Tainted Milk: What Kind of Justice for Victims' Families in China

Yungsuk Karen Yoo

Follow this and additional works at: https://repository.uchastings.edu/hastings_international_comparative_law_review

Part of the Comparative and Foreign Law Commons, and the International Law Commons

Recommended Citation
Yungsuk Karen Yoo, Tainted Milk: What Kind of Justice for Victims' Families in China, 33 Hastings Int’l & Comp. L. Rev. 555 (2010). Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol33/iss2/8

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings International and Comparative Law Review by an authorized editor of UC Hastings Scholarship Repository.
Tainted Milk: What Kind of Justice for Victims’ Families in China?

By Yungsuk Karen Yoo*

I. Introduction

The first criminal trials related to China’s tainted milk scandal began in late December 2008. This was a big step forward for the families of six babies who died and at least 294,000 infants who suffered health problems from drinking contaminated baby formula. Hearings were held in the Intermediate People’s Court in Shijiazhuang in the northern province of Hebei, where the now-bankrupt dairy company at the center of the scandal, Sanlu Group (Sanlu), is headquartered. On January 22, 2009, two of the defendants, a dairy producer and a dairy middleman, were sentenced to death.¹ The head of Sanlu, a former Communist Party official, was sentenced to life imprisonment. The defendants were charged with producing and selling fake or substandard products, and with crimes against the public safety for producing and selling melamine to major dairies.² Melamine is an industrial chemical commonly used in the manufacture of plastics and fertilizers. It was added to dilute raw milk to falsely raise protein levels in order to meet nutrition standards.³ Ingested in large amounts, melamine can

* Yungsuk Karen Yoo is a third-year law student at UC Hastings. She has a Bachelor of Arts in International Relations from Stanford University and a Master of Science in Comparative Politics from the London School of Economics. Karen would like to thank her family, friends, and colleagues at HICLR for their hard work on the publication.

cause kidney stones and kidney failure.

The Sanlu case presents a vivid illustration of modern Chinese legal culture and current developments in the rule of law in China. Since its transition to a market-oriented economy in the 1970s, China's legal system has undergone rapid reform against the backdrop of exponential economic growth and burgeoning international trade. Increased domestic litigation is one aspect of the change in China's legal landscape as litigation becomes a more socially accepted form of dispute resolution. Yet the government maintains strict control over the courts, wary of cases that implicate government involvement or responsibility, and especially sensitive to international scrutiny. In the Sanlu debacle, parents of sick infants blamed the government for breaching their trust by certifying melamine-containing products as safe. Communist Party officials were also implicated in covering up the deaths and illnesses of victims. News of tainted Chinese products spread swiftly to China's trade partners, who began to recall dairy products imported from China. When the melamine scandal first erupted in September 2008, Chinese courts repeatedly refused to hear lawsuits filed on behalf of affected families because the government hoped that families would quietly accept out-of-court settlements. Some of the lawyers who took on these cases were threatened with disbarment. The December trials signaled the Chinese

---


5. Mary E. Gallagher, *Mobilizing the Law in China: 'Informed Disenchantment' and the Development of Legal Consciousness*, 40 LAW & SOC'Y REV. 783, 789 (2006) (“China's process of dispute resolution for labor conflict has evolved over the reform period from an almost total reliance on mediation and administrative measures to an increasing legalization and formalization of the dispute process.”).


government’s response to public frustration and anger, as well as its reaction to the international pressure and media attention that threatened to tarnish the reputation of the “Made in China” label.¹¹

This note will explore the ways in which the Sanlu case marks a turning point for dispute resolution in China, from one based on settlement and mediation to one in which plaintiffs increasingly seek their day in court. The Sanlu case is also illustrative in that it tests the outer limits of civil litigation and access of private parties to Chinese courts, especially when government liability is in question. China’s adoption of its Product Quality Law (PQL) in 1993 and subsequent amendment in 2000, brought into focus the potential liability for product manufacturers and sellers under tort law, and the role of the State in prosecuting producers and sellers of harmful products under its criminal liability provisions. As China emerges as a major player in the global economy, the government’s role in regulating product quality and food safety will be increasingly scrutinized as domestic pressures challenge more traditional forms of dispute resolution in favor of the courts. Litigation provides an outlet for plaintiffs to voice their concerns, assert their right to be heard, and seek greater compensation, while the threat of litigation incentivizes potential defendants to change their behavior. The prospect of litigation also shifts the burden onto manufacturers to self-regulate by holding them accountable for past and present wrongdoing.

