

Evolution of Chinese Tort Law in the Post-Codification Era: A Comparative Study Based on Children's Tort Liability

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Abstract

The Chinese Civil Code that was promulgated in 2020 has basically incorporated the pre-existing tort law without significant amendments. This raises the question as to how deficiencies identified in the past will be remedied and how tort law will further evolve. This paper tries to offer answers by examining children's tort liability, which is the focus of the first judicial interpretation on torts issued in September 2024. The analysis produces

Die Entwicklung des chinesischen Deliktsrechts nach der ZGB-Kodifikation – Eine vergleichende Untersuchung zur Deliktshaftung von Kindern — Das im Jahr 2020 verabschiedete chinesische Zivilgesetzbuch (ZGB) hat im Wesentlichen das vorbestehende Deliktsrecht ohne wesentliche Änderungen übernommen. Dies wirft die Frage auf, wie die in der Vergangenheit festgestellten Mängel behoben werden und wie sich das Deliktsrecht weiterentwickeln

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two primary findings. First, the Chinese regime of children's tort liability is characterized by a unity of liability in respect of a minor and his or her parents. The scheme exhibits similarities with French law, despite huge differences between the two countries in terms of liability insurance and medical insurance. German tort law, which follows completely different approaches in a number of key aspects, is, however, treated as the primary role model in China. Secondly, a discrepancy exists between legal scholarship and the judiciary in the perception of what constitutes deficiencies in tort law. In putting more emphasis on fundamental legal concepts and doctrinal coherence, Chinese scholars are often critical of the current regime governing children's tort liability. By contrast, the judiciary does not view problems that can be solved by pragmatic adjudication guidance as deficiencies. The judiciary, which is the driving force for any improvements of the Code by virtue of its power to enact judicial interpretations, prioritizes pressing issues in practice rather than the treatment of academic concerns. The overwhelming orientation on German law might also have complicated the reform of the relevant norms in the CCC.

wird. Dieser Beitrag versucht, darauf Antworten zu geben, indem er die deliktische Haftung von Kindern untersucht, die im Mittelpunkt der ersten gerichtlichen Auslegung des Deliktsrechtsbuches des ZGB vom September 2024 steht. Aus der vorliegenden Untersuchung ergeben sich zwei zentrale Befunde. Erstens ist das chinesische Konzept der Haftung für Deliktshandlungen von Kindern durch eine einheitliche Haftung des Minderjährigen und seiner Eltern gekennzeichnet. Das Konzept weist Ähnlichkeiten mit dem französischen Recht auf, obwohl zwischen den beiden Ländern große Unterschiede in Bezug auf Haftpflicht- und Krankenversicherung bestehen. Das deutsche Deliktsrecht, das in einer Reihe von zentralen Aspekten völlig andere Ansätze verfolgt, wird jedoch in China als primäres Vorbild behandelt. Zweitens besteht eine Diskrepanz zwischen Wissenschaft und Justiz in der Wahrnehmung, was Defizite im Deliktsrecht ausmacht. Die Wissenschaft legt mehr Wert auf die grundlegenden Rechtsbegriffe und die dogmatische Kohärenz und steht der derzeitigen Regelung der deliktischen Haftung von Kindern oft kritisch gegenüber. Im Gegensatz dazu sieht die Justiz Probleme, die durch pragmatische Leitlinien zur Entscheidungsfindung gelöst werden können, nicht als Defizite an. Die Justiz, die aufgrund ihrer Befugnis, gerichtliche Interpretationen zu erlassen, als treibende Kraft für Verbesserungen des Gesetzbuches gilt, räumt drängenden Praxisfragen Vorrang vor der Behandlung akademischer Anliegen ein. Auch die überwiegende Orientierung am deutschen Recht könnte die Reform der einschlägigen Normen des ZGB erschwert haben.

I. Introduction

Tort law is codified as an independent book in the recently promulgated Chinese Civil Code (hereafter CCC).¹ Due to time constraints, the CCC has retained most of the content of the previous Tort Liability Law (hereafter TLL) enacted in 2007.² For some commentators, the Chinese lawmakers have thereby missed a historic opportunity to create a cutting-edge civil code for the new century.³ In light of the difficulties in

amending a civil code on a large scale, questions inevitably arise as to what will happen to the flaws identified in the past and how Chinese tort law will further develop. Three years after the CCC has taken effect, an initial response was offered by the "Judicial Interpretation regarding the Book on Torts of the CCC" (hereafter Interpretation on Torts) promulgated by the Supreme People's Court (hereafter SPC) on 25 September 2024.⁴ This interpretation contains 26 provisions in total and constitutes the first round of

1 中华人民共和国民法典, English translation available at <<https://www.wipo.int/wipolex/en/legislation/details/21757>>.

2 中华人民共和国侵权责任法, English translation available at <<https://www.wipo.int/wipolex/en/legislation/details/6596>>; Yuanshi Bu, Introduction, in: Yuanshi Bu (ed.) Chinese Civil Code – The Specific Parts, 2023, pp. 1–2; Yuanshi Bu, Neuerungen und unterbliebene Verbesserungen im Deliktsrecht: Muster der Entscheidungsfindung im Kodifikationsvorgang, in: Yuanshi Bu (ed.), Der Besondere Teil der chinesischen Zivilrechtskodifikation, 2019, p. 230.

3 Cf. Ken Oliphant, Uncertain Causes: the Chinese Tort Liability Law in Comparative Perspective, in: Lei Chen/Remco van Rhee (ed.), Towards a Chinese Civil Code Comparative and Historical Perspectives, p. 407, holds that art. 10 Tort Liability Law (now art. 1170 CCC with the same wording), which codifies joint and several liability in cases of uncertain causes following the German model of art. 830 para. 1 sent. 2 German Civil Code, lags behind the international cutting-edge approach.

4 最高人民法院关于适用《中华人民共和国民法典》侵权责任编的解释（一），English translation available at <<https://www.lawinfochina.com/display.aspx?id=43604&lib=law>>.

improvements to tort law launched in the post-codification era.

Strikingly, almost half of this interpretation deals with the liability of children,⁵ which demonstrates the urgent need of lower courts for guidance in dealing with relevant disputes. Indeed, a large number of judgments has been rendered in relation to children's tort liability since the CCC has entered into effect.⁶ Equally remarkable is the unusually high regulatory density featured in the CCC with regards to children's tort liability. There exist a total of six relevant norms in this area, with arts. 1169, 1189, 1190 CCC related to children as tortfeasors, and arts. 1199–1201 CCC related to children as victims. The latter three norms are also relevant since in such cases the direct tortfeasors are often themselves children. At the same time, to foreign observers, details of the Chinese model governing children's tort liability lack coherency and need at least clarification,⁷ if not even an overhaul.⁸ In domestic legal scholarship, the regime of children's tort liability is portrayed as having been defective for a long time. There is a constant call for reforms following European models – in particular the German one – in legal writing in China. After all, in the drafting process of the

TLL, Chinese lawmakers had already opted for German law as its major role model, although representative authors of the Draft Common Frame of Reference (DCFR) and the Principles of European Tort Law (PETL) were also invited as experts.⁹

Against this background, it seems promising to examine children's tort liability and thereby probe the paths which the further evolution of Chinese tort law can be expected to take. This perspective is chosen not only because of the great importance Chinese lawmakers and judiciary attached to this issue, but also because children's tort liability is connected with other fundamental tort law issues such as fault, comparative fault and the liability of multiple tortfeasors. This study explores the deficiencies that were discovered with respect to children's tort liability, how courts cope with them, the existing barriers to reform, and the extent to which improvement of the relevant law is still feasible. To precisely map Chinese tort law, it is indispensable to include judicial practice. For this reason, the author has reviewed around 400 relevant court decisions in preparing this paper, especially those reached by appellate courts, i. e. intermediate courts onwards.¹⁰ Nevertheless, the present work is not designed as empirical research, as the situations to be analysed are too diverse to be covered by one study. In addition, Chinese regulations and practice will be compared with rules in German and French law, as well as the DCFR and PETL. Given the abundant existing comparative studies on liability of children in Europe, references to European jurisdictions and model laws are kept brief in this contribution.

Part II of this paper first looks into key aspects and criticism of the basic regime established by art. 1188 CCC relating to tort liability of children and their parents. Subsequently, Part III reviews the extended liability regime in cases where the supervisory duties are delegated by the parents to a third person, where the damage arises in educational institutions, or where a child has been instigated or assisted in the wrongdoing; alleged shortcomings are highlighted. It also assesses the impact of insurance on the adjudication pattern of courts when educational institutions are insured against third-party liability. This question is not examined with regards to private

5 In this paper, the term “children” refers to natural persons under the age of 18 and is used as a synonym for minors. Although one may argue that art. 1188 CCC also covers adults without capacity or with limited capacity, children's liability constitutes by far the most significant field of application of this norm based on the published court judgments and research in academic literature. There are almost no other cases where art. 1188 CCC is applied outside of children's liability. A search with the keywords “mental illness” (精神病) and “mental disability” (智力障碍) within 8326 cases related to art. 1188 CCC yields only 53 matches, in which the wrongdoers are sometimes both minors and suffer from a mental illness or disability. That means cases involving adults lacking full civil capacity make up less than 1 % of all the cases involving art. 1188 CCC.

6 The number of relevant judgments and in parentheses the number of cases involving liability insurance yielded from a search in the database <www.chinalawinfo.com> on 21 February 2025: 1 related to art. 1169 para. 2 CCC; 8354 (449) related to art. 1188 CCC; 213 (9) related to art. 1189 CCC; 1231 (139) related to art. 1199 CCC; 2928 (339) related to art. 1120 CCC; and 386 (25) related to art. 1121 CCC. There are some overlapping cases that are related to several provisions and that have been counted multiple times. A small number of hits are irrelevant as they were listed as relevant due to mistakes in the data collection.

7 Wolfgang Wurmnest, *Die Regelungen zum Deliktsrecht im Zivilgesetzbuch der Volksrepublik China*, in: Thomas Möllers/Hao Li (eds), *Der Besondere Teil des neuen chinesischen Zivilgesetzbuches*, 2022, p. 582; Helmut Koziol/Yan Zhu, *Background and Key Contents of the New Chinese Tort Liability Law*, JETL 2010, 346–347.

8 Hans-Georg Bollweg/Norman Doukoff/Nils Jansen, *Das neue chinesische Haftpflichtgesetz*, ZChinR 2011, 95.

9 Hans-Georg Bollweg/Norman Doukoff/Nils Jansen (fn. 8), 92; Helmut Koziol/Yan Zhu (fn. 7), 333.

10 Other judgments are either those marked in the database as reference judgments or chosen as exemplary judgments or they are the first matches resulting from the database queries relating to the six norms.

persons in China, for they rarely purchase liability insurance. Part IV analyses scholarly proposals and the Interpretation on Torts regarding improvement of the existing law on children's tort liability. This paper ends with conclusions on the features of children's liability in China and thoughts on the possible reform path of Chinese tort law.

II. Basic Liability Regime

Under Chinese law, the basic regime governing tort liability of children and their parents is established by art. 1188 CCC, which states:

"Where a person with no or limited capacity for performing civil juristic acts causes damage to another person, the custodian of the said person shall assume tortious capacity. The custodian's tortious capacity may be mitigated if the custodian has fulfilled his duty of custodianship.

Where a person, who has assets but has no or limited capacity for performing civil juristic acts, causes damage to another person, compensation shall be paid out of his own assets and any deficiency shall be satisfied by the custodian."

1. Liability of Children

Art. 1188 para. 1 CCC suggests that a child is not personally liable for his or her wrongdoing until it attains full civil capacity at the age of 18. It is the child's parents who are liable for any damage the child caused regardless of his or her age and fault. Despite not being directly accountable, art. 1188 para. 2 CCC requires that damages are to be paid first out of the child's assets and that only the shortfall is to be assumed by his or her parents.

