index.htm (stating that "[n]o American lawyer interviewed for this article was contemplating suing Chinese entities in Chinese courts, where tiny damage awards and frequently hostile local judges often make litigation pointless.").
36. See id.
38. See id.
39. See generally JIANSHENG LI, LAW ON PRODUCT QUALITY CONTROL AND PRODUCT LIABILITY IN CHINA (2006).
40. See id. at 457-89.
41. See id. at 467.
42. See id. at 457-89.
loss of a pet or funds for medical monitoring. Chinese citizens are routinely under-compensated for tortious injuries and deaths, and often not compensated at all. As United States attorneys are scrambling to find plaintiffs for class action suits regarding defective products made in China, many Chinese citizens never file claims because the damages awarded are so low that they may incur more expense pursuing a cause of action than they are able to recover. In China, attorneys’ fees and litigation handling fees are sufficient to deter the injured from seeking compensation.

III. AN ILLUSTRATIVE EXAMPLE: HANGZHOU ZhONGCE RUBBER CO.

On August 12, 2006, an accident on the Pennsylvania turnpike left two men dead and one man with permanent brain damage. A tire defect had caused a tread to suddenly become wrapped around an axle, resulting in a loss of vehicular control and a consequent rollover collision into an embankment. The Hangzhou Zhongce Rubber Co. in Hangzhou, China is being blamed for the loss.

A lawsuit filed on May 4, 2007 by Woloshin and Killino, P.C. alleges that the accident resulted from a tire that was lacking a gum strip, a necessary safety component. Following the Pennsylvania accident, as well as an ambulance rollover in New Mexico, Foreign Tire Sales was ordered by the National Highway Traffic Safety Administration to recall approximately 450,000 tires imported from Hangzhou Zhongce Rubber Co. It is alleged that the Hangzhou Zhongce Rubber Co. “deliberately and secretly” removed the gum strip feature from the tires they imported to the United States in order to cut costs. The forced tire recall and the potential damage awards in the wrongful death and personal injury cases

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44. See Passarella, supra note 21.
45. See Li, supra note 39, at 457-89.
48. See Li, supra note 39, at 457-89.
50. See id.
52. See Fatal Crash, supra note 49.
53. See id.
54. See id.
are two measures that will help to ensure future tire safety in the United States.\(^5\)

The United States tort system faces no shortage of lawyers who will zealously represent clients on a contingent fee basis and prosecute their cases at no charge until there is a settlement or a favorable jury verdict.\(^5\)

A quick internet search\(^5\) reveals the abundance of plaintiffs' attorneys who are anxious to represent consumers affected by unsafe Chinese products. The largest association of American plaintiffs' lawyers, the American Association for Justice ("AAJ"), is also the world's largest trial bar.\(^8\)

The purpose of the AAJ is to ensure that any individual who is tortiously harmed can get "justice in America's courtrooms,"\(^5\) even when challenging "the most powerful interests."\(^6\)

Justice in the courtroom has an entirely different meaning in China, where there were only 110,000 lawyers for a population of 1248.1 million at the end of 1998,\(^6\) or, nine lawyers for every 100,000 people.\(^6\)

Contrasted with 1999 figures for the United States (about 1,000,000 lawyers for a population of 270.561 million people, or, 370 lawyers for every 100,000 people),\(^5\) it becomes clear that obtaining legal representation in China is a more difficult task than it is in the United States.\(^6\)

All of China's lawyers are members of the All China Lawyers Association,\(^6\) which claims a membership of only 110,000.\(^6\)

With such an inadequate supply of lawyers, most Chinese cases proceed without counsel.\(^6\)

Chinese plaintiffs do not have the benefit of a legal team that is willing to pay their filing fees, medical records costs, expert witness fees, or trial preparation costs.\(^6\)

Pursuing recovery through the Chinese system involves time and effort, as well as attorneys' fees and expenses

\(^{55}\) See id.

\(^{56}\) See About AAJ, Mission & History, http://www.justice.org/cps/rde/xchg/justice/hs.xsl/418.htm (last visited May 11, 2009) [hereinafter AAJ]. AAJ was formerly the Association of Trial Lawyers of America ("ATLA").

\(^{57}\) Using the terms "Chinese," "product," and "lawyer" in a Google search produces an abundance of law firms handling Chinese product litigation for consumers.

\(^{58}\) See AAJ, supra note 56.

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Li, supra note 39, at 447.