II. Sources of Law Relevant to the Sanlu Case

In China, a civil law system, product liability is entirely statute-based.¹² Case law does not generally carry precedential value, and judicial decisions are rarely published or otherwise made available to the public.¹³ China’s product liability law has been greatly influenced by the legal experience of developed countries including the United States, and the Chinese legal system has adopted various Western legal concepts such as warranties, strict product liability,
punitive damages, public hearings and state compensation.14 While China does not have an independent statute that addresses product liability in a comprehensive or systematic way,15 product liability issues arising in the Sanlu case draw from various sources of Chinese law, which will be explored below.

A. First Law Related to Food Quality: Food Hygiene Law

The beginning of economic reform and development of a market economy in China in 1979 led to the adoption of a new legal framework, which in turn sought to address the proliferation of low quality goods through regulation. During this period, the Chinese government promulgated many laws and regulations concerning product quality and civil law liabilities, including the 1982 Food Hygiene Law.16 Section 39 of the Food Hygiene Law provides that a manufacturer or seller of a food product "who causes food poisoning or a food-borne bacterial related disease to others, shall bear responsibility of compensation to a victim."17 While the law marked an important step in regulating the quality of food in the Chinese market, it was a narrow statute that applied only to food products and did not establish an independent product-related tort liability.18 The enactment of the General Principles of Civil Law in 1986 addressed such tort liability.

B. General Principles of Civil Law

Arguably the most important legislation related to civil law liability enacted in China during this period was the 1986 General Principles of Civil Law (GPCL), China's civil code.19 Section 122 of the GPCL provides: "Where a substandard product causes property damage or personal injury to others, the manufacturer or seller shall bear civil liability according to law." This provision established a comprehensive product-related tort scheme for the first time in China.20 It is not clear, however, whether the provision established a strict liability or an "inferential fault" standard for the

14. Id. at 9.
15. Id. at 13.
16. Id. at 14.
17. Id. at 15.
18. Id.
20. Id.
manufacturer or seller. Edward Epstein argues that the primary purpose of the GPCL was to enforce a system to prevent damage and injury, not to provide compensation; at the same time the GPCL is more than just a protective statute creating a duty not to harm a class of persons, because it "expressly create[s] the constituents and form of liability." What remained significant, though, was the broad application of the product liability law to every kind of product.

In the context of China's civil law system, the GPCL should be viewed as a general law that "coordinates" specific types of legal obligations created by particular laws with regulations relevant to the subject area in question. The GPCL is the legislative source for China's Product Quality Law (PQL), which will be discussed below.

C. The 1993 Product Quality Law and its Administration

The use of the term "substandard" in section 122 of the GPCL was highly ambiguous and therefore widely criticized. The PQL, which replaced the term "substandard" with "defect in product," can be seen as the Chinese legislature's response to this ambiguity. Article 46 of the PQL defines "defect" (quexian) as an unreasonable defect existing in a product that may endanger 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 noncompliance with such standards. Under the PQL, producers and sellers are liable for defective products when such products cause personal injury or damage to the property of others. The existence of a defect in a product is thus a necessary element in tortious product liability.

The PQL represents the farthest reaching and most systematic

21. Id. at 16.
23. Li, supra note 13, at 16.
26. Li, supra note 13, at 20.
27. Han, supra note 12.
28. Han, supra note 12; Epstein, supra note 22, at 304.
regulation of product liability in China to date. It imposes administrative and criminal penalties, as well as civil liability for contract and tort violations of quality control requirements as defined by the law. Therefore, its provisions are administrative and civil in nature. Article 4 of the PQL also implicates the liability of administrative organs by providing that “administrative departments ‘whose control and supervision of quality are slack shall bear joint and several liability.”

Under the PQL and Article 5 of China’s Standardization Law, the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) has sole authority to conduct conformity assessments in order to maintain nationwide supervision and control over product quality. The administration, through random inspection of producers and sellers, ensures compliance with prescribed standards. The AQSIQ was established in 1955 to set quality standards and to test and certify domestically traded products. In China, national, local, and industry standards related to public health are considered compulsory. AQSIQ sets forth mandatory certification requirements and falls under the direct authority of the State Council, the highest organ of state administration in China.

