

Chinese Civil Law

Commentary

von

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1. Auflage

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VI. Exclusion and Reduction of Liability

operator's liability. Some commentators argue that the third party's act only excludes the tortfeasor's fault, which is however irrelevant in no-fault liability; therefore, art. 28 LTL does not apply to no-fault liability.¹¹⁵ This line of argument obviously fails to consider the issue of causation.

3. Force Majeure

Force majeure constitutes a general liability-excluding ground pursuant to art. 29 LTL, except otherwise provided by the law. The exception mentioned in art. 29 LTL is intended to only be applicable to no-fault liability set out in arts. 70, 72 and 73.¹¹⁶ For the purpose of liability exclusion, the act of God should be solely causal for the damage. If the defendant's act has caused or aggravated the harm, it is easy to understand that he is to that extent proportionally liable. Unlike the Contract Law, the LTL does not provide a definition for force majeure. As a result, the scope of force majeure is still subject to controversy in China.¹¹⁷ The discussion resembles, in its content, one in contract law (*supra* Chapter 7 at 3).

4. Self-defence and Necessity

Self-defence is another liability-excluding ground pursuant to art. 30 LTL, as long as the measure does not exceed the adequate level. Otherwise, the self-defending party is liable for the damage that could have been avoided in the case of having taken adequate measures. It is to note that self-defence is permissible with respect to imminent danger both to the human body and to property.¹¹⁸

Art. 31 LTL allows the defendant to invoke necessity as a defence to his liability. If damage is caused by a conduct of necessity, the person causing the occurrence of danger is liable. If the danger is caused by a natural cause, the liability of the person causing the damage is either exempted or reduced to an appropriate amount of compensation. Should the measure taken for necessity be improper or exceed the necessary level and thereby causing damage, the person causing the damage is correspondingly liable.

5. Assumption of Risk

Acting at one's own risk was a frequent discussion topic during the legislation process, but in the end was left out in the final text of the LTL. It was argued that this defence may only be found in model laws such as the Restatement of Torts, DCFR and Principles of European Tort Law, but not in any national legislation.¹¹⁹

¹¹⁵ Wang Liming (2010/b), 161.

¹¹⁶ Ding Guangyu/Jin Qinan citing Liang Huixing 34; Koziol/Zhu, 345.

¹¹⁷ Zhang Mo, 463.

¹¹⁸ Zhang Mo, 464–465.

¹¹⁹ Wang Shengming, 131.

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Chapter 11. General Provision on Tort Liability

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I. Background

Since the concept of general provision of tort liability was discovered by Chinese lawyers for the first time in 2001¹, this problem has given rise to a (in its scale) impressive discussion in the legal academic circle in China. This issue is not only of theoretical value, but has also great practical implication in that it determines how courts are to identify new types of torts. This is why this book dedicates a brief chapter to this topic.

¹ *Zhang Xinbao* (2001), 42-54.

- 2 Early on, commentators in China reached a consensus that it is impossible to explicitly enumerate all conceivable types of torts in a single statute. New types of torts arise over time and the legislature is unable to keep pace with the development and to timely come up with appropriate statutory solutions. Thus, the ideal model for the LTL would be a model consisting of a general provision on tort liability plus a list of established types of torts. The central question in this context is how to frame such a general provision. From this starting point, the issues of the definition, nature, normative function, and legislative approach to such a general provision were heatedly debated in the course of reshaping tort law in China in the last decade. As a result, the wording of the designated general provisions in the drafts of the LTL has undergone amendments several times. In the draft of 23rd September, 2008 the wording states, “*The one who intentionally or negligently infringes upon another’s life, health, dignity, freedom, reputation, likeness, privacy, rights in rem, intellectual property rights, or other rights and interests, shall bear tort liability*”. This draft was criticised for not mentioning unlawfulness and harm and the enumeration of rights being incomplete.² Thus, the draft of 16th October, 2008 changed the wording to “*The one who intentionally or negligently causes damage to another’s following civil rights and interests, shall bear tort liability: (1) personal rights, such as the right to life, to health, to name, to likeness, to reputation, and to privacy; (2) status rights, such as custodial rights, and right to be fostered (被抚养权); (3) rights in rem, such as legal ownership, easement, secured rights in rem; (4) intellectual property rights, such as copyrights, trademark rights, and patent rights; (5) other civil rights and interests.*” The pertinent language was again reduced to “*The one who commits tortious acts, shall bear tort liability*” in the draft of 4th December, 2008 and to “*The one who infringes upon civil rights and interests, shall bear tort liability.*” in the draft of 22nd December, 2008.
- 3 The different fashions to frame the general provision in the LTL reflect the controversy as to which elements amount to a general provision governing tort liability. The first question to be solved in this context is the definition of a general provision in tort law. In this regard, a distinction was made in China between a comprehensive general provision (全面的一般条款; 大的一般条款) and a limited general provision (有限的一般条款; 小的一般条款) in the pertinent discussion. The so-called comprehensive general clause refers to a clause capable to provide the basis for all tort claims, irrespective of the attribution principle (fault-based liability or no-fault liability), as well as the forms of relief (compensation, injunction etc.), while other tort law provisions only have the function to interpret and concretize the application of this clause.³ A limited general clause is deemed to only cover liability for compensation caused by one’s own misconduct, namely, the fault-based tort liability for compensation.⁴ Art. 1:101 of the Principles of European Law⁵ is regarded in China as an example of a comprehensive general