However, in certain aspects judicial practice operates differently than is provided by art. 1188 CCC. First of all, it is a usual practice to sue both children and their parents as co-defendants,¹¹ which is even prescribed by art. 67 of the Interpretation on Civil Procedure Law,¹² although

children are not subjects having tort liability based on art. 1188 para. 1 CCC. In a commentary edited by the SPC,¹³ judges are advised to demand that the plaintiff add the minor as a co-defendant in order to better inquire into the existence of a tortious act on the part of the child; on the other hand, it is stated at another place that age, ability of discernment and tortious capacity do not play a role in the determination of the parents' liability.¹⁴ These observations reflect the contradictory understanding of art. 1188 CCC in that it is unclear whether the parents' liability is conditioned on the existence of a tortious act of the child (see below II. 4b)). It is interesting to see that the common practice of the judiciary has also been criticized from two diametrically opposed angles: one opinion believes only parents can be prosecuted as defendants,¹⁵ while the other allows only the child wrongdoer to be sued.¹⁶

Although a child wrongdoer and his or her parents are normally sued together, in the case of proven liability, courts do not always order them to pay compensation together. It is common to require the parents to bear liability alone, even when only the child tortfeasor is sued.¹⁷ Where both the child and the parents are ordered to pay compensation, courts normally specify neither from whose assets compensation should be paid nor that the liability is a solidary one.¹⁸ Occasionally, courts will order a child wrongdoer to initially pay compensation on the condition that the child has assets, and in a case of a shortfall the parents are obligated to step in.¹⁹ Since the

11 Li Xiaoqian (李晓倩), Norm Logic and Legislative Choice for Harm Caused by Minors (未成年人致人损害的规范逻辑与立法选择), *Global Law Review* (环球法律评论) 2018/4, 123; Zhu Fuyong/Li Chunbo (朱福勇/李春波), Doctrinal Analysis and Application of the Tort Liability of Wards (被监护人侵权责任的学理分析与适用), *Journal of Southwest University of Political Science and Law* (西北政法大学学报) 2021/4, 37; Jin Keke/Hu Jianming (金可可/胡坚明) Tort Liability of Person without Full Capacity (不完全行为能力人侵权责任构成之检讨), *Chinese Journal of Law* (法学研究) 2012/5, 104.

12 最高人民法院关于适用《中华人民共和国民事诉讼法》的解释 (Interpretation of the SPC on the Application of the Civil Procedure Law (2022 Amendment)), English translation available at <<https://lawinfochina.com/display.aspx?lib=law&id=37765>>, promulgated on 1 April 2022 and effective since 10 April 2022.

13 *Leading Group of the SPC for the Implementation of the CCC* (ed.) (最高人民法院民法典贯彻实施工作领导小组), *Understanding and Application of the Book on Tort Liability of the Civil Code of the PRC* (中华人民共和国民法典总则编理解与适用), 2020, p. 223.

14 *Leading Group of the SPC for the Implementation of the CCC* (fn. 13), p. 222.

15 Chen Bangfeng (陈帮锋), On the Liability of a Guardian – Solution to Article 32 of Tort Liability Law (论监护人责任《侵权责任法》第32条的破解), *Peking University Law Journal* (中外法学) 2011/1, 110.

16 Wang Xingfei (王杏飞), On a Guardian's Tort Liability and Litigation Status (论监护人的侵权责任与诉讼地位), *Law Review* (法学评论) 2021/2, 128.

17 Li Xiaoqian (fn. 11), 123.

18 Liu Shuangyu (刘双玉), Study on Rules of Comparative Negligence in the Law of Torts (侵权法上之过失法律规则研究), Ph.D. Dissertation of the City University of Hong Kong, 2022, pp. 110–111.

19 Judgment of the Intermediate Court of Binzhou District (City) of Shandong Province of 12 April 2022, (2022) Lu 16 Min Zhong No. 692 (山东省滨州市(市)中级人民法院, (2022)鲁16民终692号); judgment of the Baoding City (Region) Intermediate Court of Hebei Province of 15 September 2021, (2021) Hebei 06 Min Zhong No. 4324 (河北省保定市(地区)中级人民法院, (2021)冀06民终4324号).

plaintiff may run the risk that the judgment cannot be enforced against the child's parents if only the child tortfeasor is sued and named as debtor in the verdict,²⁰ most courts will allow the plaintiff to sue the child tortfeasor alone only when the availability of the child's assets is proven.²¹ The same risk exists if only the parents and not the child are identified by the court as a liable person.²² To avoid such risks, the plaintiff has to request that the court specify in the award that the child is also liable, particularly where the tortfeasor is an adolescent who already has income or is going to have it very soon, in order to obtain an execution title not only against the parents but also against the child.

No matter who settled the payment, there is no recourse claim between the child tortfeasor and the parents, as art. 1188 para. 2 CCC allows only parents to use their child's money – if available – to compensate the victim, but it does not grant them the right to seek reimbursement from the child's future assets.²³ In this sense, a child wrongdoer and the parents do not produce two separate liabilities towards the victim. They instead form a liability union and assume the identical liability in relation to the victim. Recourse based on unjustified enrichment can be ruled out as well, as the payment by the child has a legal basis in art. 1188 para. 2 CCC.

Since children are not directly liable, the problem of excessive damages, once it becomes relevant in China, primarily affects the parents instead of the children. In practice, courts try to negotiate settlements with all parties and try to reduce the liability of the defendant to a payable level, in the hope that the judgment will be voluntarily performed by the defendants.²⁴ To provide a legal basis for such an *ad hoc* approach, some scholars endorse a general authorization allowing courts to adjust the amount of compensation following the precedent of the Swiss Code of Obligations (art. 44 para. 2) and the Korean Civil Code (art. 765),²⁵ as bankruptcy of natural persons is still unavailable in China.

20 Wang Xingfei (fn. 16), 124–125.

21 Wang Xingfei (fn. 16), 124.

22 Judgment of the Intermediate Court of Zhangzhou City of Fujian Province of 30 September 2022, (2022) Min 06 Zhi Fu No. 47 (福建省漳州市中级人民法院, (2022) 闽 06 执复 47 号).

23 With regards to the parent's recourse claim against a child tortfeasor, see also Zhu Hu (朱虎), The Assumption of Liability for Torts of Minors (未成年人侵权的责任承担), Law and Economy (财经法学) 2025/1, 85.

24 Li Fei (李飞), On the Institute of Limitation of Recourses of Debtors (论债务人的能力限度利益制度), Political Science and Law (政治与法律) 2015/3, 148.

A question remains with regards to minors between 16 and 18 who can support themselves primarily by their own income and who are treated as persons with full civil capacity (art. 18 para. 2 CCC). Now, art. 6 of the Interpretation on Torts explicitly stipulates that art. 1188 CCC applies to parents as long as the tortfeasor is under 18 at the time of the tortious conduct. The drafters of the Interpretation on Torts explained that art. 1188 CCC also covers adolescents who are treated as adults, as art. 18 para. 2 CCC applies only to the field of civil legal acts and does not apply to the field of tort liability.²⁶ In any case, courts have some leeway in evading this question by tightening requirements for evidence showing that the prerequisites of art. 18 para. 2 CCC are fulfilled.²⁷

2. Liability of Parents

Parental liability as stipulated by art. 1188 para. 1 CCC is very close to a strict liability. A parent's performance of the supervision duty may only work to reduce the parent's liability. This harsh standard of liability is regarded as justified because otherwise an innocent victim would have to shoulder all the losses by him- or herself. Compared to the child tortfeasor's parents, a victim is deemed to deserve more protection, and it is with this logic that the legislature justified its objection to its recognition of tortious capacity.²⁸ Pursuant to arts. 30 para. 1 nos. 1 and 2 and 42 of the PRC Social Insurance Law,²⁹ public medical insurance is unavailable for injuries completely caused by a tortious act. The social insurance authority is entitled to recourse should it have already paid

25 Li Fei (fn. 24), 148–149; Zhou Youjun (周有军), The Preliminary Conception of Revising Tortious Capacity Law and Incorporating it into the Civil Code (我国《侵权责任法》修订入典的初步构想), Politics and Law (政治与法律) 2018/5, 8.

26 Pan Jie (潘杰), Solution to Disputes over the Application of Guardianship Responsibility Provisions in Judicial Interpretation on Tort Liability (侵权责任编司法解释关于监护人责任规定适用争议的解决方案), China Journal of Applied Jurisprudence (中国应用法学) 2024/6, 21 f.

27 Judgment of the Intermediate Court of Shenyang City of Liaoning Province of 03 April 2023, (2022) Liao 01 Min Zhong No. 12772 (辽宁省沈阳市中级人民法院, (2022) 辽 01 民终 12772 号).

28 Wang Shengming (王胜明) (ed.), Interpretation of the PRC Tort Liability Law (中华人民共和国侵权责任法释义), 2010, pp. 162–163.

29 中华人民共和国社会保险法, promulgated on 28 October 2010, last revised with effect from 29 December 2018. English translation available at <https://www.pkulaw.com/en_law/4449c7967540e761bdfb.html>.

for the medical treatment.³⁰ In general, medical coverage is particularly precarious for children, given the fact that 60.44 % of the treatment costs are reportedly born by the families.³¹ This is the reason why very few circumstances for liability reduction in favour of the parents are acknowledged, these including assumption of the entire responsibility by the child wrongdoer, comparative fault of the victim and fault of a third party.³²

Hence, parental liability is not directly linked to supervisory duties but is instead linked to one's status as custodian of a child tortfeasor under Chinese law.³³ It is impossible to delegate custodianship to one parent in the case of divorce, as Chinese law uses a very broad term of custodianship and does not distinguish parental care (亲权) from custodianship (监护权).³⁴ While parental care in the form of custody (抚养权) can be awarded to one parent in the event of divorce, custodianship – and with it the supervisory and education duty – can neither be waived nor rest on one parent.³⁵ For this reason, according to art. 8 of the Interpretation on Torts, divorced couples still bear solidary liability for wrongdoings of their children in external relationship (i. e. towards the victim), even if only one parent has custody; internal allocation between the divorced parents is calculated by reference to his/her defective supervision and education. Where the parents are not divorced, Chinese courts will not scrutinize the fulfilment of supervisory duties of each parent separately. Instead, they will be held jointly liable in respect of their joint matrimonial assets once external liability is established, so that the question of recourse between the couple becomes obsolete as well.

In summary, the Chinese regime of children's tort liability resembles to a certain degree that of French law: the establishment of tort liability

of a minor does not depend on the child's age and discernment;³⁶ parental liability is incurred automatically, irrespective of whether the child is under the care of the parents, even in the case a boarding school.³⁷ Furthermore, only force majeure and comparative fault can exempt liability.³⁸ The Chinese liability regime has a distinct feature: namely, the child wrongdoer's liability and that of his or her parents is one and the same for any harm caused by the child.

3. Tortious Capacity

From a doctrinal point of view, it is logical to separate a child's liability and that of his or her parents for the wrongdoing committed by the child, since minors can be held liable vis-à-vis their own property and courts also consider their fault in determining liability. After all, at least older children have the ability to distinguish right from wrong, which is evidenced by 12 years of age being the threshold for criminal liability for murder and manslaughter in China.³⁹ In this regard, one can hardly deny the paradox in holding a child criminally liable but categorically exempting his civil liability for the same misconduct.

In the past, numerous proposals have been elaborated in favour of a reform.⁴⁰ At the core, a new liability regime should consist of three elements: Firstly, it should establish the tortious capacity (责任能力) of children, so that they may be held independently liable under

30 Judgment of the First Court of Zhongshan City of Guangdong Province of 12 September 2022, (2022) Guangdong 2071 Min Chu No. 6362 (广东省中山市第一人民法院, (2022) 粤 2071 民初 6362 号).

31 Social policy team of UNICEF China, Basic Medical Insurance for Children in China, <<https://www.unicef.cn/media/25331/file/BASIC%20MEDICAL%20INSURANCE%20FOR%20CHILDREN%20IN%20CHINA.pdf>>.

32 Zhu Fuyong/Li Chunbo (fn. 11), 39.

33 Zheng Xiaojian (郑晓剑), On the Interpretation of Rule of Guardian's Responsibility in Civil Code (民法典监护人责任规则的释论), Modern Law Science (现代法学) 2022/4, 30.

34 Knut Benjamin Piffler/Thomas von Hippel, Länderbericht China, in: Alexander Bergmann et al (ed), Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht, 246. Lf., 2022, pp. 100–101.