Producers and sellers are potentially liable when an inspection agency discovers a violation of quality or certification regulations, either through random inspections, or through customer complaints. At the same time, institutional problems such as entrenched corruption and weak enforcement capabilities at the

29. Epstein, supra note 22, at 293.
30. Li, supra note 13, at 17.
31. Epstein, supra note 22, at 306.
33. SAADAT, supra note 32, at 21.
34. Id. at 15.
35. Biukovic, supra note 32, at 822-23.
36. SAADAT, supra note 32, at 16; Biukovic, supra note 32, at 821.
37. SAADAT, supra note 32, at 21.
local level result in government oversight.\textsuperscript{38} Julia Phillips argues that corruption in China's manufacturing sector is a result of the sheer number of factories that require policing, preferential treatment for big businesses by officials who are charged with monitoring them, and the widespread acceptance of bribes by local police.\textsuperscript{39} Furthermore, a complicated chain of production involving multiple subcontractors, who are often untraceable due to lack of disclosure rules means that not enough attention is paid at the local contractor level.\textsuperscript{40} Because manufacturers are also under pressure from their trading partners to provide their products quickly and at a low price, they have an incentive to cut costs, which often means using ingredients that are less safe.\textsuperscript{41} In recent years, however, international media exposure concerning the safety of Chinese products has forced the Chinese government to crack down on its quality control problem, or at least appear to do so.\textsuperscript{42}

\section*{D. Consumer Rights Law}

The Consumer Rights Law (CRL) broadens the scope of China's product-related law. It enumerates the basic rights of consumers, the basic obligations of business operators, and outlines the administrative liabilities of business operators who violate the law.\textsuperscript{43} For example, product manufacturers are held liable for any express warranties on their products as well as implied warranties on the functionality of their products. The CRL allows consumers to pursue product liability claims in court, where they may be compensated for damages incurred as a result of a defective product.\textsuperscript{44} Other penalties include the confiscation of goods and business licenses, as well as fines, and possible criminal prosecution.\textsuperscript{45}

Under the CRL, the Chinese government is required to assist administrative agencies in performing their consumer safety duties, including the fielding of complaints from consumers and public

\begin{itemize}
\item \textsuperscript{38} Phillips, supra note 11, at 224.
\item \textsuperscript{39} Id. at 225, 235.
\item \textsuperscript{40} Id. at 228.
\item \textsuperscript{41} Id. at 234.
\item \textsuperscript{42} Phillips, supra note 11, at 225.
\item \textsuperscript{43} Li, supra note 13, at 23-24.
\item \textsuperscript{44} SAADAT, supra note 32, at 26.
\item \textsuperscript{45} SAADAT, supra note 32, at 26.
\end{itemize}
organizations concerning product quality, and the investigation and prosecution of those who violate the CRL and other related laws.\footnote{46} In addition, consumer-based organizations are obligated to monitor product quality and protect consumer rights by providing support to victims in legal proceedings and utilizing the media to assert the rights and interests of consumers.\footnote{47} Finally, it is worth noting that neither the CRL nor the PQL requires notification of an unsafe product to an importing country, even when it is known not to meet product quality standards.\footnote{48}

The CRL underwent a major overhaul in 2009, which expanded the coverage of the law to a greater range of products, and allowed the China Consumers Association, a national consumer rights body, to represent consumers in courts.\footnote{49} This amendment has implications for enhanced consumer protection in China and increased access to legal representation for those who may not otherwise be able to afford it.

\section*{E. Criminal Laws and Procedure}

Although this note focuses on Chinese civil litigation, a brief background on the relevant criminal law may be appropriate for a better understanding of the Sanlu case. The 1997 Revised Criminal Law punishes unlawful actions of producing or marketing fake or inferior products, in addition to the crime of endangering the public security when the action causes serious injury to human life or property.\footnote{50} Furthermore, China’s Code of Criminal Procedure allows crime victims who suffer personal injury or damage to property to bring a civil action in addition to the criminal prosecution. Victims’ families may bring supplementary civil actions to be heard at the same time as the criminal trial.\footnote{51}

\printfootnotes
III. Dispute Resolution Mechanisms in China: From Mediation to Litigation

This section outlines commonly used dispute resolution mechanisms in contemporary China, focusing on civil cases. The current trend indicates a shift from mediation and out-of-court dispute settlements to more formalized procedures including litigation through the judicial system. However, the shift has been skewed in favor of politically acceptable resolutions rather than those dictated by the parties involved.