\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) See id.


\(^{66}\) Id.

\(^{67}\) See Class Action Litigation in China, 111 HARV. L. REV. 1523, 1536 (1998) [hereinafter Class Action].

\(^{68}\) See generally, Li, supra note 39, at 457-89.
related to prosecution of the case. Many Chinese tort victims regard legal recourse as being too risky to pursue, as a court’s monetary award, if any, may be less than the cost of engaging in litigation.

With regard to the Foreign Tires Sales recall, New York Times writers David Barboza and Andrew Martin discuss “assertions that experts say point to a common problem: Chinese manufacturers win a contract after agreeing to make a product, following certain guidelines or specifications, and then, often for cost reasons, switch to a cheaper ingredient or process that lowers costs.” The lawyer representing Foreign Tire Sales has asserted that the omitted gum strips would have cost the Hangzhou Zhongce Rubber Co. less than one dollar per tire. A recall of the 450,000 tires will cost between $50,000,000 and $80,000,000 (between $111 and $178 per tire). Additionally, the wrongful death and personal injury cases are likely to result in damage awards in the millions of dollars.

The tremendous loss resulting from this deliberately skipped safety step could have been prevented for $450,000. Applying Judge Posner’s formula, it is obvious that the cost of accidents resulting from Hangzhou Zhongce Rubber Co.’s faulty tires is not less than $450,000. In Reforming Products Liability, author Kip Viscusi concluded that the value of life in the United States was at least $2,400,000 in 1990. If Hangzhou Zhongce Rubber Co. had followed the Hand Formula and considered the probability that one life would be lost as a result of the gum strips missing from its tires, it would not have skipped the safety step. However, Chinese manufacturers may not care about the Hand Formula. Even if Hangzhou Zhongce Rubber Co. had considered the potential for loss of life, it may have skipped the step anyway.

The reality of the situation is that Hangzhou Zhongce Rubber Co. may end up paying nothing. The National Highway Traffic Safety Administration insists that Foreign Tire Sales is the liable party.

69. See id. at 475.
70. See id. at 447.
71. See id.
72. Barboza & Martin, supra note 15.
73. See id.
74. Id.
76. See Barboza & Martin, supra note 15.
77. See Posner, supra note 37 (stating that “[w]hen the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability.”).
79. See Barboza & Martin, supra note 15.
Despite the likelihood that Hangzhou Zhongce Rubber Co.'s defective tires will put Foreign Tire Sales out of business, traffic safety administrator Nicole R. Nason has stated, "If you import the equipment, you assume the responsibility."80 The difficulty with applying United States economic principles to tort law in China, and with regard to Chinese products, is the fact that Chinese manufacturers do not bear the appropriate level of accident costs caused by their products in the Chinese market or in the foreign market.81 The outcome of the $80,000,000 lawsuit filed by Foreign Tire Sales against Hangzhou Zhongce Rubber Co. is uncertain, as the Chinese manufacturer denies all liability.82

Furthermore, as in the case of the pet product lawsuit that was filed against a Chinese supplier, Chinese companies often have no assets in the United States and it is difficult to ascertain who or what owns them in China.83 According to Professor Robert Berring, "Chinese courts are often inhospitable to foreign claims, especially those that reflect on Chinese national pride or integrity."84 He said, "They may never respond. It may take a lot of time. But I don't see why a Chinese company should be immune from liability in the United States."85 As of February 6, 2008, international law experts were unaware of any situation during which a United States plaintiff successfully collected on a verdict against a Chinese company.86

An examination of the extent to which Chinese companies are held liable for the injuries caused by products in the Chinese market is warranted to determine why China's tort system is ineffective at deterring manufacturers from skipping safety measures. A comparison of the United States product liability system and the Chinese product liability system may reveal why United States companies are answering for the losses caused by products purchased from Chinese suppliers.

80. Id.
81. See Li, supra note 39, at 476.
82. See Fatal Crash, supra note 49; see also Barboza & Martin, supra note 15.
83. See Bailey, supra note 9.
84. Id.
85. Id.
IV. THE UNITED STATES PRODUCT LIABILITY SYSTEM

A. Doctrine

Product liability law in the United States traditionally has been rooted in a standard of negligence. However, in *Greenman v. Yuba Power Products, Inc.*, the Supreme Court of California adopted a new form of product liability: strict liability. The opinion, written by Justice Roger Traynor in 1963, states that a "manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." Among the first indications of a potential shift from negligence to strict liability was Justice Traynor's concurrence in the 1944 case *Escola v. Coca Cola Bottling Co. of Fresno*.