35 Knut Benjamin Piffler/Thomas von Hippel (fn. 34), pp. 106–107.

36 As to the situation in France, see Christian von Bar, The Common European Law of Torts, Vol. 1, 1998, pp. 90–93.

37 As to the situation in France, see Larence Francoz-Terminal/Fabien Lafay/Olivier Moréteau/Caroline Pellerin-Reguliano, Children as Tortfeasors under French Law, in: M Martín-Casals (ed), Children in Tort Law Part I: Children as Tortfeasors, 2006, p. 201. As to the situation in China, see the judgment of the Intermediate Court Tieling City of Liaoning Province of 01 November 2017, (2017) Liao 12 Min Zhong No. 1320 (辽宁省铁岭市中级人民法院, (2017) 辽 12 民终 1320 号) and the judgment of the Chuzhou District Court of Huai'an City of Jiangsu Province of 16 November 2005, (2005) Chu Min Yi Chu Zi No. 347 (江苏省淮安市楚州区人民法院, (2005) 楚民一初字第 347 号).

38 As to the situation in France, Miquel Martín-Casals, Comparative Report, in: M Martín-Casals (fn. 37), p. 441, no. 67; Larence Francoz-Terminal/Fabien Lafay/Olivier Moréteau/Caroline Pellerin-Reguliano (fn. 37), p. 201, no. 120.

39 Art. 17 para. 3 PRC Criminal Law (中华人民共和国刑法), last revised with effect from 1 March 2024. English translation available at <https://www.pkulaw.com/en_law/3b70bb09d2971662bdfb.html>.

40 For the status quo of discussions prior to the promulgation of the CCC, see Zhu Fuyong/Li Chunbo (fn. 11), 43.

civil law.⁴¹ Secondly, parents should be liable only for a failure to discharge their duties as custodians, and they should, together with the child tortfeasor, have either solidary liability, non-genuine solidary liability or supplementary liability towards the victim.⁴² Thirdly, equitable liability should fill any gaps if neither the child nor his or her parents are otherwise liable.⁴³ It is intriguing that the majority of authors endorses the adoption of tortious capacity modelled after German law,⁴⁴ although setting a minimum age as the threshold for tortious capacity is rather an exception in East Asia and Europe.⁴⁵ In the civil codes of Japan (art. 712), Korea (art. 753), Taiwan (art. 187) and most European countries, the tortious capacity of children hinges on the ability of discernment (识别能力).⁴⁶

To date, none of the reform ideas have been taken up by Chinese rule-makers. The legislature has pointed out that the current regime works well and that a change would weaken the legal protection for the victim.⁴⁷ Based on the court judgments evaluated by this paper relating to child tortfeasors, one has to reckon that courts have strived to achieve a well-balanced

partitioning of liability, despite the inconsistency regarding persons qualifying as defendants. It comes as no surprise that art. 1188 CCC is so persistent given that this rule has grown out of judicial practice in China, which finds parallels in other older statutes, i. e. art. 29 of the Public Security Management Punishment Regulations⁴⁸ of 1957 and art. 17 of the Marriage Law⁴⁹ of 1980.⁵⁰ By contrast, none of the alleged models for art. 1188 CCC, such as arts. 450–451 of the Soviet Civil Code⁵¹ or art. 187 of the Taiwan Civil Code,⁵² exempts children completely from tort liability, which suggests that their impact on the Chinese legislature was rather limited.

The uniqueness of art. 1188 CCC lies not only in the exoneration of children to a full extent but also in the priority given to using the minor's assets to pay compensation. This dichotomy has been the subject of considerable academic disagreement in terms of explaining the legal nature of the child's liability and that of the child's parents. In the eyes of some scholars, any liability should be bundled with the obligation to pay for it.⁵³ If a child is released from tort liability, it cannot be requested to pay compensation and *vice versa*. As it does not matter to the victim who pays compensation, as long as he or she receives the full amount, one must question why a distinction is made between children having assets and those not having assets. Hints may be found in the legislative history. In the codification process, the legislature justified this distinction with two arguments: Firstly, with the development of economy and society, the likelihood that a child has property is growing, and it is fair to let children pay reparation with their own property; secondly, this provision is intended to eliminate the concerns of individuals who are considering serving as a child's custodian and replacing absent or unsuitable parents. However, such individuals usually receive no remuneration for this work

41 Yu Fei (于飞), The Interpretation of Guardian's Responsibility under the Background of Civil Code (《民法典》背景下监护人责任的解释论), *Law and Economy (财经法学)* 2021/2, 22–24 and Xi Zhiguo (席志国), On the Type-Construction of Tort Capacity of Minors (论未成年人侵权责任能力类型化构造), *Journal of Zhejiang Gongshang University (浙江工商大学学报)* 2020/3, 57–59; Zhu Fuyong/Li Chunbo (fn. 9), 44–45; Zhou Youjun (fn. 23), 5.

42 Yu Fei (fn. 41), 30 and Xi Zhiguo (fn. 41), 61, supports solidary liability; Zhu Fuyong/Li Chunbo (fn. 11), 47, is a proponent of supplementary liability; Zhou Youjun (fn. 25), 9, supports non-genuine solidary liability.

43 Chen Su (陈甦) (ed.), *Commentary on the GRCL (民法总则评注)* (2017), p. 120; Zheng Xiaojian (郑晓剑), Studies on the Criteria of Judgment for Tortious Liability Capacity (侵权责任能力判断标准之辨析), *Modern Law Science (现代法学)* 2015/6, 72; Zhou Youjun, Preliminary (fn. 25), 9; Zhu Fuyong/Li Chunbo (fn. 11), 47; Zhu Guangxin (朱广新), Compensation for Damages Suffered Due to the Normative Method of Damage Caused by Minors (论未成年人致人损害的赔偿责任), *Studies in Law and Business (法商研究)* 2020/1, 184; Yu Yanman/Wu Deqiao (余延满/吴德桥), Several Questions on the Civil Liability Capacity of Natural Persons (自然人民事责任能力的若干问题), *Chinese Journal of Law (法学研究)* 2001/6, 115.

44 Chen Bangfeng (陈帮锋), Ability of Tort Liability: Origin and Alienation (民事责任能力: 本原与异化), *Peking University Law Journal (中外法学)* 2012/2, 299; Yu Yanman/Wu Deqiao (fn. 43), 111, believes the German model is easier for courts to handle.

45 Christian von Bar (fn. 36), pp. 84–85. In the European model laws, DCFR VI. – 3:103 follows the German approach, while PETL 4:102 considers age as one factor in determining fault.

46 Miquel Martín-Casals (fn. 38), p. 425.

47 Wang Shengming (王胜明) (ed.), *Interpretation of the PRC Tort Liability Law (中华人民共和国侵权责任法解读)*, 2010, p. 152.

48 中华人民共和国治安管理处罚条例, promulgated on 22 October 1957 and repealed on 1 January 1987, Chinese version available at <<https://www.gov.cn/gongbao/shuju/1957/gwyb195747.pdf>>.

49 中华人民共和国婚姻法, promulgated on 10 September 1980 and repealed on 29 December 2020, English translation available at <<https://www.jstor.org/stable/2759127?seq=2>>.

50 Chen Bangfeng (fn. 15), 103–104; Zheng Xiaojian (fn. 33), 30.

51 Chen Bangfeng (fn. 15), 103 et seqq; Civil Code of the Russian Soviet Federated Socialist Republic: An English Translation, Whitmore Gray/Raymond Stults.

52 Chen Bangfeng (fn. 44), 293–294. Official English translation available at <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001>>.

53 Chen Bangfeng (fn. 15), 108. Wang Xingfei (fn. 16), 122.

and still have to assume liability for the child.⁵⁴ Against this background, one scholar believes that art. 1188 para. 2 CCC needs a purpose-based reduction (teleologische Reduktion: 目的限缩) and should be applied only to custodians who do not have a kinship relationship with the child.⁵⁵ However, if victim protection enjoys the utmost priority, such a purpose-based reduction would undermine this concern and could be rejected for this reason. That means, the current version of art. 1188 para. 2 CCC is not optimal, but eliminating the possibility of using a child's assets to pay compensation without introducing a direct liability of the child at the same time could be even worse.

From a comparative perspective, this paper advances the view that there is a third reason why the financial situation of the child plays a role in art. 1188 CCC. Different than German law, a claim sustained by a court judgment in China is time-barred after two years.⁵⁶ Consequently, it is useless to sue a child that has no money because the court award will have already become unenforceable by the time the child has grown up and has income. After all, private households rarely purchase third-party liability insurance. For this reason, even if the personal liability of a child tortfeasor could be adopted in China, it is unlikely to change the current practice without an extension of the two-year limitation period attached to court decisions.

4. Fault and Comparative Fault

Currently, both the fault and the comparative fault of children are taken into consideration by Chinese courts in determining tort liability. In this context, the notion of ability of discernment, albeit nowhere mentioned in the CCC, plays a role behind the scenes.

a) Fault of Children

In China, children are sued in spite of their apparent exemption from personal liability because it is necessary to determine the fault of a child as well as the causal relationship between the child's conduct and the harm. In the past, courts allegedly did not treat children differently and

used to assess children's fault against the standard of care expected of adults.⁵⁷ In the majority of judgments rendered on the basis of the CCC and reviewed by this paper, an age-specific objective standard is usually applied, even though the assessment of fault is kept extremely brief. In this regard, except for small children, no child wrongdoer seems to be excluded from the examination for fault.⁵⁸ It is only after establishing the extent of the minor's liability that the courts will shift this liability to the child's parents. In terms of children who lack the capacity to act reasonably, courts instead assess the fault of the parents in discharging their custodial duties and treat it as the fault of the children.⁵⁹ In Chinese literature, the applicability of strict liability to children has drawn almost no attention. In practice, courts routinely apply strict liability to adolescents driving motor vehicles without a license, this conduct constituting one of the primary disputes involving children tortfeasors.⁶⁰

b) Fault of Parents

Although fault is not a prerequisite for parental liability, courts still rely on it to establish liability. However, the fulfilment of parental duties is generally examined neither in detail nor independently if the tortious act occurs outside the realm of parental care, e.g. at school. Neglect of parental duties is usually affirmed as long as

57 *Chen Bangfeng* (fn. 44), 299–300; *Zhu Hu* (fn. 23), 82.

58 Clause 3.2.3 of the Adjudication Guidelines and Main Points in Campus Personal Injury Cases of Minors (未成年人校园人身伤害类案件审理思路和裁判要点), published by the Adjudication Commission of the Shanghai First Intermediate Court on 08 January 2019 (hereafter Shanghai Guidelines), <https://www.a-court.gov.cn/xxfb/no1court_412/docs/201911/d_3558525.html>, states that courts should determine the minor's capacity to recognize risk according to his or her age. If the minor is over 16 years old, he or she shall be presumed to have full capacity of understanding; *Liu Shuangyu* (fn. 18), pp. 138–139.

59 Judgment of the Basic Court of Dongming County Shandong Province of 20 March 2023, (2023) Lu 1728 Min Chu No. 98 (山东省东明县人民法院, (2023) 鲁 1728 民初 98 号); judgment of the Intermediate Court of Meizhou City Guangdong Province of 17 November 2021, (2021) Guangdong 14th Civil Final No. 1895 (广东省梅州市中级人民法院, (2021) 粤 14 民终 1895 号); judgment of the Intermediate Court of Wuzhou City Guangxi Zhuang Autonomous Region of 17 November 2022, (2022) Gui 04 Min Zhong No. 1774 (广西壮族自治区梧州市中级人民法院, (2022) 桂 04 民终 1774 号); judgment of the Court of Wenshang County Shandong Province of 02 November 2022, (2022) Lu 0830 Min Chu No. 4032 (山东省汶上县人民法院, (2022) 鲁 0830 民初 4032 号); judgment of the Court of Zhaoling District Luohe City Henan Province of 29 June 2022, (2022) Henan 1104 Min Chu No. 1869 (河南省漯河市召陵区人民法院, (2022) 豫 1104 民初 1869 号).