In broad terms, the Chinese courts represent an extension of the political system over which the ruling Communist Party (CCP) maintains a strong grip. Ronald Brown explains that the courts "may be viewed ... as an administrative organ of the government" with duties that are interrelated to the other political and governmental branches. Randall Peerenboom argues that the courts lack independence due to a system in which the CCP approves the appointment of senior judges as well as court presidents, who have ultimate decision-making power. Peerenboom notes that while direct party interference is actually rare, the overwhelming source of outside influence is local government officials seeking to protect local interests. Meanwhile, CCP committees look over politically sensitive cases before they are accepted by courts, and those cases that are accepted may be tried in secret using "internal rules" and without the presence of attorneys. Andrea Cheuk further notes that the docketing process governed by the Civil Procedure Law gives Chinese courts great discretion over whether or not to accept particular cases, which places another barrier to entry into the court system for litigants. Courts also offer parties a chance to mediate before accepting cases and before

53. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 14 (2002); see also Benjamin L. Liebman, China's Courts: Restricted Reform, 21 COLUM. J. ASIAN L. 1, 17 (2007).
54. See PEERENBOOM, supra note 53, at 14.
55. See BROWN, supra note 52, at 4; see also DVD: The People's Court: Introducing the Rule of Law in China (Xanadu Productions Ltd. 2007) (on file with Hastings Law Library) [hereinafter The People's Court].
making judgments.\textsuperscript{57} Settlements agreed to under mediation are binding agreements and cannot be overturned by courts or appealed.\textsuperscript{58}

A. Mediation

Grassroots dispute settlement, a traditional method of non-litigation, continues to be a major means of resolving disputes in China.\textsuperscript{59} Historically, China has utilized what Laurence Boulle refers to as “communally-based systems of managing conflict,” with respected local elders acting as mediators in order to resolve disputes, keep the peace, and enforce social sanctions.\textsuperscript{60} Localized dispute resolution mechanisms within villages and cities were codified under the 1989 Organic Regulations on People’s Mediation Committees and the 1990 Measures for Handling Disputes Among the People.\textsuperscript{61} By 1989 over 1 million mediation committees were established. Mediation is available for minor civil disputes and minor criminal offenses.\textsuperscript{62}

Mediation, a widely accepted form of dispute resolution in Chinese society, has been formalized to a certain extent under the new approaches to litigation and court-enforced arbitration as highlighted in the Civil Procedure Law.\textsuperscript{63} When a Chinese court hears a civil case, it follows the principle of “doing all it can to mediate first, adjudicating when so doing is proper, and combining mediation with adjudication to close the case.”\textsuperscript{64} The Civil Procedure Law provides that: (a) A people’s mediation committee shall mediate in accordance with the provisions of law and on the basis of the principle of voluntary participation; (b) The parties shall carry out the agreements reached upon mediation; and (c) If any party does not wish to enter into mediation, mediation has failed, or any party repudiates the mediation agreement, an action may be

\textsuperscript{57} The People’s Court, supra note 55.
\textsuperscript{58} Id.
\textsuperscript{59} BROWN, supra note 52, at 22.
\textsuperscript{60} BEE CHEN GOH, LAW WITHOUT LAWYERS, JUSTICE WITHOUT COURTS: ON TRADITIONAL CHINESE MEDIATION 3 (2002) (quoting LAURENCE BOULLE & MIRYANA NESIC, MEDIATION: PRINCIPLES, PROCESS, PRACTICE 32 (1996)).
\textsuperscript{61} BROWN, supra note 52, at 22-23.
\textsuperscript{62} Id. at 23.
\textsuperscript{63} Id. at 22.
\textsuperscript{64} State Council Information Office, China's Efforts and Achievement in Promoting the Rule of Law, 7 CHIN. J. INT’L LAW 513, 536 (2008).
brought in the People’s Court.\textsuperscript{65}