In *Escola*, a soda bottle broke in the plaintiff's hand as she placed it in the refrigerator of the restaurant where she worked. The majority allowed the plaintiff an inference of negligence based upon the fact that the bottle would not have exploded if the manufacturer had exercised due care. Defendant's exclusive control at the time of manufacture was critical to the plaintiff's case, as bottles do not develop latent defects post-manufacture. Foreshadowing his opinion in *Greenman*, Justice Traynor wrote: "Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." Justice Traynor further argued that the manufacturer is in a better position than the public to afford protection against the risk of injury.

Two years after the *Greenman* decision, the American Law Institute published Section 402A of the Restatement (Second) of Torts, which applies to "[o]ne who sells any product that is in a defective

87. *See* *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944).
89. *See id*.
90. *Id. *at 900.
91. *Escola*, 150 P.2d at 440-44.
92. *Id. *at 437-38.
93. *Id. *at 440.
94. *Id*.
95. *Id*.
96. *Escola*, 150 P.2d at 441.
As reasonableness is a central concept of negligence, it would seem that the drafters of the Restatement were indecisive about the application of a strict liability standard. However, the Restatement (Third) of Torts: Products Liability, published in 1998, applies to "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product."

The Products Liability Restatement reflects a partial abandonment of reasonableness and the negligence standard and an expansion from liability of sellers exclusively to liability of sellers and distributors. The chain of liability now runs from supplier to manufacturer; manufacturer to vendor; vendor to retailer; retailer to purchaser; and purchaser to injured party. The strict liability standard requires evidence that the product at issue was defective at the time of manufacture and that it caused the plaintiff's injuries. A defendant need not be at fault for a plaintiff to prevail under a theory of strict liability.

B. Policy Justifications for Strict Liability

Most jurisdictions in the United States have adopted a strict liability standard for cases involving defective products. The consequent economic incentive for manufacturers to make and distribute safe products has been cited as one of the most significant developments in tort law. The current policy justifications for a movement from negligence to strict liability are reminiscent of Justice Traynor's arguments in Escola and Greenman: (1) manufacturers are in the best position to assume the risks of injuries and spread the cost of those risks by charging consumers higher prices; (2) total accident costs are...
reduced by charging manufacturers without regard for a negligence standard;\textsuperscript{111} and (3) the burden of proving negligence in manufacturing is too great for a consumer, who has little to no knowledge of the manufacturing process.\textsuperscript{112} It has been argued that society is best served by treating the risks of injuries from defective products as a cost of doing business.\textsuperscript{113} The value of a business is negatively impacted by "[a]ccidents, product recalls, and adverse information events related to product safety,"\textsuperscript{114} the combination of which produces a strong economic incentive for manufacturers to make safe products.

\section*{C. Legal Representation and Access to the Courts}

United States plaintiffs enjoy the benefits of a contingency fee system.\textsuperscript{115} On a contingency basis, if a plaintiff's case is not successfully settled or tried by retained counsel, the plaintiff does not owe a fee.\textsuperscript{116} However, if the plaintiff does recover a monetary sum, counsel is entitled to a pre-arranged percentage of the amount recovered from the defendant.\textsuperscript{117} The consequence of such an arrangement is that counsel for the plaintiff bears all of the economic risk associated with litigation.\textsuperscript{118} The contingency fee has been referred to as an individual's "key to the courthouse."\textsuperscript{119} Absent such a system, a tort victim who could not afford competent counsel would be unable to present effectively his or her case and seek compensation for wrongful injury.\textsuperscript{120} Greater access to legal counsel is one of several factors cited as contributing to an increase in civil litigation over the years.\textsuperscript{121}