60 See fn. 59.

54 *Huang Wei* (黄薇) (ed.), *Interpretation of the CCC: The Book of Personality Rights and the Book of Tort Liability* (中华人民共和国民法典解读人格权编、侵权责任编), 2020, pp. 100–101; *Chen Bangfeng* (fn. 15), 106.

55 *Zheng Xiaojian* (fn. 33), 33.

56 Art. 250 of Chinese Civil Procedure Law (中华人民共和国民事诉讼法), last revised with effect from 1 January 2024. English translation available at <https://www.pkulaw.com/en_law/55ada7bc4fc9d8ccdbdfb.html>.

damage can be attributed to a minor.⁶¹ As the foundation for parental liability does not rest on the duty of supervision, but also includes the duty of education, it is doctrinally unnecessary to investigate the extent of parents' failure in discharging supervisory duties in specific cases. In situations where it is difficult to identify the fault of parents, such as when tortious acts occur in schools, courts may attribute the fault to the child instead.⁶² If the damage is not attributable to the child, his or her parents can theoretically escape liability.⁶³ However, such exculpation factually requires that the harm is caused solely by a third party, by the victim or as the result of force majeure. However, China is not alone in this respect. According to art. 1242 para. 7 French Code civil, parents are also liable for damage "caused by the purely normal behaviour of their child".⁶⁴ Parent's liability under Chinese law is even less strict than the French scheme with a view to the possibility of reducing liability.

c) Comparative Fault

What is likely most striking to a foreign observer is the frequent application of comparative fault in the case of a child victim in China regardless of the victim's age. This practice is presumably caused by the fact that defendants normally have to pay compensation out of their own pockets, because purchasing liability insurance is rather rare for individuals in China. Courts thus feel compelled to lower the financial burden of defendants by reducing their liability on the ground of comparative fault. In the eyes of Chinese judges, being at the wrong place at the wrong time already indi-

cates a failure of the child or the parents.⁶⁵ Even where non-fault-based liability applies, such as a motor vehicle driver's liability and an animal owner's liability, the victim's parents' fault can still be affirmed if their child, even as a toddler, is injured.⁶⁶

In practice, not only the comparative fault of the child but also the fault of the parents (or of a person entrusted to supervise the child, sometimes even meaning the fault of the child victim's sibling⁶⁷) can be attributed to the child victim and thereby work to mitigate the defendant's liability. Art. 8 of the Interpretation of the SPC on Compensation for Personal Injuries in Railway Transport⁶⁸ explicitly stipulates the permissibility of reducing a railway company's liability up to 40 % with respect to children under 8 and up to 50 % with respect to children between 8 and 18 in cases of their parents' fault. However, the Chinese approach is not entirely unique from a comparative view. For instance, French law also allows the recognition of the comparative fault of a child victim that lacks the ability of discernment.⁶⁹ Likewise, Chinese courts bring the comparative fault of children into play with the term "share of causation" (原因力; similar to the German term "*Tatbeitrag*"), a term which does

61 In practice, there is an assumption that an infringing act of a minor indicates a breach of the duty of supervision. The defence of full compliance with the guardian's duty is thus unavailable in China, see *Yan Guizhen* (严桂珍), *The Safety and Security Obligations in the Civil Code and Civil Liability of Bicycle-Sharing Enterprises* (民法典安全保障义务条款与共享单车企业民事责任), *Oriental Law* (东方法学) 2020/6, 101.

62 See the cases cited under III. 4.

63 *Zhang Xinbao* (张新宝), *Study on the Legislation of Tort Liability in the Civil Code* (民法分则侵权责任编立法研究), *China Legal Science* (中国法学) 2017/3, 62, made the proposal that the parents are not liable when the child would not be liable for the damage even if it had committed the same conduct as an adult. The same suggestion is made by *Helmut Koziol/Yan Zhu* (fn. 7), 347.

64 *Jean-Sébastien Borghetti*, *Grenzen des Verschuldensprinzip: Haftung für Sachen und Haftung für Dritte*, in: *Stefan Huber/Jens Kleinschmidt* (ed.), *Die Reform des französischen Haftungsrechts im europäischen Kontext*, 2021, p. 63.

65 In one case, the victim was a nine-year-old child who was a bystander injured by two other children (9 and 11 years old) who had built an improvised swing constructed with artificial grass strips on the mobile soccer goal at school, which subsequently tipped over. The allocation of liability: victim 20 %, each of the children tortfeasors and their parents 20 %; the school 40 %; judgment of the Basic Court of Pingliang City of Gansu Province (formerly) of 12 May 2023, (2023) Gan 08 Min Zhong No. 316 (甘肃省平凉市中级人民法院 (原), (2023) 甘 08 民终 316 号).

66 *Cheng Xiao* (程啸), *Comparative Negligence and No-Fault Liability* (过失相抵与无过错责任), *Science of Law* (法律科学) 2014/1, 144; *Zheng Yongkuan* (郑永宽), *On Contributory Negligence and No-fault Liability* (过失相抵与无过错责任), *Modern Law Science* (现代法学) 2019/1, 133; *Liu Shuangyu* (fn. 18), p. 268.

67 *Ji Ruowang* (季若望), *Interpretation of Alternative Liability from the Perspective of the Civil Code* (《民法典》视域下共同危险行为规则解释论), *Jurist* (法学家) 2021/4, 125.

68 最高人民法院关于审理铁路运输人身损害赔偿纠纷案件适用法律若干问题的解释 (Interpretation of the SPC on Several Issues concerning the Application of Law in the Trial of Cases Involving Disputes over Compensation for Personal Injuries in Railway Transport (2021 Amendment)), promulgated on 2 March 2010 and last revised with effect from 1 January 2022. English translation available at <https://www.pkulaw.com/en_law/0242ca12cdf18e0ebdfb.html>.

69 *Christian von Bar* (fn. 36), pp. 91–92; *Frédérique Niboyet*, *Die Haftung Minderjähriger und ihrer Eltern nach deutschem und französischem Deliktsrecht zwischen Dogmatik und Rechtspolitik*, 2001, pp. 85–86.

not include a subjective element.⁷⁰ In addition, with regards to children lacking the ability of discernment, children's fault can be treated as being equal to their parents' fault.⁷¹

As to the fault of the victim's parents, both the DCFR and German law do not allow contributory supervisory failure on the part of the parents to be used to reduce the liability of the tortfeasor.⁷² Instead, both the third-party (e.g. child) tortfeasor and the parents bear solidary liability towards the child victim. Under German law, it may happen that a third party first pays full compensation to the injured child and then sues the negligent parents for reimbursement.⁷³ In China, such an approach is hardly conceivable since the end result is economically the same and the third party (e.g. child) would normally not pay out compensation in the first place. Rather, the victim's family is barred from claiming full compensation if the parents fail to supervise the child in a potentially dangerous situation appropriately. Theoretically, the child has a claim against his or her negligent parents if the child's claim against the third party is reduced (art. 34 para. 3 CCC); practically, due to the conflict of interests, no such case has ever been reported,⁷⁴ as the child must be represented by his or her parents in lawsuits, who normally would not sue themselves.⁷⁵ Thus, the current practice can hardly be changed, despite the scholarly proposals to

exclude the comparative fault of parents for the purpose of reducing the child victim's claim.⁷⁶

Conversely, courts are reserved in applying assumption of risk to reduce damages when a child suffers injury when playing competitive sports.⁷⁷ This liability exemption ground is applied only to older children who have both experience of playing the relevant sport and are sufficiently aware of the typical risks.⁷⁸

III. Extending the Liability Regime

With arts. 1169 para. 2, 1189 and 1199–1201 CCC, the Chinese legislature has created concrete rules governing the liability of multiple persons in cases involving children either as victims or tortfeasors. One may wonder why three norms, namely arts. 1199–1201 CCC, are needed to deal with injuries inflicted to minors in educational institutions. The reason is that arts. 1199 and 1200 CCC cover tortious acts caused by persons or factors internal to educational institutions, while art. 1201 CCC covers those caused by external persons. In the former scenario, a further distinction is made between minors without legal capacity and minors with limited legal capacity – governed, respectively, by arts. 1199 and 1200 CCC. Although arts. 1199 and 1200 CCC are not limited to cases where both the victim and the wrongdoer are children, they constitute the majority of actual disputes adjudicated by courts, given the small number of cases where the injured child is harmed by a defective facility, a slippery floor, food, water, physical punishment or verbal offences committed by the staff, not at least because of the pressure that has resulted from the widespread use of video surveillance within educational institutions.⁷⁹

However, such provisions often neither address the external relationship between the tortfeasors and the injured person nor clearly regulate the internal relationship between the

70 Zheng Xiaojian (郑晓剑), *Tortious Capacity and Application of Comparative Fault (侵权责任能力与过失相抵规则之适用)*, *Law Science (法学)* 2014/10, 51; regarding comparative fault, i.e. „le fait non fautif de la victim“ in French law, see *Frédérique Niboyet* (fn. 69), p. 86.

71 Zheng Xiaojian (fn. 70), 53; Zheng Yongkuan (郑永宽), *Implications and Tests for the Determination of Negligence of the Injured Person in Tort Law (论侵权过失相抵中受害人与有过失的实质与判断)*, *Journal of Fujian Jiangxia University (福建江夏学院学报)* 2018/3, 42; Zhou Youjun (fn. 25), 8, proposes to incorporate the equalization of the child's fault and the parents' fault into written law.

72 Christian von Bar/Eric Clive (ed.), *Draft Common Frame of Reference (DCFR) Full Edition Volume 4*, 2009, p. 3437.

73 BGH 19.1.2021- VI ZR 210/18. Under German law, parents are privileged over a third-party tortfeasor in terms of the liability for negligence, as art. 1664 para. 2 of the German Civil Code limits the parents' liability to the level of care they customarily exercise in their own affairs. See Dirk Looschelders, *Schuldrecht BT*, 19 ed., 2024, p. 509.

74 Liu Shuangyu (fn. 18), 143 f.

75 Other than art. 1773 of the German Civil Code, Chinese law offers no possibility to appoint another guardian for cases of conflicts of interest between a child and the parents. At the same time, the Chinese Civil Code lacks a norm comparable to art. 1664 para. 2 of the German Civil Code, which means that the parents' liability towards the child is theoretically stricter under Chinese law.

76 Wang Lei (王雷), *Application of Comparative Fault in Cases Involving Injury Suffered by Minors (侵害未成年人案件中过失相抵规则的适用)*, *Chinese Youth Social Science (中国青年社会科学)* 2015/3, 59; Zheng Xiaojian (fn. 70), 53.

77 100% Liability is imposed on a school for an injury suffered by a student in a soccer game. See the judgment of the Intermediate Court of Baicheng City of Jilin Province of 26 July 2022, (2022) Ji 08 Min Zhong No. 227 (吉林省白城市中级人民法院, (2022) 吉 08 民终 227 号).

78 Clause 3.2.4. of the Shanghai Guidelines (fn. 58).

79 Searches with the keywords "safety facility", "physical punishment", "dangerous sports" and "safety supervision" within 1,231 cases related to art. 1199 CCC and 2,928 cases related to art. 1120 CCC yield around 350 matches in total, in which some cases are counted twice or multiple times because they are shown as results for more than one of the four keywords.

tortfeasors. Therefore, courts are left alone to find solutions dispersing liability among all the involved actors. Therefore, this paper intends to explore the judicial practice that has developed in the face of legal gaps; additionally considered are scholarly proposals as well as the SPC's suggestions for solving problems in the five codified situations. The analysis starts with the most straightforward situation of art. 1189 CCC and ends with the most complicated one of art. 1169 para. 2 CCC.