Therefore mediation is voluntary in theory, but official state policy emphasizes mediation as the preferred mode of dispute resolution.\textsuperscript{66} Judicial personnel will try to mediate with the parties to persuade them to reach a compromise. Mediation decisions are legally enforceable, issued as formal court decisions which the parties sign.\textsuperscript{67} Court-enforced mediation has been a highly successful means of dispute resolution in China. For instance, in 2006, about 56 percent of civil cases of first instance in China were solved through mediation.\textsuperscript{68} Court mediation is available in all areas except administrative litigation.\textsuperscript{69}

\section*{B. Litigation}

Litigation, including administrative litigation, has become an increasingly common means of resolving disputes in China. While litigation was virtually nonexistent in 1979, the total number of cases of first instance equaled 3 million by 1992, and 5 million by 1996.\textsuperscript{70} More recent numbers indicate 8.1 million cases that were heard in 2006.\textsuperscript{71} While litigation has increased in the past two decades, mediation has decreased over the same time period.\textsuperscript{72} Part of this shift may be attributed to a change in society’s attitudes in favor of more formalized methods of dispute resolution and greater acceptance of litigation as a legitimate means of addressing and resolving conflict. Some theorists also argue that the shift towards litigation can be attributed to a greater assertion of individual rights in the context of a market economy including the protection of newly accumulated wealth and a greater willingness to sue among the Chinese.\textsuperscript{73} Litigation has thus become more socially acceptable.

\begin{footnotesize}
\begin{itemize}
\item[65.] \textit{Brown}, supra note 52, at 22.
\item[66.] \textit{Goh}, supra note 60, at 133.
\item[68.] State Council Information Office, supra note 64.
\item[69.] \textit{Brown}, supra note 52, at 23.
\item[70.] \textit{Peerboom}, supra note 53, at 7.
\item[71.] \textit{Liebman}, supra note 53, at 4.
\item[72.] \textit{Peerboom}, supra note 53, at 162.
\item[73.] See Andrew J. Green, \textit{Tort Reform with Chinese Characteristics: Towards a ‘Harmonious Society’ in the People’s Republic of China}, 10 \textit{San Diego Int’l L. J.} 121, 146
\end{itemize}
\end{footnotesize}
in a society that has undergone unparalleled transformation in the past three decades.

Better access to lawyers is another important factor that weighs in favor of increased litigation in China. The number of lawyers doubled from 43,000 in 1989, to over 115,000 in 2001. The 1996 Lawyer’s Law has transformed the profession from one made up of public servants supporting a socialist state, to one centered around the best interests of the client and operation under established rules of professional conduct. Similarly, the 1995 Judge’s Law has spurred judicial reform in China to create a more competent professional body of judges with better legal knowledge and training. The quality of court opinions has also improved due to a 2005 notice issued by the Supreme People’s Court that required opinions to contain an accurate description of the facts, evidence, logical arguments and legal reasoning. All of these factors coalesce to form a new legal environment that prompts ordinary citizens to use the courts to resolve their disputes. Still, it must be acknowledged that litigation is most likely regarded as a method of last resort, or at least as a threatening counterweight to mediation that induces parties to take mediation seriously. Mediation and litigation may thus be considered two sides of the same coin. While courts still emphasize mediation as an important means of resolving conflicts, if mediation fails or one party refuses to comply with the terms of the settlement, the other party may seek enforcement or dispute resolution through the courts.

IV. Dispute Resolution in the Sanlu Case

Returning to the Sanlu case, the various approaches taken by the parties that brought suit against melamine producers and dairy companies represent the spectrum of available and unavailable dispute resolution mechanisms in China. Courts facing difficult or sensitive cases often respond with inaction. Courts have long
refused to accept certain classes of disputes related to government decisions and institutional reform, deferring to the other branches of government on tough political issues. Nevertheless, the courts have become a popular forum for airing public grievances including class actions and public interest litigation. Usually, the goal of litigants in such cases is to generate sufficient media attention and public pressure to compel official action. Benjamin Liebman notes that China is “distinct in its extreme reliance on extra-judicial responses to major public disputes in the courts.” In this way, litigation, or at least the act of filing suit, provides a way for plaintiffs to urge some kind of response from the government, even if it does not come from the courts. At first glance, the Sanlu case appears to follow this pattern of using litigation to prompt a non-judicial response to a major public policy issue.