\section*{D. Damage Awards}

The purpose of a damage award for an unintentional tort is "to return the plaintiff as closely as possible to his or her condition before the accident."\textsuperscript{122} Compensatory damage awards usually are comprised

\begin{itemize}
\item[111.] See Escola, 150 P.2d at 441; see also Pfennigstorf, supra note 106, at 19.
\item[112.] See Escola, 150 P.2d at 441; see also Pfennigstorf, supra note 106, at 19.
\item[113.] See Escola, 150 P.2d at 441; see also Trial, supra note 109.
\item[115.] See Franklin, supra note 99, at 16.
\item[116.] See id.
\item[117.] See id.
\item[118.] See Pfennigstorf, supra note 106, at 32.
\item[120.] See Pfennigstorf, supra note 106, at 32.
\item[121.] See id. at 35 (citing Donald G. Gifford and David J. Nye, Litigation Trends in Florida: Saga of a Growth State, 39 U. Fla. L. Rev. 829, 869 (1987)).
\item[122.] Franklin, supra note 99, at 698.
\end{itemize}
of: loss of earnings from time of accident to time of trial;\textsuperscript{123} possible future loss of earnings;\textsuperscript{124} past and future medical expenses;\textsuperscript{125} and pain and suffering.\textsuperscript{126} The jury in a tort case is responsible for determining damage awards, and is expected to do so with little instruction.\textsuperscript{127} As Justice Traynor pointed out in his \textit{Seffert v. Los Angeles Transit Lines}\textsuperscript{128} dissenting opinion, "The jury and the trial court have broad discretion in determining the damages in a personal injury case."\textsuperscript{129} Such broad discretion has been the subject of much debate surrounding tort reform, particularly with regard to pain and suffering awards and punitive damage awards.\textsuperscript{130} Punitive damages awards are justified as a deterrent to "willful and wanton conduct."\textsuperscript{131}

According to a comprehensive study done by the U.S. Department of Justice in 2001, the median product liability award in the seventy largest United States counties was $450,000 for the 70 out of 154 trials that were won by a plaintiff.\textsuperscript{132} Of those trials, three involved punitive damage awards, the median of which was $433,000.\textsuperscript{133} Of the eleven product liability trials involving a wrongful death claim, the median award was $2,000,000.\textsuperscript{134} It is important to note, however, that the vast majority of product liability claims that are not voluntarily dismissed by plaintiffs are settled out of court and never proceed to trial.\textsuperscript{135} Furthermore, the cases that get filed in court tend to involve large monetary claims, while small claims may never be pursued.\textsuperscript{136}

V. THE CHINESE PRODUCT LIABILITY SYSTEM

A. Doctrine

The People's Republic of China ("PRC") began to recognize the rights of consumers\textsuperscript{137} thirty years after the \textit{Greenman} decision\textsuperscript{138} had re-

\textsuperscript{123} See id. at 706.
\textsuperscript{124} See id. at 706-09.
\textsuperscript{125} See id. at 706.
\textsuperscript{126} See id. at 709-13; see also Seffert v. Los Angeles Transit Lines, 364 P.2d 337 (Cal. 1961).
\textsuperscript{127} See PFENNIGSTORF, supra note 106, at 27.
\textsuperscript{128} Seffert, 364 P.2d 337.
\textsuperscript{129} Id. at 344-345.
\textsuperscript{130} See, e.g., PFENNIGSTORF, supra note 106, at 31.
\textsuperscript{131} Id. at 28.
\textsuperscript{132} See Cases and Verdicts, supra note 75.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} See VISCUSI, supra note 78, at 6.
\textsuperscript{136} See id.
shaped product liability law in the United States. The perceived United States product liability crisis of the late 1980’s had already come and gone by the time the PRC was adopting its first law expressly to address product liability. The Law of the People’s Republic of China on Product Quality (“PQL”) became effective on September 1, 1993. Simply put, Chinese product liability law has not had the decades of development that United States product liability law has experienced. The PQL was amended by the Standing Committee of the National People’s Congress (“NPCSC”) on July 8, 2000, and the new law became effective on September 1, 2000. As stated in the PQL, the objective of the law is to “strengthen the supervision and control over product quality, to define the liability for product quality, to protect the legitimate rights and interests of users and consumers and to safeguard the socioeconomic order.”

Unlike product liability law in the United States, which is rooted in common law, Chinese product liability law is based entirely upon statute. As defined in Article 34 of the PQL, a defect “means the unreasonable danger existing in [a] product which endangers the safety of human life or another person[’s] property; where there are national or trade standards safeguarding the health or safety of human life and property defect means inconformity to such standards.” The PQL language more closely resembles the “unreasonably dangerous” phrasing of Section 402A of the Restatement (Second) of Torts than it does the phrasing of the Products Liability Restatement. Indeed, there is much discussion about whether the PRC should adopt a strict liability standard or a fault-based standard.