1. Liability of Persons Entrusted with the Supervision of a Minor

The CCC provides a general clause relating to the delegation of supervisory duties owed towards minors, namely art. 1189 CCC, which is not a new codification but a continuation of art. 22 of the Opinions on General Principle of Civil Law.⁸⁰ According to its wording, parents are still primarily liable for the damage caused by their underage children notwithstanding the delegation of parental care, while the entrusted person bears liability corresponding to his fault. Art. 1189 CCC uses the term "delegation of duties of custodianship" not because it intends to govern the designation of a new custodian to replace his or her parents (as some authors mistakenly thought⁸¹), but because Chinese law lacks an equivalent term for supervisory duties. This explains why a school may be referred to as a temporary custodian and not as a supervisor in court judgments.⁸² Of course, duties of custodianship as defined by art. 34 para. 1 CCC are broader than the duty of supervision; thus art. 1189 CCC merely refines certain duties of custodianship, such as the duty of management, supervision and education.⁸³ In sum, art. 1189 CCC is designed to govern the delegation of custodial duties to a third person either completely or partially.⁸⁴

However, there are several uncertainties associated with this norm. Firstly, it is unclear whether it is applicable to educational institutions. As art. 1189 CCC only covers the delegation of supervisory duty by contract, it seems not directly applicable to the situation where such a duty is established solely by law,⁸⁵ such as with public schools. In one leading case, the court ruled that a school can be deemed an entrusted person only when there is an unambiguous agreement with the parents regarding the delegation of a custodian's duties.⁸⁶ By contrast, institutions that assume supervisory duties through contract, such as providing daycare for children, should fall into the scope of this norm.⁸⁷ Originally, art. 1189 CCC was supposed to solve the care issue for left-behind children of migrant workers from the countryside; however, numerous court judgments acknowledged its applicability to after-school care services⁸⁸ and childminders (including particularly grandparents) who are the main caregivers of children in China but who are often not paid for their

80 关于贯彻执行《中华人民共和国民事诉讼法通则》若干问题的意见（试行）（Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation)), promulgated on 2 April 1988 and repealed on 29 December 2020. English translation available at <https://www.pkulaw.com/en_law/36d5796192fb4235bdfb.html>.

81 Huang Wei (fn. 54), p. 104; *Leading Group of the SPC for the Implementation of the CCC* (fn. 13), p. 226.

82 This is criticized as an erroneous interpretation, see Han Qiang (韩强), *Rebuttal of the Specialty of Special Provisions on Responsibility Subjects* ("关于责任主体的特殊规定" 特殊性辩驳), *Politics and Law* (政治与法律) 2014/10, 114.

83 *Leading Group of the SPC for the Implementation of the CCC* (fn. 13), p. 226; Zou Hailin/Zhu Guangxin (邹海林/朱广新), *Commentary on CCC: Tort I* (民法典评注: 侵权责任编 I), 2020, p. 289.

84 Zou Hailin/Zhu Guangxin (fn. 83), p. 289.

85 Relevant law includes Kindergarten Management Regulations (幼儿园管理条例), promulgated by the Commission of Education on 11 September 1989 and effective from 1 February 1990, Chinese version available at <http://www.moe.gov.cn/jyb_sjzl/sjzl_zcfg/zcfg_jyxzfg/202204/t20220422_620517.html>; Primary and Middle School and Kindergarten Safety Management Measures (中小学幼儿园安全管理办法), promulgated by the Ministry of Education et al on 30 June 2006 and effective from 1 September 2006, Chinese version available at <http://www.moe.gov.cn/srcsite/A02/s5911/moe_621/200606/t20060630_180470.html>; Measures for the Handling of Student Injury Accidents (学生伤害事故处理办法), promulgated by the Ministry of Education on 21 August 2002 and last revised with effect from 13 December 2010, Chinese version available at <<https://www.pkulaw.com/chl/609f52ec3c4d5e79bdfb.html>>.

86 Judgment of the Chuzhou District Court of Huai'an City of Jiangsu Province of 16 November 2005, (2005) Chu Min Yi Chu Zi No. 347 (江苏省淮安市楚州区人民法院, (2005) 楚民一初字第 347 号), published in the SPC Gazette (2006) No. 12.

87 *Leading Group of the SPC for the Implementation of the CCC* (fn. 13), p. 226.

88 A child under eight injured the eye of another child over eight with a crossbow during the daycare provision of an after-school care service; the service provider was allocated 60% liability and the child tortfeasor 40%; judgment of the Intermediate Court of Zhumadian City of Henan Province of 01 June 2021, (2021) Yu 17 Min Zhong No. 2198 (河南省驻马店市中级人民法院, (2021) 豫 17 民终 2198 号). A child under eight was injured after being pushed by another child in the same daycare facility. Liability allocation: victim 20%, child tortfeasor 40% and daycare 40%; judgment of the Yanta District Court of Xi'an City of Shaanxi Province of 27 April 2022, (2022) Shaanxi 0113 Min Chu No. 1549 (陕西省西安市雁塔区人民法院, (2022) 陕 0113 民初 1549 号).

support.⁸⁹ Despite the uncertainty regarding the applicability of art. 1189 CCC to educational institutions, courts frequently apply art. 1189 CCC in conjunction with other norms, such as arts. 1199 and 1200 CCC, to determine liability for injuries suffered by minors on campus. A concurrent application of art. 1189 CCC and art. 1199 or art. 1200 CCC is likely to emerge in cases where a supervised child is injured by another supervised child.

Secondly, art. 1189 CCC fails to clarify the internal and external relationship between the parties involved. Art. 10 of the Interpretation on Torts sets out that in the external relationship the entrusted person is liable to the extent of his or her fault and the parents are solidarily liable for the entire loss, while in the internal relationship a claim to recourse is recognised based on the degree of fault and the nature of the entrustment.⁹⁰ As the internal relationship between the entrusted person and the parents is one of a mandate contract, it seems obvious to determine the issue of recourse through reference to arts. 929 and 930 CCC, the rules governing the liability relationship between an entrusted person and the principle. Hence, the entrusted person who is held liable by a court despite having provided a level of supervision that exceeds the one specified in the mandate contract may also have a claim of recourse against the parents.

Upon review of judgments relating to art. 1189 CCC, no clear pattern can be identified as to why courts sometimes confirm and sometimes reject the liability of entrusted persons, even in cases of gross negligence.⁹¹ If the entrusted person is found to be at fault, courts usually impose proportionate liability on each defendant, so that the issue of recourse does not arise in the first place. Furthermore, the tendency of recognizing comparative fault also persists here so as to strike a balance among the relevant parties.

2. Liability of Educational Institutions

The CCC has incorporated previous rules and codified three norms (arts. 1199–1201 CCC) governing the liability of educational institutions for personal injury suffered by children in their care. These norms are not applicable if a supervised child causes harm to someone who is not supervised by the institution; they do not cover property damage; and they are not applicable in situations where adults are the victims.⁹² Arts. 1199–1201 CCC also do not distinguish between public and private institutions in terms of the na-

89 Grumbling grannies, *The Economist* of 14th–20th October 2023, p. 47.

90 Art. 10 paras. 2, 3 of the Interpretation on Torts. In the case of gratuitous mandate, liability can be imposed only in the event of intent and gross negligence on the part of the entrusted person. This means an unpaid entrusted person is not liable for ordinary negligence.

91 A four-year-old child drove a toy electric car and ran into the victim. The grandfather was held partially liable together with the parents despite only slight negligence; the lender of the car bore 40 % liability; judgment of the Court of Xinhua County Hunan Province of 13 December 2022, (2022) Hunan 1322 Min Chu No. 3358 (湖南省新化县人民法院, (2022) 湘 1322 民初 3358 号). A child drove a toy electric car and ran into the victim. Proportionate liability of the grandfather (20 %), parents (40 %) and lender of the car (30 %); judgment of the Court of Shimen County Hunan Province of 22 September 2022, (2022) Hunan 0726 Min Chu No. 1722 (湖南省石门县人民法院, (2022) 湘 0726 民初 1722 号). A grandmother was not held liable despite gross negligence in failing to prevent the crash between two children near a slide; only the parents were liable; judgment of the Court of Haishu District Ningbo City Zhejiang Province of 19 January 2023, (2022) Zhejiang 0203 Min Chu No. 10401 (浙江省宁波市海曙区人民法院, (2022) 浙 0203 民初 10401 号). A three-year-old child ran into another small child and caused him injury. No liability of the grandmother; only the parents were liable; judgment of the Court of Beijing Daxing District (County) of 02 June 2022 (2022) Beijing 0115 Min Chu No. 4176 (北京市大兴区(县)人民法院, (2022) 京 0115 民初 4176 号). A child caused the victim who was performing a social dance to fall and suffer injury. Proportionate liability of grandmother (28 %) and parents (42 %); judgment of the Court of Yanliang District Xi'an City Shaanxi Province of 31 May 2022, (2021) Shaanxi 0114 Min Chu No. 3629 (陕西省西安市阎良区人民法院, (2021) 陕 0114 民初 3629 号). A 22-month-old baby ran over one foot of the victim with a buggy. The grandmother was not held liable; only the parents were liable; judgment of the Court of Guta District Jinzhou City Liaoning Province of 08 April 2022, (2022) Liao 0702 Min Chu No. 509 (辽宁省锦州市古塔区人民法院, (2022) 辽 0702 民初 509 号). A child injured another child while jumping on a trampoline. The grandfather was not held liable; the mother and child bore joint liability; judgment of the Court of Fangcheng County Henan Province of 21 March 2022, (2021) Henan 1322 Min Chu No. 5996 (河南省方城县人民法院, (2021) 豫 1322 民初 5996 号). In one case, only the grandmother was held liable, probably because the compensation could be paid by her employer; judgment of the Intermediate Court of Hechi City Guangxi Zhuang Autonomous Region of 25 October 2021, (2021) Gui 12 Min Zhong No. 1319 (广西壮族自治区河池市中级人民法院, (2021) 桂 12 民终 1319 号).

ture of their liabilities,⁹³ this despite a significant dispute in literature inspired by the bifurcation in German law.⁹⁴ The provisions do not specify that there must be a causal link between the conduct of the educational institution and the injury.⁹⁵ Furthermore, liability towards the victim is born by the educational institutions and not by their staff.

Art. 9 of the “Measures for the Handling of Student Injury Accidents”⁹⁶ issued by the Ministry of Education stipulates situations in which the fault of educational institutions can be presumed, while the Shanghai Guidelines⁹⁷ (Clause 3.1) suggest that the fault of educational institutions is to be assessed by reference to factors such as safety education undertaken, safety facilities, the absence and reactions of the staff onsite at the time of accident, the timeliness of aid provided by the educational institution and the age of the victim.

a) Injury not Involving an External Third-party Tortfeasor

For injuries caused to a child solely by the educational institution, the legal situation is straightforward. Arts. 1199–1200 CCC stipulate that the institution can be held liable either for its fault if the victim is over eight (art. 1200 CCC) or for presumed fault if the victim is under eight (art. 1199 CCC). The heavier liability towards younger children is justified by the greater need of care and the difficulty for such victims to control the circumstances leading to the harm.⁹⁸

92 Zhou Youjun, (fn. 25), 10; Zeng Dapeng (曾大鹏), School Liability in Accidents Involving Third Parties Infringing on Students (第三人侵害学生事故中的学校责任), Law Science (法学) 2012/7, 107; Han Qiang (fn. 82), 108, all authors find the inapplicability to property loss as a gap in the law and support the analogous application of these norms to property loss. According to the *Leading Group of the SPC for the Implementation of the CCC* (fn. 13), p. 298, this gap was an intended one as cases involving property loss are rare and can be solved by the general tort law rules. The case where an external person is injured by a child supervised by an educational institution used to be regulated by art. 7 of the Interpretation of the SPC of Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury, which was abolished after the promulgation of the CCC. Previously, the educational institution could also be held liable if it had breached its duty of management, education and supervision.

93 Zeng Dapeng (fn. 92), 110–111.

94 Gerhard Wagner, in: Miquel Martín-Casals (ed.) (fn. 35), pp. 256–257.

95 Hans-Georg Bollweg/Norman Doukoff/Nils Jansen (fn. 8), p. 97.

96 See above fn. 85.

97 See above fn. 58.

98 *Leading Group of the SPC for the Implementation of the CCC* (fn. 13), p. 298.

Where a child is injured by another child, while both are supervised by the same educational institution, the liability will be determined in an interplay between arts. 1188, 1199 and 1200 CCC,⁹⁹ and not based on art. 1201 CCC. If the educational institution is also to be blamed for the injury alongside the child tortfeasor, it is deemed a case of cumulative causation in the sense of art. 1172 CCC. Consequently, the parents of the child tortfeasor and the institution should bear proportionate liability, with their respective shares determined by the individual contribution of each party.¹⁰⁰ The Shanghai Guidelines¹⁰¹ (Clause 3.2.1) recommend that the liability of the school be capped at 30 % if the injury is caused by a direct tortfeasor in situations of competitive sports and the negligence of the school is not severe; absent a direct tortfeasor and fault on the part of the victim, the educational institution should bear the majority of or full liability.