² Yang Lixin (2009), 2–3.

³ Zhang Xinbao (2001), 42.

⁴ Yang Lixin (2003), 2.

⁵ Art. 1:101. [Basis Norm] (1) A person to whom damage to another is legally attributed is liable to compensate that damage.

(2) Damage may be attributed in particular to the person

a) whose conduct constituting fault has caused it; or

b) whose abnormally dangerous activity has caused it; or

II. Model in the LTL

provision, while art. 823 of the German Civil Code⁶ is deemed as an example of a limited general provision.⁷

II. Model in the LTL

Before the codification of the LTL the issue of whether art. 106 para. 1 GPCL: “A 4 citizen or legal person who through his own fault infringes upon the state, collective property, or upon another person’s property or harms another person, shall assume civil liability.” constitutes a general provision was already subject to a heated debate.

The enactment of the LTL did not put an end to this issue. On the contrary, a 5 new wave of controversy started around the question of whether the LTL contained a general provision and which clause constitutes such a provision. Arts. 2, 6, and 7 were generally considered as able to serve the function as a general provision:

Art. 2: “*The one who injures civil rights or interests has to bear tort liability according to this law.*”

For the purpose of this Law, “civil rights and interests” shall include personal and property rights and interests, such as the right to life, the right to health, rights associated with names, reputational rights, honorary rights, the right to one’s image, the right to privacy, the right to marital autonomy, the right to guardianship, ownership rights, usufruct, collateral rights, copyrights, patent rights, exclusive rights to use trademarks, discovery rights, equity rights, and inheritance rights.”

Art. 6: “*Where an actor is at fault in infringing another party’s civil rights and interests, it shall bear tortious liability.*”

Where an actor is presumed to be at fault by law and is unable to prove its innocence, he shall bear tortious liability.”

Art. 7 “*Where an actor infringes upon another party’s civil rights and interests and the law provides that it shall bear tortious liability regardless of whether or not he is at fault, such provisions shall apply.”*⁸

So far, in an attempt to construe these clauses, a number of theories have been 6 put forward⁹: some assume that both art. 2 para. 1 and art. 6 para. 1 are general provisions, while others believe that art. 2 para. 1, art. 6 para. 1, or art. 7 constitute a general provision. In particular, it is argued that art. 2 para. 1 LTL is incapable of serving as a genuine general clause because art. 2 para. 1 fails to set out attribution principles and to indicate concrete legal consequences, so that tort liability can only be determined in conjunction with other regulations of the LTL.¹⁰ According to this view, art. 2 para. 1 is merely a reference clause and, standing alone, unable to serve

c) whose auxiliary has caused it within the scope of his functions.

⁶ Section 823 [Liability in damages]

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property, or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

⁷ Yang Lixin (2009), 2.

⁸ LexisNexis Translation.

⁹ For a summary of the opinions, see Zhou/Ding, 70–71.