At the same time, the case fits into the category of politically sensitive cases that involve litigants with ties to CCP officials and has attracted much public attention due to the nationwide media coverage and public health implications. Perhaps due to increased pressures and international scrutiny caused by the 2008 Olympic Games, local government officials covered up the deaths and illnesses of victims for months before the scandal erupted. Although dairy producers were receiving complaints as early as December 2007, Sanlu allegedly did not take action until its foreign trade partner Fonterra, a New Zealand dairy firm, notified Beijing in September 2008. Officials then acknowledged that China’s major dairy companies were exempted from government inspections, signaling a complete collapse of the regulatory system. As public anger flared against both dairy producers and government officials and regulators, the central government realized that it needed to

81. Id. at 34.
82. Id. at 35.
take a more proactive stance.86

In the face of mounting public pressure, the initial government reaction was to play the blame game, firing local city officials in Shijiazhuang who allegedly delayed notifying Beijing and colluded with dairy companies in the cover up.87 China's highest-ranking food quality official, Li Changjiang, resigned. Meanwhile, judges and lawyers were pressured by officials not to take on milk-related product liability cases. Courts refused to hear cases brought by private individual plaintiffs.88 Frustrated with the lack of justice and redress through the courts, families of sick children called on the government for other means of relief. These plaintiffs and their attorneys arguably recognized early on that courts would not accept their cases, but wanted to use the threat of litigation to mobilize public attention and exert greater pressure on the central government.

A. Out-of-Court Settlements

In a step towards conciliation under heightened public pressure and media scrutiny, Sanlu and twenty-one other dairy companies sent letters to parents offering settlements of 200,000 yuan for the death of a child, 30,000 yuan for children who suffered kidney stones or acute kidney failure, and 2,000 yuan for less severe cases.89 Around 3,000 families in the city of Shijiazhuang accepted compensation for their sick children. Furthermore, a fund was set up to pay for medical treatment of the children until they reach 18 years of age.90 While some parents accepted these payments, others have complained that the offer does not adequately compensate the harm their children suffered as a result of the tainted milk. One group collected two hundred and fifty signatures from victims' families who demanded long-term health care and medical research

87. Yardley & Barboza, supra note 85.
90. Id.
on their children’s illnesses.\textsuperscript{91}

The first to opt for an out-of-court settlement for the death of a child was a young couple from Gansu province who lost their infant son in May 2008, accepting a 200,000 yuan (USD 29,250) compensation from Sanlu and forfeiting any further rights to sue.\textsuperscript{92} The couple had filed suit in Lanzhou Intermediate People’s Court in Gansu province in October 2008, but the court did not accept the case.\textsuperscript{93} In a \textit{New York Times} interview, the couple’s lawyer attested that the amount of compensation “seems fine” for the parents, who were from a relatively poor province and did not expect a higher amount in damages even if the case had gone to court. The baby’s father, Mr. Yi Yongsheng, is quoted as saying: “I don’t place too much hope in a lawsuit. I just want to ask for justice.”\textsuperscript{94}

The range of behavior among the plaintiffs indicates a split between those who considered the monetary compensation sufficient, partly because they did not expect more from further suit or distrusted the justice system, and those who were dissatisfied with the terms of the settlement and continued to press charges. The former group appears to rely on what Liebman calls an “extra-judicial response,”\textsuperscript{95} accepting payments offered by dairy companies and thereby losing their rights to sue, while the latter group diverges from this approach. This latter group sustained their litigious efforts, bringing various individual civil suits to local courts, as well as a joint class action lawsuit to the Supreme People’s Court, the highest court in the land.