B. Policy Justifications for Strict Liability

The PQL does not expressly address the idea of strict liability. However, the following policy goals were afforded consideration by the

139. See Trial, supra note 109.
140. See Han, supra note 137, at 3.
141. See id. at 1.
142. Id.
144. See Han, supra note 137, at 2.
145. PQL ch. 4, art.34, cited in Saadat, supra note 143, at 102.
146. Restatement (Second) of Torts § 402A (1965).
148. See generally Han, supra note 137.
149. See id. at 8.
drafters of the legislation: (1) consistency with international legal practice for optimal "economic and trade exchanges";\textsuperscript{150} (2) the "practical needs" and considerations of China;\textsuperscript{151} and (3) China's developing market economy.\textsuperscript{152} After a study of international legislation involving countries such as the United States, the United Kingdom, Japan, Canada, Taiwan, and Germany, the Chinese legislature determined that most countries with a product liability system have adopted strict liability as the principle standard of liability.\textsuperscript{153} Further evidence that strict liability may have been the legislative intent of the drafters can be found through a consideration of China's economic and political scheme around 1993.\textsuperscript{154} At the time of the PQL's adoption, China's market was flooded with fake, inferior, and defective products, but consumer protection laws were not yet a reality.\textsuperscript{155}

C. Legal Representation and Access to the Courts

Considered "the worst of that 'stinking ninth category' of antisocial elements called intellectuals"\textsuperscript{156} during the Anti-Rightist Campaign and the Cultural Revolution, Chinese lawyers have rapidly grown in number during recent history.\textsuperscript{157} As recently as 1980, there were only 3,000 lawyers practicing in the entire country.\textsuperscript{158} Contrasted with the current figure of 110,000 lawyers,\textsuperscript{159} it is evident that change has encompassed China's legal arena.\textsuperscript{160} During the Anti-Rightist Campaign and the Cultural Revolution, the practice of law was outlawed and lawyers were accused of being capitalists whose purpose was contrary to "socialist ideology and the state interest."\textsuperscript{161} The legal profession was reborn when Deng Xiaoping became the Communist Party leader in 1978.\textsuperscript{162} However, the organization of non-state law firms was forbidden until 1988,\textsuperscript{163} as all lawyers were considered "state legal workers."\textsuperscript{164} A lack

\begin{itemize}
\item \textsuperscript{150} Id. at 7-8.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} See Han, supra note 137, at 8.
\item \textsuperscript{154} See id.
\item \textsuperscript{155} See id.
\item \textsuperscript{156} Jerome A. Cohen, Reforming China's Civil Procedure: Judging the Courts, 45 AM. J. COMP. L. 793 (1997).
\item \textsuperscript{157} See Class Action, supra note 67, at 1536.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} See All China Lawyers, supra note 65.
\item \textsuperscript{160} See Class Action, supra note 67, at 1536-40.
\item \textsuperscript{161} Al Young, The Continuing Lack of Independence of Chinese Lawyers, 18 GEO. J. LEGAL ETHICS 1133, 1135 (2005).
\item \textsuperscript{162} See id.
\item \textsuperscript{163} See Class Action, supra note 67, at 1536.
\item \textsuperscript{164} Id.
\end{itemize}
of individual autonomy regarding case selection and practice management limited the amount of profit expected and sought by Chinese lawyers.\textsuperscript{165}

The promulgation of the Lawyers Law\textsuperscript{166} in 1996, which definitively allows for the formation of law firms as cooperatives or partnerships, created profit motivation within the legal field.\textsuperscript{167} However, fee restrictions continue to render many cases undesirable, and plaintiffs are often unable to retain counsel.\textsuperscript{168} Figures from the Supreme People's Court reveal that of the 4,889,353 cases heard in 1995, only 863,574 involved lawyer participation.\textsuperscript{169} National fee standards dictate the amount lawyers may charge for their services.\textsuperscript{170} Economic cases and property cases face an upper limit of "three percent of the amount in controversy."\textsuperscript{171} With little economic incentive for lawyers to accept a plaintiff's case under the current system, many have decided to either disregard the law and charge an excess amount (or a contingency fee) or turn to commercial practice.\textsuperscript{172}

It is important to note that while the Lawyers Law of 1996 has afforded Chinese lawyers an increased sense of independence from their government, representation of a client whose case is unfavorable to the government, or even against the government, may lead to retaliation.\textsuperscript{173} The idea of an individual winning a lawsuit against the government is a new concept in China.\textsuperscript{174} The case of a five-year old boy's HIV infection illustrates this point.\textsuperscript{175}