¹⁰ Ge Yunsong (2010), 39–40.

as the basis for tort claims.¹¹ In contrast, art. 6 para. 1 stipulates the attribution principles and can be drawn on to determine tort liability.

III. Rights v. Interests

1. Terminology

- 7 Art. 2 LTL employs the terminology “civil rights and interests” (民事权益). Thereby, it deals with a concept that has already been followed in the GPCL.¹² This term has so far triggered two fundamental questions.
- 8 The first one is whether the term “rights and interests” (权益) and the term “rights” (权利) are two different legal figures and if this is the case, how to distinguish one from the other. Again, the scholarly opinions are split on this issue.¹³ Some assume that the term “rights and interests” is broader than that of “rights” and rights in the sense of art. 2 LTL only refer to codified subjective rights, while interest deals with a legal position that has not yet been explicitly acknowledged as a statutory right, but nonetheless merits legal protection. Such interests are also called legally protected interests (法益). Not codified personality rights, the interests of unborn baby, interests of the deceased, interests in fair competition, ideal interests in a certain object, and pure economic loss are cited as examples of legally protected interests.¹⁴ In the judicial practice, the SPC has actually recognized the existence of non-codified rights on a case-by-case basis. Some deny the existence of legally protected interests beyond codified rights by arguing that the holder of such interests may not actually dispose of such interests.¹⁵ Furthermore, such interests may not be infringed upon by negligence, but only by intent.
- 9 The second one is what sort of civil rights and interests are exactly covered by art. 2 LTL. This question is actually interrelated with the first one. In terms of civil rights, art. 2 para. 1 LTL has provided a list. However, it is unclear whether this enumeration is exhaustive and covers only absolute rights. The majority of commentators believe that the list is non-exhaustive,¹⁶ while a minority view holds that the list is to be construed as exhaustive in order to construct a functioning clause to deal with non-codified interests following the example of the German Civil Code (*infra* at 3).¹⁷

2. Determination of Protected Interests

- 10 Speaking from a practical point of view, a general provision is crucial primarily in the case where the affected interest claimed by the plaintiff is not explicitly protected by a statute. It is generally acknowledged that, in order to be protected against infringement by virtue of tort law, such interest has to meet a certain threshold. The reason is that, lacking a statutory provision, a third party is unable to take notice of the existence of the claimed interest and to adjust his conduct to

¹¹ Zhou Yuhui/Ding Haijun, 70 with further reference.

¹² Liang Huixing, 6–7.

¹³ Liu Shiguo, 16.

¹⁴ Liu Shiguo, 18; Zhang Xinbao (2005), 209.

¹⁵ Liu Shiguo, 17–19.

¹⁶ Ge Yunsong (2010), 38–39.

¹⁷ Ge Yunsong (2010), 44–45; Wang Cheng, 68.

IV. Case Groups

avoid interference therewith. The imposition of a duty of care by tort law *ex post* is not justified for it was not foreseeable at the time when the third party committed his conduct. Furthermore, the expansion of the interests protected by tort law beyond the scope of statutorily conferred rights may inevitably restrict the freedom of action of anyone else. Thus, to strike a reasonable balance between the protection of the plaintiff and the freedom of action of the defendant, a general provision should be equipped with the function of assisting a judge in reaching a right decision, where both sides have merits. Judged from this standard, all the above-mentioned clauses in the LTL and the GPCL fail to fulfill the function of a general clause. Therefore, more and more scholars propose to adopt the German model to introduce a genuinely functioning general clause.¹⁸ That means, an interest is granted legal protection where it has not yet been statutorily recognized only when it meets one of following prerequisites: (1) either it violates a protective statute (art. 823 para. 2 German Civil Code) or (2) constitutes an intentional and conscientious tort (art. 826 German Civil Code).