According to the Shanghai Guidelines¹⁰² (Clause 3.2.1), the plaintiff is not allowed to sue only the child tortfeasor if the injury (to another child) occurs during the time of supervision by an educational institution; the court is even authorized to add the institution as a third party *ex officio*. This requirement is probably also motivated by the aim of attributing part of the liability to the educational institution, as it is extremely difficult for an educational institution to prove its absence of fault (under art. 1199 CCC, e.g. where the victim is under eight). In one case, the teacher was writing the lecture content on the blackboard with his back to the students. The plaintiff and the defendant, both six years old, sat next to each other at the table. After a short exchange of words, the plaintiff looked at defendant’s pencil case and then moved towards it. Just at this time, the defendant opened the case, took out a pencil and accidentally stabbed the plaintiff in the eye.¹⁰³ The court ruled that the kindergarten should bear 90 % of the liability and the child tortfeasor 10 %, this although

99 Zou Hailin/Zhu Guangxin (fn. 83), p. 371.

100 *Leading Group of the SPC for the Implementation of the CCC* (fn. 13), p. 300, holds that proportionate liability applies only when the plaintiff sues the child tortfeasor’s parents and the educational institution together. Judgment of the Basic Court of Jinan High-tech Industrial Development Zone of Shandong Province of 16 January 2023, (2022) Lu 0191 Min Chu No. 6248 (山东省济南高新技术产业开发区人民法院, (2022) 鲁 0191 民初 6248 号).

101 See above fn. 58.

102 See above fn. 58.

103 Judgment of the Suiyang District Court of Shangqiu City of Henan Province of 03 November 2022, (2022) Henan 1403 Min Chu No. 8371 (河南省商丘市睢阳区人民法院, (2022) 豫 1403 民初 8371 号).

it was impossible for the teacher to have prevented the accident. The concern expressed in the legislative process¹⁰⁴ that a harsh standard of liability would result in restrictions being imposed on campus activities has already become a sad reality in many schools, where children are not allowed to leave the classrooms during breaks.¹⁰⁵

b) Damage Involving an External Third-party Tortfeasor

If a child is injured by an external third-party tortfeasor while being supervised by an educational institution, the third party assumes the entirety of liability and the educational institution bears corresponding supplementary liability (art. 1201 sent. 1 CCC). Notwithstanding contrary claims in literature,¹⁰⁶ Art. 1201 Sent. 1 CCC is not redundant despite arts. 1199–1200 CCC since it codified a new type of liability that has two components: (1) it is supplementary, which means that it applies only if the third party is unable to perform a judgment or cannot be found; (2) it is corresponding, which means that the educational institution can be held liable only up to the share of its fault.¹⁰⁷ Art. 1201 sent. 2 CCC grants a claim of recourse to the educational institution.¹⁰⁸ However, it is unclear whether reimbursement is available only for the liability component that goes beyond the educational institution's own responsibility, as it is equally unclear whether the external liability of the educational institution is indeed limited to its share of fault.¹⁰⁹ In practice, courts have previously usually avoided the issue of recourse by imposing proportionate liability on the third party and the educational institution instead of the liability stipulated by art. 1201 sent. 1 CCC.¹¹⁰ Only where the third-party tortfeasor cannot be identified or his/her financial means are insufficient

will courts impose greater liability, even up to the amount of full compensation, on the educational institution.¹¹¹ In art. 14 of the Interpretation on Torts, the SPC requires lower courts to adhere to the original wording of art. 1201 sent. 1 CCC. An educational institution's liability is thus limited to the share corresponding to its fault and under the condition that it is impossible to get compensation from the third party.

c) Summary

The aim of arts. 1199–1201 CCC is to regulate the liability of educational institutions for unsatisfactory supervision and management, which is in essence ordinary fault-based liability and not vicarious liability for the misconduct of children in their care. Consequently, some authors believe that these norms were a temporary populist solution to the frequent occurrence of accidents on campus and that their codification was inappropriate.¹¹² In particular, the distinction between children under eight and those over eight is crucial for the determination of fault in arts. 1199 and 1120 CCC and becomes completely irrelevant in art. 1201 CCC without an obvious ground.¹¹³

3. Instigator and Accessory

According to art. 1169 para. 1 CCC, an instigator or an accessory bears solidary liability for the harm inflicted by a direct tortfeasor. If the direct tortfeasor is a child, the instigator or the accessory is liable for the harm, while his or her parents bear corresponding liability (art. 1169 para. 2 CCC). Because art. 1169 para. 2 CCC does not mention the liability of a child tortfeasor, it is presumably not personally accountable at all. The scope of application of art. 1169 CCC is highly limited because the situations in which (1) both the instigator/accessory and direct tortfeasor are

104 Huang Wei (fn. 54), p. 145.

105 Most recently, the Ministry of Education responded to the "disappearing 10 minutes of break time"! (刚刚, 关于“消失的课间 10 分钟”, 教育部回应了!), <<https://www.163.com/dy/article/IILA0H7H0530U7LS.html>>.

106 Hans-Georg Bollweg/Norman Doukoff/Nils Jansen (fn. 8), 97.

107 Such corresponding supplementary liability is prescribed in art. 1201 CCC governing the liability of persons bearing the duty of maintaining safety, where the conditions for the recourse claim is controversial as well. Such a recourse claim is rejected by Yan Xianbin (杨显滨), On the Maintaining Safety Obligor's Indemnification Right (论安保义务人的追偿权), Tribune of Politics and Law (政法论丛) 2021/5, 36 et seqq.

108 Zeng Dapeng (fn. 92), 112.

109 Zou Hailin/Zhu Guangxin (fn. 83), p. 373, holds that the educational institution is entitled to full indemnity. From Huang Wei (fn. 54), p. 153, one may draw the same conclusion.

110 Zeng Dapeng (fn. 92), 109. In one case, supplementary liability has been understood as proportionate liability; judgment of the Intermediate Court of Zhuzhou City of Hunan Province of 19 March 2020, (2020) Xiang 02 Min Zhong No. 343 (湖南省株洲市中级人民法院, (2020) 湘 02 民终 343 号).

111 Judgment of the Intermediate Court of Guangzhou City of Guangdong Province (广东省广州市中级人民法院) of 14 December 2007, published by the SPC Gazette (2008) No. 9.

112 Meng Qinguo/Yu Wei (孟勤国/余卫), On the Liability of Education Institutions in Harmful Accident of Underage Students (论未成年学生伤害事故教育机构的责任), Hebei Law Science (河北法学) 2016/2, 7; Han Qiang (fn. 82), 107–108; Zhang Wei, Understanding the Law of Torts in China: A Political Economy Perspective, University of Pennsylvania Asian Law Review 2018, 224–225.

113 Leading Group of the SPC for the Implementation of the CCC (fn. 13), p. 306, and Zou Hailin/Zhu Guangxin (fn. 83), p. 374, hold that the attribution principle of arts. 1199 and 1200 CCC also applies to art. 1201 CCC.

children or (2) the instigator/accessory is a child and the direct tortfeasor is an adult are not covered.¹¹⁴ For the sake of the minor's protection, it seems appropriate to impose proportionate liability on the child tortfeasor's parents, irrespective of whether the child has acted as instigator, accessory or direct wrongdoer.¹¹⁵ In addition, art. 1169 para. 2 CCC is ambiguously worded in terms of external liability and is silent as to the right to recourse internally,¹¹⁶ something which has been solved in the meantime by art. 12 of the Interpretation on Torts. Art. 1169 para. 2 CCC seems to have no equivalent in comparative law, presumably because existing rules pertaining to children's liability in other jurisdictions already suffice to solve problems associated with instigation and assistance involving children in tortious acts.

Cases decided by applying art. 1169 para. 2 CCC are extremely rare, although group fights are not rare in Chinese schools, particularly in rural areas. In two common legal databases, only one judgment is to be found. In this case, all the participants in a fight were classmates. The instigator did not participate in the physical violence but verbally drove the main direct

tortfeasor to bludgeon the victim to death. After settling the compensation with the victim's family, the school filed a lawsuit seeking contribution from all the participating children and their parents, the school's insurer, and the insurer of the victim as joint debtors. The court ruled that for the death of the victim, the school was to bear 30 % liability, the main direct tortfeasor and her family bore 30 % liability in total, each of the five accessories on the side of the direct tortfeasor and their families bore 5 % liability, the victim's accessory and her family 5 % in total, and the victim and her parents 10 %.¹¹⁷

This court ruling offers some clues on the internal and external relationship in cases involving underage instigators, accessories and tortfeasors. Firstly, judges apply art. 1169 para. 2 CCC despite both the instigators/accessories and direct tortfeasors being children, although this situation is not, as mentioned, covered by the wording of this norm. Secondly, the court has determined the exact share of each direct and indirect tortfeasor and imposed proportionate liability on the involved tortfeasors. As the individual percentage of each litigant is ascertained by the court, the issue of recourse has resolved itself. Thirdly, in achieving this result, all related persons are joined in the proceeding, which means children instigators/accessories and tortfeasors can be sued directly under art. 1169 para. 2 CCC and can also be ordered to assume liability together with their parents. Fourth, the parents' fault is not examined separately and is treated as being equal to that of their children.

However, this court ruling does not directly respond to the question of the external and internal relationship among the parties under art. 1169 para. 2 CCC. In this regard, the SPC in its commentary supports one-way solidary liability (单向连带责任),¹¹⁸ which is a term coined by a Chinese scholar with reference to US tort law¹¹⁹ and which depicts the situation that, for the same harm, one or some debtors bear solidary liability and other debtors bear proportionate liability, whereby the wrongdoers bearing solidary liability, after paying the whole compensation, are entitled to seek contribution from the wrongdoers bearing proportionate liability up to the

114 I draw this conclusion from a systemic interpretation of art. 1169 CCC. Art. 1169 para. 1 CCC deals with the liability of instigators and accessories in general, while art. 1169 para. 2 CCC concerns that of a direct wrongdoer lacking full civil capacity, e. g. a minor. It is questionable whether art. 1169 CCC also covers situations where the instigator/accessory is a minor, with a minor or an adult being the direct wrongdoer. I believe the answer is no. The reason is that art. 1188 para. 1 CCC rejects direct tort liability ability of children. If art. 1169 CCC was applicable to a child instigator/accessory, the child would directly assume tort liability, which would contradict art. 1188 para. 1 CCC. This means that the Chinese legislature has addressed only the most common case of a minor being the direct wrongdoer and has ignored that a minor can also be the instigator/accessory; as a result of this oversight, it has failed to create a separate rule for this situation. This is an unintended gap in the law.

115 In *Zou Hailin/Zhu Guangxin*, (fn. 83), 57, another solution is recommended: if the instigator/accessory is a child and the direct tortfeasor is an adult, only the adult is subject to liability for the harm. If all the participants are children, they should bear solidary liability.

116 Art. 1169 para. 2 CCC says that the guardian of a direct wrongdoer lacking full civil capacity, e. g. a minor, assumes corresponding liability (相应的责任). Such a corresponding liability cannot be solidary liability, because solidary liability can be established only when it is explicitly stipulated by the law or by party agreement according to art. 178 para. 3 CCC. In this regard, the CCC has adopted the "doctrine of expressly stipulated joint liability" (连带债务发生明定主义), while art. 421 German Civil Code follows an opposite doctrine. For more details, see *Bu Yuanshi* (卜元石), *Conceptual Interface of Chinese Legal Scholarship's Exchange with Abroad and Research* (中国法学对外交流与研究中的概念对接), *Chinese Journal of Law* (法学研究) 2024/3, 38–39, with further references.

117 Judgment of the Baojing County Court of Hunan Province of 12 August 2021, (2021) Xiang 3125 Min Chu No. 42 (湖南省保靖县人民法院, (2021) 湘 3125 民初 42 号).