Li Ning contracted HIV during a 1996 procedure performed at a government hospital in the county of Xinye, and was subsequently awarded $47,000 (USD), to be paid by the Xinye County Health Department.\textsuperscript{176} While the award was considered to be a "milestone in a country where the courts have long been subservient to the Communist

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165. See id.
167. See Class Action, supra note 67, at 1536.
168. See id.
169. Id. (citing Zhongguo Falü Nianjian Bianji Bu, LAW YEARBOOK OF CHINA (1996)).
171. Id.
172. See id. at 1537.
173. See generally Young, supra note 161.
174. See id.
175. Id. at 1147-48.
176. Id.
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Party," it is strikingly small for the contraction of a fatal disease, especially since Ning’s treatment was estimated at $50,000 (USD) a year. At the time Ning’s family received the verdict in 2000, China did not have laws regarding medical malpractice and the system was seriously tilted in favor of hospital defendants. Aware of the difficulties with pursuing such a cause of action and the consequent rejection of the case by many attorneys, a law professor named Zhang Qian decided to represent Ning at no charge. Despite Qian’s request for $1,340,000 (USD) in damages, Ning ended up receiving approximately $24,000 (USD) of a $47,000 (USD) award, the inadequacy of which is evident. Most hospitals in China do not carry malpractice insurance, a factor that contributes to a lack of justice for plaintiffs.

In another partial victory against the Chinese government, up to $1,200,000 (USD) was awarded by the Wuxian People’s Court in Jiangsu to the family of a woman who died after contracting HIV during a blood transfusion at the Nanzhang County Hospital. The court found that the hospital had failed to screen its blood supplies and was therefore culpable “beyond reasonable doubt.” The woman’s husband and their baby subsequently became infected with HIV and are to be compensated periodically. The lawyer for the plaintiffs reflected concern that financial troubles within the hospital would prevent his clients from being paid.


178. See id.

179. See id.

180. Id.

181. Id.


184. Id.


186. Id.
D. Damage Awards

Appeal to juror sympathy, an effective strategy in the United States, would be futile in China, where the system of compensatory damages is strictly mathematical. The perceived value of an individual’s life in China can be calculated using geography and income data. As stated in Article 29 of the December 4, 2003 Supreme People’s Court Interpretation:

Compensation for death is calculated on the basis of 20 times the previous year’s average net income of urban residents in the city where the court is located, or the average net income of rural residents where the court is located. However, if the decedent is 60 or over, compensation is reduced by one year for each year over 60, provided that the compensation is based on 5 years for decedents 75 or over.

The lack of ambiguity in Article 29 should make the calculation of expected accident costs a less cumbersome task for manufacturers in China than it is for manufacturers in the United States, where juries have broad discretion in assessing damages.

Like manufacturers in a negligence regime, manufacturers in a strict liability regime are expected to take cost-justified precautions. The impact of cost justification in China is striking and is best illustrated by the Hand Formula. According to statistics compiled by the World Health Organization (“WHO”), rural households in China had a per capita annual net income of $356 (USD) while urban households had a per capita disposable income of $1138 (USD) in 2004. At the end of 2004, 26.1 million Chinese citizens lived in rural areas with an annual

189. See id.
190. Id.
194. Id.
per capita net income below $81 (USD).\textsuperscript{195} Utilizing those figures, it would be possible for a Chinese individual's life to be valued at just $1,620 (USD). Compared to life valuation in the United States, which measures in the millions of dollars,\textsuperscript{196} it becomes evident that a Chinese manufacturer will take a different approach to accident prevention than will a United States manufacturer. Such economic analysis may explain the seemingly unacceptable level of precaution taken by Chinese companies.

VI. CONCLUSION

While it has been predicted that China will become more aligned with the international legal community during the next ten years,\textsuperscript{197} United States consumers and businesses will need an immediate course of action with regard to this dangerous trading partner. Some consumers have decided to remove Chinese products from their households altogether,\textsuperscript{198} but the feasibility of such a plan is questionable at best. Chinese products are much more affordable than American products.\textsuperscript{199} Furthermore, they seem to be inescapable.\textsuperscript{200} As documented by Sara Bongiorni in A Year without "Made in China": One Family's True Life Adventure in the Global Economy,\textsuperscript{201} trying to avoid Chinese products is more of an experiment than a way of life. Consumers can visit the website of the CPSC for product safety and recall information\textsuperscript{202} to eliminate known dangers from their homes, but the unknown dangers can be just as worrisome.