Alternatively, another doctrine considers the following factors as relevant while 11 answering the question of which interests are protected from tortious actions based on art. 2 para. 1 LTL: (1) if these interests are protected by legal regulations; (2) if the alleged wrongdoer has acted with intent; (3) if there is a bond of reliance between the alleged wrongdoer and the injured, so that the injured can assume that there will be no injurious acts; and finally, (4) the freedom of action of third parties and the community is to be adequately considered.¹⁹

IV. Case Groups

It is still uncommon in China to summarize case groups for general provisions 12 based on case law to facilitate law application. The discussion below addresses several cases heatedly debated in legal writings, which are supposed to be solved by the general provision of tort law:

(1) Pure economic loss (纯粹经济损失). In China, the concept of pure 13 economic loss began to draw attention in the legal circle only since the last decade. The previous ignorance of this problem is attributed to the fact that art. 106 para. 2 GPCL is deemed broad enough to cover pure economic loss as a type of legally protected interest.²⁰ The recovery of pure economic loss has already been warranted by some statutes and judicial interpretations, such as art. 44 PQL (*infra* Chapter 12 at 52).²¹ Nevertheless, the relevant judicial practice is rather close to the German model in that compensation is awarded only in cases where a protective statute is violated. In absence of such a protective statute, the defendant must have acted intentionally and conscientiously.²² Frequently, compensation claims are denied by citing other reasons, such as lack of direct causation or lack of fault, without mentioning the concept of pure economic loss. To avoid

¹⁸ Ge Yunsong (2010), 42, 44; Wang Cheng, 66–70; Wang Guanxi, 50–53; Zhang Gu, 27–28.

¹⁹ Xi Xiaoming, 26–27.

²⁰ Liang Huixing, 7.

²¹ Ge Yunsong (2009), 703–705.

²² Ge Yunsong (2009), 709.

unreasonable limitations on an individual's freedom, scholars propose to exclude recovery for pure economic loss under no-fault liability.²³

- 14 (2) Contractual rights (合同债权). The protection of contractual rights by tort law is actually a subcategory of pure economic loss. A breach of contract caused by the interference of a third person is deemed a tort under Chinese law, only when the third party is aware of the existence of the contractual relationship and the third party's act violates public policy.²⁴ For example, someone is only liable for inducing a breach of contract, if he offers a higher price for a commodity, although he is aware that the seller has already agreed to sell it to the buyer when he commits this act, thus, intending to hurt the buyer.
- 15 (3) General right to an individual's protection of personality (一般人格权). Under Chinese law, some personality rights are explicitly protected either by the GPCL, the LTL, or other statutes such as name, reputation and likeness. However, the concept of a general right to an individual's protection of personality has not yet been codified. This poses the question of whether other personality interests are also eligible for legal protection provided by art. 6 para. 1 LTL. Again, some favour the German approach and propose that legal protection can only be granted by weighing the interests of the parties after taking into account consideration of the particular circumstances.²⁵
- 16 (4) Interest in fair competition/fair competition right (公平竞争利益/公平竞争权). The Chinese Anti-Unfair Competition Law (AUCL) protects business operators against unfair competition practice, which includes passing-off, misrepresentation and fraudulent advertisement, etc. As in the case involving fraudulent advertisement, no absolute right is infringed upon, but only certain economic interests. Some believe that, in such cases, the nature of economic interests is the interest in fair competition or fair competition right. This discussion is however only of theoretical value, as it does not provide the judiciary with a viable tool to determine new types of unfair competition conduct, which is not expressly enumerated in the AUCL.
- 17 (5) Wrongful birth. Wrongful birth (错误出生/错误生命) may take different forms²⁶ and in China primarily refers to the birth of a handicapped child, the handicap of whom has not been identified because of erroneous medical diagnosis. So far, the attitude of the Chinese courts toward actionability of a parent's claim to compensation are inconsistent. In some cases the plaintiff was able to recover damages and, in other cases, the claim was rejected with the argument that there is no codified right of the parents having been infringed.²⁷ In the case where compensation is granted, courts argue in different ways. Most see the basis in the parent's right to bearing and rearing better children (优生优育权),²⁸ namely, that a parent is entitled to choose to abort an unhealthy embryo, while some construe it as a liability for medical damage²⁹. A scholarly interpretation

²³ *Ge Yunsong* (2010), 46–47.

²⁴ *Ge Yunsong* (2009), 731.

²⁵ *Ge Yunsong* (2010), 42–43.

²⁶ *Ding Chunyan*, 682–684.

²⁷ *Yang Lixin/Wang Lisha*, 15–16; *Zhang Hong*, 54–55.

²⁸ *Zhang Hong*, 57.

²⁹ *Ding Chunyan*, 694.