\subsection*{B. Individual Civil Actions}

Hundreds of individual families filed civil suits in the courts against dairy companies such as Sanlu, as well as retailers who sold the tainted milk, to seek compensation for the harm to their children. In late 2009, courts accepted just six of these cases. A hearing on the first case was held in Beijing on November 28, 2009, in which a family from Henan province sought $8,000 in compensation from Sanlu and Longhua, a Beijing-based

\begin{footnotes}
\footnotetext{91}{Wong, \textit{supra} note 88.}
\footnotetext{92}{\textit{CHANNEL NEWS ASIA}, \textit{supra} note 89; Wong, \textit{supra} note 88.}
\footnotetext{93}{Wong, \textit{supra} note 88.}
\footnotetext{94}{\textit{Id.}}
\footnotetext{95}{Liebman, \textit{supra} note 53, at 14.}
\end{footnotes}
A second hearing, initially scheduled for December 9, was postponed to allow defendants more time to investigate the link between the tainted milk and the child’s illness. The delay signals an unwillingness and hesitation on the part of Chinese courts to take on politically sensitive issues without clear guidance or precedent.

C. Potential Class Action Suit

In January 2009, Chinese lawyers filed a class action product liability suit in the Supreme People’s Court in Beijing on behalf of the families whose children died or became ill due to tainted milk. The action sought $5.2 million in damages from twenty-two dairy companies on behalf of 213 children. Some of the plaintiffs included those who had previously filed class actions in Hebei Province High Court and Shijiazhuang Intermediate Court and were rejected. In early March 2009, the Supreme People’s Court announced, contrary to previous policy, that it would accept these cases. However, one lawyer involved in the suit told a reporter that the Court would only be guiding him to the existing compensation plan.

Class action lawsuits are extremely rare in China, as the CCP discourages such suits on grounds that they threaten social stability. The Chinese Civil Procedure Law contains provisions regarding “joint lawsuits,” but the language is overly broad. Article 54


100. Id.

applies when there is a fixed number of litigants; article 55 applies when the number of litigants is indefinite. Furthermore, questions of subject matter jurisdiction arise as to suits filed in the Supreme People’s Court. Under the Civil Procedure Law, the Supreme People’s Court is the court of first instance for matters of national significance and cases it “deems it should try.” The ambiguity of this language indicates that there is much room for discretion and political sway in whether the case is accepted by the court.

In September 2001, before the tainted milk scandal, the Supreme People’s Court issued a notice that it would not accept class actions, at least for the present time. This notice came in response to a series of shareholder derivative suits. The Court accepted such litigation only on the condition that the Securities Regulatory Commission had made an administrative penalty decision. Thus, the highest court of the nation indicated that these joint actions would not be heard until administrative remedies were exhausted. Another obstacle to class actions in China is the weak independence of the judiciary, which means that political pressure on the courts not to accept such suits prevents well-deserving plaintiffs from being heard.

In this way, class actions in China have had limited utility for private litigants aside from the ability to announce their grievances to the public and garner media attention, which serves indirectly to pressure the government to take official action. At the same time, class actions may be useful as a private enforcement mechanism that fills in the gaps of China’s food safety regulation and monitoring system and allows plaintiffs to organize collectively. Increased litigation and the threat of litigation alter the cost-benefit analysis of manufacturers and distributors of food products and incentivize them to exercise greater care in food safety. How the Supreme People’s Court will treat the class action in the present case is yet to be seen. At this point, Sanlu is poised to become a landmark case that may introduce new forces in litigation and alter the landscape

102. Id.
of the Chinese legal system forever.

D. Criminal Proceedings

While litigation is still a relatively new method of dispute resolution in civil cases, criminal trials are quite common. In China, 99% of criminal cases result in conviction. Furthermore, the death penalty is ever-present in China, a country known to carry out as many as 8,000 executions per year. It is clear that the government is more comfortable in the role of prosecutor, carrying out hard-handed justice and cracking down on wrongdoers. However, when official government actions are under question, the judiciary is much more reluctant to intervene.

In the present case, Tian Wenhua, the former chairwoman of Sanlu and CCP appointee, was arrested and tried in a Hebei court in the first round of hearings. Tian pleaded guilty to selling tainted formula, acknowledging for the first time that the company knew of melamine in the milk for months before alerting local officials. She was fined $3 million and sentenced to life imprisonment. Tian is one of the highest-ranking corporate executives ever to go on trial in China. She has since appealed her sentence, announcing her belief that she has been made a scapegoat. In an interview with a London paper, her lawyer sharply criticized the Chinese authorities and suggested that charges against Tian were designed to shield local government officials from culpability. In March 2009, the Hebei Higher People’s Court affirmed the lower court’s ruling, rejecting Tian’s appeal.