Product recall lists are not enough for John Mazziotti, mayor of Palm Bay, Florida, who has proposed a ban on Chinese-made products.\textsuperscript{203} Mazziotti's concerns include: product quality and safety,\textsuperscript{204}

\textsuperscript{195} Id.
\textsuperscript{196} See generally VISCUSSI, supra note 78.
\textsuperscript{197} See Product Suits Fall Short, supra note 86 (stating that within a decade, China is likely to conform more closely to international legal standards).
\textsuperscript{199} See Mutual Benefit, supra note 33.
\textsuperscript{201} See SARA BONGIORNI, A YEAR WITHOUT "MADE IN CHINA": ONE FAMILY'S TRUE LIFE ADVENTURE IN THE GLOBAL ECONOMY (1997).
human rights abuses in China,\textsuperscript{205} China's record on pollution,\textsuperscript{206} and a loss of United States jobs in the manufacturing sector.\textsuperscript{207} The proposed ban would prevent the city from purchasing products made in China that cost more than $50\textsuperscript{208} or are composed of parts, half of which are made in China.\textsuperscript{209} George Wang, president of the U.S.-China Exchange Association, asserts that such a measure would be irrational, as a cost-benefit analysis would clearly disfavor avoiding all Chinese products.\textsuperscript{210}

As long as the demand for Chinese-made products continues, there will be companies in the United States to import the products. Law firms such as McDermott Will & Emery have formed Chinese Products Practice Groups to advise these companies of their rights and responsibilities with regard to importation from China.\textsuperscript{211} Their recommendations include: maintaining adequate insurance coverage;\textsuperscript{212} adding liability-minimizing provisions to contracts with Chinese manufacturers;\textsuperscript{213} and seeking indemnification from Chinese companies following product recalls, class actions, and other lawsuits.\textsuperscript{214} As discussed earlier, indemnification is a near impossibility.\textsuperscript{215} United States companies will face a disproportionate burden until Chinese manufacturers are made to bear the losses caused by their products.

While tort reform in China, particularly an increase in compensatory damage awards and the addition of punitive damage awards, is the most effective way to influence manufacturer behavior, change does not happen overnight. China admits that the products it manufacturers for export are of a higher quality than those manufactured for domestic use.\textsuperscript{216} In fact, twenty percent of the products manufactured for use in China fail to meet basic requirements.\textsuperscript{217} China's overall conformity to international safety standards would protect consumers and eliminate the

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\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} See id.
\textsuperscript{209} See Leonard, supra note 204.
\textsuperscript{210} See Abraham, supra note 203.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} See Parloff, supra note 35.
\textsuperscript{217} See id; see also Wild West Imports, supra note 5.
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current need for over-regulation. However, until such standards are met, governmental agencies will be responsible for ensuring consumer safety.\textsuperscript{218}

The CPSC reached an agreement with China's General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) on September 11, 2007.\textsuperscript{219} The agreement calls for China to upgrade its inspection of products to be shipped to the United States and to cooperate with the CPSC in locating the sources of hazardous products.\textsuperscript{220} Additionally, the FDA has opened an office in China.\textsuperscript{221} Officials will concentrate on heightened safety standards for producers and increased regulation,\textsuperscript{222} the idea being to place the burden on China and rely less on inspections in the United States.\textsuperscript{223}

Placing the burden on China is exactly what needs to happen. China must be responsible for a level of precaution that corresponds with the expected accident costs of its products. If the United States is to maintain a trade relationship with China, Chinese manufacturers will need to become accountable for safety. While it is evident that a lack of regulatory enforcement cleared the way for defective products to enter the United States, the root of the problem lies elsewhere. An environment of danger is thriving in China due to an unpredictable, newly developing tort system; a lack of incentive for manufacturers to make safe products; and a long history of complete and total disregard for safety. Tort reform, accompanied by an increase in plaintiffs' attorneys, would open the doors to the courthouse and compel Chinese manufacturers to exercise due care in the production of their products.


\textsuperscript{219} See Product Safety Agencies, supra note 218.

\textsuperscript{220} See id.

\textsuperscript{221} See id.

\textsuperscript{222} See id.

\textsuperscript{223} See id.