

If a foreigner gets killed or injured in the high-speed train collision in Wenzhou, China

Description

China's deadly Wenzhou train crash has passed for more than a year, leaving still a few dozens of people in agony awaiting for compensation from Chinese Ministry of Railway. For most of those whose lives are claimed in the incident, their relatives should have accepted the compensation of RMB 915,000. But not all of them.

I am retained recently by the American family that has lost the parents and has one son seriously injured to participate in negotiation with the task force assigned to take charge of compensation for those victims of the incident. Yesterday, two rounds of meeting were held in the Hollyear Hotel at Shanghai railway station.

The negotiation is cold and tough for my clients.

1. Applicable Laws

Clients wanted to have a case in United States in order to take advantage of the generous protection availed to plaintiffs in personal injury cases under American tort laws. Due to lack of facts to establish jurisdiction in USA, clients now moved to China to face up to the legal challenges here.

Under Chinese laws on choice of law/conflict of laws rules, in a tort case, the *lex loci delicti* principle applies which means that a tort case shall be governed by the laws in the place where the tort occurs. Further in judicial practice, Chinese laws differentiate the place where the tortious misconduct occurs and the place where the result or consequence of tortious misconduct occurs, and the laws in both places can be chosen as applicable law.

Since the jurisdiction has now moved to China, Chinese courts will for sure choose the Chinese laws as the applicable law for the case, even though we may raise challenge or argument to that, but we know our efforts will go nowhere.

We finally decide to argue for and defend client's interests under Chinese legal framework in respect of personal injury and death. The following information discussed below in the post is based on Chinese laws.

2. Why RMB 915,000 for All the Dead

In the opening of the first negotiation meeting, the representative on the other party introduced how the compensation work has been done and how reasonable and generous the package they offer is. The principle of "in compliance with Chinese laws" is reiterated in his introduction. Ironically, what they have done are in clear incompliance with Chinese tort laws.

Any simple mind will wonder about why the same amount of RMB 915,000 is offered to all the dead. Is

it the case that everyone of the dead is in the same conditions at the time of their death? How could it be true! If the compensation is to be made in accordance with laws, the facts about any of those dead shall be in first place be found out, and such facts can be found out. It will be an onerous task to complete but for the sake of justice, it is worth it.

The task force said that the same amount practice is based on Chinese Tort Liability Law which provides in its Article 17 that in the case where more than one persons are killed by a tortious act, the damages for each of the dead MAY be the same. I need to clarify the terms I am using here. Death compensation as used above refers to the whole package covering all the items of compensation including loss of income, medical cost, spiritual damages, nursing care fee, cost of raising dependents as well as the death damages. Death damages is only one item of death compensation.

That said, it is very clear that the amount of RMB 915,000 is not based on solid legal ground, mistakenly substituting the term of death compensation for death damages.

While the RMB 915,000 will be largely reasonable for any Chinese nationals, it is apparently a humble sum for a person living in USA. That is the reason why the family of the foreigners dying in the crash has refused to accept that offer.

3. Key Point in Dispute under Chinese Laws

Given the steep injustice of accepting the offer of RMB 915,000, we are trying to look for legal ground to support our request of applying USA economic data in computing those compensation items in particular death damages.

Under Chinese Supreme Court's interpretation on personal injury laws, the death damages is calculated by multiplying the amount of the per capital average disposable income of the immediately last year in the place of the forum court by twenty (years). In the same judicial interpretation, it is provided that if the plaintiff can prove the economic standards in the place of his or her domicile or habitual residence are greater than those in the place of forum court, the death damages may be calculated based on such greater economic standards.

For clients, their habitual residence is in NY and NC in United States, they need to apply the economic data in these two places. According to clients, the per capital average disposable income in New York in the year of 2010 is USD 38241, or equivalent of RMB 243,465 (1 USD=6.3666 RMB). Death damages for the deceased of an age of below 60 shall be the amount of said disposable income multiplied by 20, which leads to RMB 4,869,303 for each of the parents, far more than the figure offered by the government.

Given the huge difference, the representative of the task force briefly dismissing the argument on this point, firmly stating that there is no room for talk over the RMB 915,000 because this is set for all the dead and cannot be changed for any specific person.

4. Equitability, Fairness and Justice

The negotiation seems to go nowhere beyond what they have set already. Their stone-hard attitude denotes dismay and even despair on the part of the clients. But one will naturally ask out of their instinct where the fairness and justice is now.

The principles of equitability and fairness is explicitly provided in Chinese civil laws. Can these principles play a positive role in the settlement of the compensation? This will probably be the last straw at law that the victims can hold on to.

Apparently, it may seem unfair to calculate the compensation based on the economic data of any one side. The RMB 915,000 is far from fair to the American family, and on the other hand, one may equally claim that the application of American economic data may be too much for the other party, especially when the wrongdoer is an ordinary Chinese citizen. In such a situation, it may be nothing but fair for the contending parties to make concession or compromise or meet each other half way.

Now the question is: do they have a correct concept of fairness and justice in their hearts?



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Author
admin

Shanghai Landing Law Offices