118 *Leading Group of the SPC for the Implementation of the CCC* (fn. 13), p. 65.

119 *Yang Lixin*, *Tort Liability Law of China*, 2018, pp. 104–105.

latter's share – but not *vice versa*.¹²⁰ With regard to art. 1169 para. 2 CCC, the instigator/accessory and the child tortfeasor's guardian bear solidary liability and liability corresponding to their fault, respectively. In literature, a wide range of opinions have been expressed. For instance, one commentary holds that both the child tortfeasor's parents and the instigator/accessory assume proportionate liability externally and that recourse between them is thus excluded.¹²¹ A second opinion believes that the external relation is one of non-genuine joint and proportionate liability; therefore the right to recourse is to be decided based on concrete circumstances.¹²² A third view proposes to determine the recourse right based on the fault of the parties.¹²³ A fourth opinion advocates the assumption of the entirety of liability by the instigator/accessory if the direct child tortfeasor is younger than eight and his or her parents have completely discharged their duties; in all other cases, a one-way solidary liability applies with parents assuming proportionate liability to the extent of their fault and the instigator/accessory assuming liability for the entire harm.¹²⁴

In the end, art. 12 of the Interpretation on Torts adopted one-way solidary liability for an external relationship and codified the guardian's right to recourse against the instigator/accessory regarding the component exceeding the guardian's liability, but not *vice versa*. The complete ban of instigator/accessory recourse claims against the direct tortfeasor's guardian may be justified by the gravity of the instigator/accessory's tortious act. However, it remains unclear whether the guardian's internal liability share is zero, as one opinion suggests.¹²⁵ This ambiguity arises because art. 12 of the Interpretation on Torts grants the guardian a contribution claim only for the portion exceeding their internal share. If the internal share was always zero, there would be no reason to limit the contribution claim.

In summary, with art. 1169 para. 2, the CCC has created special rules governing situations of instigating and assisting children in tortious acts and has thereby limited the liability of the child tortfeasor's parents. This norm, being significantly restricted in its range, fails to provide a rule for the most important scenario, namely instances when both instigator/accessory and the direct tortfeasor are children.

4. Impact of Insurance

It can be inferred from the above discussion that Chinese courts tend to hold educational institutions liable for breach of their supervisory duties when injury occurs to children in their care. At the same time, the inclination to recognize the comparative fault of the victim continues. To a certain extent this helps to balance the heavy burden on the educational institution.

Based on the relevant judgments, one may observe that this adjudication pattern of the courts will dramatically change if the educational institution has taken out liability insurance. Greater liability will initially be found on the part of the educational institutions in order to shift it to their insurers, while the fault of the tortfeasor and his or her parent as well as the comparative fault of the victim will often be rejected or minimized.¹²⁶

Examples include: (1) A school was held 100 % liable for injuries suffered by two 16-year-old students who collided while playing basketball.¹²⁷ (2) In three cases, the school was held 70 % liable and the tortfeasor and/or their parents 30 % liable: in the first case, a nine-year-old child negligently injured a classmate's eye with a pencil sharpener;¹²⁸ in the second case, an 11-year-old child was bumped into by a classmate at the classroom door;¹²⁹ in the third case, an eight-year-old child was bumped into by a classmate while walking from the schoolyard

120 Yang Lixin (杨立新), On Tort Liability for Instigation and Assistance (教唆人、帮助人责任与监护人责任), Legal Forum (法学论坛) 2012/3, 53–54.

121 Zou Hailin/Zhu Guangxin (fn. 83), 56.

122 Jiao Hongyan (焦艳红), Interpretation of the Liability Form of "Corresponding Liability" in the Tortious Capacity Section of the Civil Code of China (我国《民法典》侵权责任编中“相应的责任”之责任形态解读), Academic Journal of Zhongzhou (中州学刊) 2022/6, 41.

123 Wang Liming (王利明), Study of Tort Law (侵权责任法研究) Vol. I, 2011, p. 533.

124 Wang Zhu (王竹), On Tort Liability for Instigation and Assistance (论教唆行为与帮助行为的侵权责任), Legal Forum (法学论坛) 2011/5, 68.

125 Zhu Hu (朱虎), Corresponding Liability in Tort Liability (侵权责任中的“相应的责任”), China Journal of Applied Jurisprudence (中国应用法学) 2024/6, 48.

126 Of course, there are a few cases which do not fit in this pattern. See the judgment of the Dongming County Court of Shandong Province of 11 February 2023, (2022) Lu 1728 Min Chu No. 3908 (山东省东明县人民法院, (2022) 鲁 1728 民初 3908 号). In this case, the child tortfeasor (ten years old) who bumped into a classmate and caused her to lose one tooth was held 70 % liable; the school was held 30 % liable.

127 Judgment of the Intermediate Court of Tieling City Liaoning Province of 06 May 2022, (2022) Liao 12 Min Zhong No. 594. (辽宁省铁岭市中级人民法院, (2022) 辽 12 民终 594 号).

128 Judgment of the Court of Yifeng County Jiangxi Province of 29 December 2021, (2021) Gan 0924 Min Chu No. 1475 (江西省宜丰县人民法院, (2021) 赣 0924 民初 1475 号).

129 Judgment of the Court of Mingshui County Heilongjiang Province of 09 July 2021, (2021) Hei 1225 Min Chu No. 147 (黑龙江省明水县人民法院, (2021) 黑 1225 民初 147 号).

to the classroom.¹³⁰ (3) In two cases, courts denied parental liability, arguing that the injuries occurred during school hours.¹³¹ (4) In two other cases, the school was found, respectively, 90 % and 85 % liable, with responsibility then shifted to its insurer:¹³² in the first case, an eight-year-old child lost two teeth after being pushed by two classmates; in the second case, an 11-year-old child in a boarding school suffered injuries to five teeth after two classmates tripped him and kicked him. By contrast, in a case where an eight-year-old child slipped and bumped into a classmate – who, upon falling, hit another classmate and caused him to lose two teeth – the school, which was apparently not insured, was not held liable at all.¹³³

Another study regarding tort law in China came to the same finding that “courts look to insurers to pay out as much as possible”, because insurance companies are regarded as an arm of the state and “thus have obligations beyond paying out on their insurance contracts.”¹³⁴ It is astonishing that most schools and day-care operators still prefer to try their luck instead of paying insurance premiums in exchange for more financial security. As illustrated by the above-mentioned study, insurance companies in China are reluctant to settle and prefer to use court proceedings to prevent fraud perpetrated by their own staff.¹³⁵ Therefore, courts generally

support the joining of all parties, including the insurance company, to the lawsuit. Some courts believe that the defendant’s educational institution can be sued with the insurance company as co-defendant,¹³⁶ while others believe that the legal relationship (between the insurance company and the educational institution) involved is different and that the insurance company can therefore not be sued in the same lawsuit.¹³⁷ Due to the extremely far-reaching scope of *res judicata* of court judgments in China,¹³⁸ all parties indeed have incentives to concentrate internal and external disputes in one proceeding to avoid being bound by an award rendered in a proceeding which they are not even aware of.

IV. Evaluation of Scholarly Proposals and the Interpretation on Torts

The above survey shows that virtually all the norms relating to children’s tort liability in the CCC have been developed in judicial practice and have distinct Chinese features. The logic of the liability scheme can be summarized as follows: because the injured person normally has difficulties in claiming reimbursement from public medical insurance and because the Chinese state is unwilling to invest more in social insurance,¹³⁹ the wrongdoer will usually be held liable, regardless of whether in the form of the child tortfeasor’s parents, an entrusted person, an educational institution or an external party. As the public is reluctant to take out third-party liability insurance, even mandatory types of insurance,¹⁴⁰ courts tend to reduce the tortfeasors’ liability by recognizing the comparative fault of the victim – irrespective of the child’s age and capacity – and impose proportionate liability on multiple wrongdoers.

Confronted with high vulnerability of the plaintiff and the defendant in coping with accidents, courts in China often have no choice other

130 Judgment of the Court of Wanning City Hainan Province of 27 June 2022, (2022) Qiong 9006 Min Chu No. 1796 (海南省万宁市人民法院, (2022) 琼 9006 民初 1796 号).

131 Judgment of the Court of Huangchuan County Henan Province of 26 July 2022 (2022), Yu 1526 Min Chu No. 1343 (河南省潢川县人民法院, (2022), 豫 1526 民初 1343 号); judgment of the Court of Huangchuan County Henan Province of 23 May 2022, (2022) Yu 1526 Min Chu No. 417 (河南省潢川县人民法院, (2022) 豫 1526 民初 417 号).

132 Judgment of the Court of Dengzhou City Henan Province of 7 April 2022, (2022) Henan 1381 Min Chu No. 262 (河南省邓州市人民法院, (2022) 豫 1381 民初 262 号); judgment of the Court of Changyuan County Henan Province of 29 March 2022, (2021) Henan 0783 Min Chu No. 6056 (河南省长垣县人民法院, (2021) 豫 0783 民初 6056 号).

133 Judgment of the Court of Yanggu County Shandong Province of 15 November 2021, (2021) Lu 1521 Min Chu No. 3107 (山东省阳谷县人民法院, (2021) 鲁 1521 民初 3107 号).

134 Benjamin Liebmann, Ordinary Tort Litigation in China: Law versus Practical Justice?, J. Tort Law, 2020, 216.

135 Benjamin Liebmann (fn. 134), 222, points out: “Insurance officials report that they do not trust local company employees to settle cases; they are worried about local ties and collusion resulting in excessive payments. Insurance company officials also note that they confront an environment in which fraud, by claimants and by their own staff, is common and [in] which they lack ability to detect fraud. Relying on court decisions allows insurance companies to out-source verification and investigation.”

136 Judgment of the Xiao County Court of Anhui Province of 25 April 2022, (2022) Anhui 1322 Min Chu No. 3114 (安徽省萧县人民法院, (2022) 皖 1322 民初 3114 号).

137 Judgment of the Huai’an District Court of Huai’an City of Jiangsu Province of 17 August 2022, (2022) Su 0803 Min Chu No. 3535 (江苏省淮安市淮安区人民法院, (2022) 苏 0803 民初 3535 号).

138 Yuanshi Bu, Neuerungen und Streitfragen zum Drittschutz im chinesischen Zivilprozessrecht, ZZP Int 2019, 308–309.

139 Chenglin Liu, Socialized Liability in Chinese Tort Law, Harvard International Law Journal 2018, 18.

140 Zhang Wei, The Evolution of the Law of Torts in China: The Growth of a Liability System, in: Yun-Chien Chang/Wei Shen/Wen-yeu Wang (ed), Private Law in China and Taiwan – Legal and Economic Analyses, 2016, pp. 147–148.

than distributing losses among all involved parties to avoid social discontent.¹⁴¹ In this sense, tort law in China is still loyal to the conventional primary purpose of compensating victims, as most tort disputes mainly concern medical bills; this is in stark contrast to most of China's Western counterparts.¹⁴² Chinese lawmakers were aware of this logic and held it unrealistic to require all schools to buy insurance.¹⁴³ These circumstances form the starting point for evaluating the existing scholarly proposals and the Interpretation on Torts.

1. Basic Liability Regime

Regarding the basic regime governing children's tort liability, the rejection of tortious capacity and the commingling of the child's liability with the parents' liability are deemed the greatest deficiencies. A separation between the liability of a child tortfeasor and that of his or her parents is proposed by the majority of scholars.¹⁴⁴ To avoid injustice, equitable liability should also be introduced as an essential component. Compared to the current liability regime, the proposed concept is more logical and coherent, and it would offer at least one additional advantage. The recognition of the tortious capacity of children would provide a legal basis for courts to issue injunctions and affirmative orders against minors. In one case, a 16-year-old boy took advantage of a flaw in the application system of the school and repeatedly changed the university applications of a classmate without her consent.¹⁴⁵ If a minor cannot be an independent subject of tort liability, no injunction can be issued against him or her. Yet this advantage is subject to the caveat that China has not yet codified a comprehensive law of enforcement and no sanction is available to deal with a minor's refusal to comply with an injunction.