The heaviest sentences were handed down to Zhang Yujin, whom the government labeled one of the “principal criminals” in the scandal, and dairy producer Geng Jinpin, who were both sentenced to death. Zhang sold 600 tons of melamine-laced

105. The People’s Court, supra note 55.
106. Id.
108. Id.
protein powder to dairy companies. Two men who sold tainted protein powder were also given life sentences. As victims' families protested outside the courthouse in Shijiazhuang, one parent of a child who had kidney stones after drinking tainted formula commented that the defendants were scapegoats and that the government should take responsibility.

The government's conduct in the criminal proceedings relating to the Sanlu case reveals its desire to appear to the Chinese public that it is taking a proactive stance on the matter. An attorney in a Chinese law firm that was not involved in the case commented that "after the government organized compensation and sentenced two dairy company executives to death over the matter, 'they think they've done what needs to be done.'" However, incarcerating corporate executives and executing melamine dealers does only so much to mitigate the public's anger over the government's involvement in the cover up. As victims' families demand greater justice through the courts in the form of class actions or otherwise, it will become increasingly difficult for the Chinese government to deny them access.

On the one hand, the government's response to the tainted milk issue was a manifestation of the available remedies within China's legal system, and to a certain extent, one that was expected by the plaintiffs (expressed in their statements indicating low expectation of money damages from and inefficiencies of a lawsuit, even if successful). On the other hand, plaintiffs found that their rights to bring forward civil claims were denied by the courts due to so-called preemption. Steve Dickinson views the government's response to the Sanlu case and subsequent resolution through criminal proceedings as "typically Chinese." According to Dickinson, the predictable pattern was that: (a) Sanlu was forced into a government-supervised bankruptcy; (b) an industry wide

---

112. Id.
113. Id.
compensation fund was established and managed by the government; (c) individuals considered responsible were subject to criminal sanctions; and (d) civil tort lawsuits against Sanlu were "rejected on the ground that the public criminal and bankruptcy proceedings preempted the private litigation process." \[116\]

In particular, Dickinson noted the use of harsh criminal sanctions against company executives for food safety violations as peculiar to China and virtually nonexistent in the United States or Europe. According to Dickinson, "private civil action is considered inadequate" where a widespread public health hazard exists, and that from the Chinese perspective, a public issue "requires a public response." \[117\] While this may be true as a matter of government policy, Dickinson’s view says nothing about the point of view of individual plaintiffs, who seek redress for the harms suffered by their children and who are enlisting the assistance of willing attorneys to push the courts for a different kind of response. The recent spate of individual civil suits brought by injured families attests to a growing desire among Chinese plaintiffs to have their day in court and to seek legal remedies when political action is unresponsive or inadequate. In short, litigation will be increasingly sought as a way for individuals to not only air their grievances, but also assert their rights and obtain remedies in China’s courts.

Further, the threat of liability in the form of massive money damages will serve as a deterrent to companies that do not comply with food and product safety regulations. It will also act as an enforcement mechanism, and change the incentive structure for government and corporate officials to act more in line with food safety regulations instead of colluding to cover up negative information, and to increase transparency in the system of food safety administration overall. These are desirable considerations for change in China’s legal system. They will better balance the needs of potential plaintiffs with those of the central government to more effectively regulate food safety across the country and rein in corruption at the local level.

116. Id.
117. Id.
V. Conclusion

The Sanlu case reflects a shift in the Chinese legal system to one that increasingly accepts and seeks civil dispute resolution through the courts. While Chinese society is generally more familiar with formal proceedings against criminal defendants prosecuted by the government, this is true to a lesser extent in the context of civil proceedings, such as tort actions brought by private parties. Though China is far from becoming a highly litigious system like the United States, the legal landscape is manifesting a greater willingness of plaintiffs to push for judicial remedies, despite uncertainty as to whether it will offer greater compensation for harm suffered. In many ways, litigation presents a better avenue for presenting and redressing plaintiffs' concerns in a public forum and holding wrongdoers accountable in a way that changes their behavior. The Sanlu case demonstrates the willingness of victims' families and their attorneys to test the limits of the legal system. The Chinese government will soon need to respond to the changing demands of a society that is increasingly asserting their rights, and to plaintiffs who are calling for their day in court.
***