Not only the practical advantages associated with the reform concept are rather lean; there are also reasons to doubt that it would change the practice significantly. Working in a system with restrained social insurance, courts would still

have to split the damage among the parties. In order to prevent a situation where no one is liable to the victim, it is necessary either to lodge the supplemental equitable liability with both the child and his or her parents or to make it extremely difficult for the parents to rebut their fault. Given the general reservation about equitable liability in China, the new regime would face more suspicion and challenge from the public. And as long as liability insurance for families remains rare in China, a change in the liability regime would not have an impact on the amount of litigation. In this aspect, international experience¹⁴⁶ has only limited reference value for China. In fact, in the proposals of Chinese scholars, an obligation to purchase insurance is not mentioned at all.¹⁴⁷

On the side of the SPC, a consolidation of the existing practice – rather than a comprehensive overhaul – is preferred. This stance is understandable, as under the envisaged new liability regime, courts would always have to determine the fault of the child tortfeasor and the fault of the parents separately, which causes additional work without, in their view, additional benefits for the victim. Another advantage that might be brought about by the separation of the liability of a child tortfeasor and the parents is that the victim can proceed against the child tortfeasor alone and obtain an execution title against him or her. However, victims will not be necessarily better off, since they can obtain a decision against the child and his or her parents already today. Arts. 4 and 6 para. 2 of the Interpretation on Torts have underpinned the current approach by explicitly stating that the victim is not allowed to sue a child tortfeasor alone. The current approach achieves the same effect more efficiently.

2. Extending the Liability Regime

Regarding an extension of the regime governing children's tort liability, scholarly proposals vary widely. On the whole, most scholars and the SPC instead prefer to concretize the existing provisi-

¹⁴¹ Chenglin Liu (fn. 139), 18.

¹⁴² Hans-Georg Bollweg/Norman Doukoff/Nils Jansen (fn. 8), 91; for the situation in the West, see Thomas Kadner Graziano, *The Purposes of Tort Law*, JETL 2023, 23–41, 25–26; Thomas Kadner Graziano, *Priorität dem Opfer-schutz: Gedanken zur Rationalität des französischen Haftungsrechts aus europäischer Perspektive*, in: Stefan Huber/Jens Kleinschmidt (fn. 64), p. 79.

¹⁴³ Huang Wei (fn. 54), p. 145.

¹⁴⁴ See above fn. 42.

¹⁴⁵ Judgment of the Yanjin County Court of Henan Province of 20 October 2022, (2022) Henan 0726 Min Chu No. 3840 (河南省延津县人民法院, (2022) 豫 0726 民初 3840 号).

¹⁴⁶ Suzanne Galand-Carval, *General Questions*, in: Jaap Spier (ed), *Unification of Tort Law: Liability for Damage Caused by Others*, 2003, p. 297.

¹⁴⁷ It plays a role in one scholarly proposal for EU harmonization, see Nuno Ferreira, *The harmonization of private law in Europe and children's tort liability: A case of fundamental and children's rights mainstreaming*, *International Journal of Children's Rights* 2011, p. 588.

ons, which are plagued by many legal gaps.¹⁴⁸ An inclination in judicial practice to divide liability among multiple tortfeasors calls for solutions capable of making adjudication more consistent. The great efforts of legal scholarship and the SPC in elaborating new concepts, such as one-way solidary liability,¹⁴⁹ have yet not born fruit. This paper believes that the main reason is the chaotic approach to responsibility in cases of multi-party fault in Chinese tort law. Unlike art. 840 para. 1 German Civil Code and the law in other European jurisdictions,¹⁵⁰ the CCC has codified proportionate liability as a general rule in the case of independent tortfeasors for indivisible injury (art. 1172 CCC), but it has codified a number of exceptions for specifically codified tort causes of action.

Taking children's liability as an example, the liability prescribed by art. 1169 para. 2 CCC is "100 % liability of instigator/accessory + corresponding liability of the child tortfeasor's parents", that of art. 1189 CCC is "100 % liability of the child tortfeasor's parents + corresponding liability of the entrusted person", and that of art. 1121 CCC is "100 % liability of the third party + supplementary corresponding liability of the educational institution". What is worse is that absent norms comparable to art. 840 paras. 2 and 3 German Civil Code, legal scholarship and the SPC are mired in finding ways to deal with the internal relationship between the tortfeasors. No clear train of thought can be observed as to why the SPC allows or bars recourse claims in some situations.¹⁵¹

148 Although it might seem repetitive, I summarize the gaps here to provide a better overview: Art. 1169 para. 2 CCC fails to provide a rule for the most important scenario, namely situations where both the instigator/accessory and the direct tortfeasor are children. It is unclear whether art. 1189 CCC is applicable to educational institutions. Furthermore, art. 1189 CCC fails to clarify the internal and external relationship between the parties involved. Neither are Arts. 1199–1201 CCC applicable when a supervised child causes harm to someone who is not supervised by the institution; nor do the articles cover property damage or apply in a situation where adults are the victims. Arts. 1199–1201 CCC also do not distinguish between public and private institutions in terms of the nature of their liabilities, despite the sizable debate in literature that has been inspired by the bifurcation in German law. The causal nexus between the conduct of the educational institution and the injury is not specified. With regard to art. 1201 CCC, it is unclear whether reimbursement is available only for the component of liability that goes beyond the educational institution's own responsibility, since it is equally unclear whether the external liability of the educational institution is indeed limited to its share of fault.

149 See above III. 3.

150 *Christian von Bar* (fn. 36), p. 70.

As long as Chinese courts succeed in splitting liability among multiple tortfeasors in one proceeding, as is often the case, the problem does not have a noteworthy negative impact in practice. However, some parties are no longer ready to accept a court determination as to the allocation of internal liability in the absence of relevant pleadings having been first lodged.¹⁵² Sooner or later, detailed rules are going to be needed to help courts navigate through the confusing norms and highly inconsistent practice relating to independent tortfeasors. Given the reservation towards solidary liability in China, it seems more promising to further develop proportionate liability in order to capture as many as possible scenarios of indivisible injury resulting from multiple-fault.¹⁵³ The reason why Chinese scholars have not taken this path likely also lies in the lack of role models in comparative law.¹⁵⁴ The conventional solution of solidary liability in other jurisdictions places a greater burden on Chinese law to justify any deviation from this approach. However, the liability of multiple tortfeasors constitutes one of, if not the most, challenging issues¹⁵⁵ in Chinese tort law.

The Interpretation on Torts suggests that efforts to improve of Chinese tort law are focused on pressing issues facing the judiciary, which include, apart from children's tort liability, liability for objects thrown out of buildings and the vicarious liability of employers. In the selected areas, the concretization can be very detailed and address questions that appear marginal, such as the scope of enforceable assets of a child tortfeasor.¹⁵⁶ By contrast, inadequacies of a more fundamental nature that have been identified by scholars,

151 *Yuanshi Bu*, *Prozessgestaltung und Schuldnermehrheit und Kodifikation des chinesischen Zivilrechts*, ZZP Int. 2020, 183–184.

152 Judgment of the Beijing Third Intermediate Court of 22 April 2022, (2022) Beijing 03 Min Zhong No. 1343 (北京市第三中级人民法院, (2022)京03民终1343号).

153 An attempt has been made with respect to the liability arising from a combination of a failure to discharge the duty of safety protection and a direct tortious act, see *Wu Yue* (吴越), *Theoretical Reflections on the Supplementary Liability of Tortfeasors Breaching the Safety Protection Duty* (安全保障义务人侵权责任补充责任的理论反思), *Chinese Journal of Law* (法学研究) 2024/4, 150–151.

154 In common law, solidary liability seems also be the norm for independent tortfeasors causing indivisible injury, see *Kit Barker/Jenny Steele*, *Drifting Towards Proportionate Liability: Ethics and Pragmatics*, *Cambridge Law Journal* 2015, 76–77.

155 One scholar has identified 10 types of liability forms for independent tortfeasors under Chinese law, see *Yang Lixin* (杨立新), *New Developments of Theories on Multiple Tortious Acts and Liability* (多数人侵权行为及责任理论的新发展), *Law Science* (法学) 2012/7, 45–49.

156 Art. 5 para. 3 of the Interpretation on Torts.

e. g. the lack of a definition of basic terms such as negligence and causation, the uncertainty regarding the role of unlawfulness in establishing tort liability, the recoverability of pure economic loss, prerequisites of equitable liability, and the relationship between personality rights and tort law,¹⁵⁷ are not given priority. The discrepancy between legal scholarship and the SPC in terms of the perception of needed reforms is rooted in the first instance in the different views on what constitutes deficiencies. Numerous tort law rules labelled as deficient are indigenous rules that cater to the concept of justice in the underlying social, political and economic setting of Chinese tort law. Flaws in the norms that can be remedied in practice are often not treated as deficiencies by the judiciary in the first place. The overwhelming dominance of German law as a role model in China has not only resulted in proposing reforms with reference to the German Civil Code, but also in codifying rules based on German models despite the opposite judicial practice in China.¹⁵⁸ Benefits that can be brought about by a reform are sometimes insignificant and may be equally achieved through pragmatic solutions, such that any proposals to change these rules in order to – primarily – improve their systematic coherence and logical vigour will face strong resistance from legal practitioners.

Remedies in practice often rely on certain procedural arrangements; this is the reason why the Interpretation on Torts includes numerous provisions governing standing and the joining of parties as well as the contents of the verdict.¹⁵⁹ The strong paternalistic tendency displayed by the judiciary in the procedural interventions are thereby enhanced, with the aim of rendering judgments that are indeed enforceable. In the ban on recourse claims between multiple tortfeasors, one may infer an intention of the SPC to legitimize the trend in judicial practice of applying proportionate liability to multiple tortfeasors. This constitutes the only area where the SPC is trying to create judge-made law *contra legem*, which raises doubt whether the written law fails to reflect judicial practice.

157 Hao Jiang, The Three Myths of Tort Law in the Chinese Civil Code, Italian L. J. 2021, 714 et seqq.; Helmut Koziol/Yan Zhu (fn. 7), 337, 341.

158 See the case mentioned by Ken Oliphant (fn. 3), p. 407, with regards to uncertain causes. In practice, Chinese courts normally (i. e. up to 75 % of the time) apply proportionate liability, s. Ji Ruowang (fn. 67), 118; this practice also fits the general adjudication pattern in cases involving multiple tortfeasors.

159 Arts. 4, 5 para. 1, 6 para. 1 and 2, 14 paras. 1 and 2 of the Interpretation on Torts.

V. Conclusions

1. The Chinese regime of children's tort liability is characterized by the unity of the liability of a minor and of his/her parents. Victim protection generally enjoys high priority in China. It is subject to the restriction that comparative fault is very easily established; even fault of the victim's parents can be attributed to the child victim. Where multiple tortfeasors are involved, courts tend to apportion liability and resolve both the internal and external relationship in a single proceeding. In terms of the tort liability of very young children, comparative fault, and the strict liability of the child tortfeasor's parents, Chinese law exhibits similarities with French law, despite the huge differences between these two countries in respect of liability insurance and social insurance. Nevertheless, German tort law, which often follows completely different approaches in the above aspects, is treated as the preferred role model in China, which might also have complicated the reform of the relevant norms in the CCC.

2. As long as liability insurance and medical insurance are unable to deal with the harm caused by tortious acts, and as long as barriers resulting from other legal areas still exist, it is unrealistic to expect that the current regime governing children's tort liability in China can be fundamentally changed so as to primarily make the law more logical. In terms of separating the liability of the child and his or her parents for the same misconduct, the role that legal scholarship can play is confined. More work is needed to resolve the problem of multiple tortfeasors for indivisible injury. Given the preference for proportionate liability in judicial practice, the best path for escaping the currently confusing array of provisions is probably to implement proportionate liability – as is already established as a common rule in art. 1172 CCC – also in specific tort actions. This is the area where legal scholarship can play an important role in the search for appropriate responses. Overall, this study demonstrates that the judiciary – the driving force for improvement of the Civil Code – prioritizes the resolution of pressing issues in practice rather than adequately addressing academic concerns. Ultimately, due to the social, economic and political context in which Chinese tort law operates, the civil law regime on tortious liability is unlikely to evolve in the way envisioned by legal scholarship but will instead follow a need-based, piecemeal path.