

# The Three Myths of Tort Law in the Chinese Civil Code

Hao Jiang\*

### Abstract

This article raises three doctrinal myths within Chinese tort law upon the enactment of Chinese Civil Code. These myths led to difficulties in understanding Chinese tort law. More specifically, it is unclear what is the exact scope of rights protected under tort law, if personality rights claim is an independent basis of claim and when and to what extent liability in equity, a special liability without fault, can be imposed. These three myths came from three different root causes, namely: the incoherence in legal transplants, the practical implications of having an independent personality rights law outside torts, the clash between commutative justice, the foundation of Western tort law and distributive justice, the bedrock of Chinese legal tradition.

### I. Introduction

2020 was the year when Chinese civil law made history. On 28 May 2020, the first Chinese Civil Code since 1949 was enacted and became effective on 1 January 2021. It contains one thousand two hundred and sixty articles that are divided in seven books: the general provisions, property, contracts, personality, family law, succession and torts. In a break with civilian traditions, the Chinese Civil Code divides the book on obligations into contracts and torts; it absorbs law of unjust enrichment into the book on contract as quasi-contracts. Moreover, a book on law of personality stands on its own, which includes an enumerated list of personality rights protected by Chinese law with a focus on privacy and data protection as an effort to keep Chinese civil law up-to-date to tackle the legal challenges posed by the advancement of technology. In its appearance, Chinese civil law, and tort law in particular does not differ much from its Western counterparts and reflects influences from French, German and Anglo-American law.<sup>1</sup> In contrast, not much of the Code reflects Chinese traditional moral

\* Assistant Professor of Comparative Private Law, Bocconi University; J.D., LL.M., S.J.D., Tulane Law School.

<sup>1</sup> For example, Art 1615-1 is a general fault liability clause that replicates French Civil Code Arts 1240-1241; Art 533 and Art 580 both deal with change of circumstances. Art 533 took the German doctrine of *Störung der Geschäftsgrundlage* (destruction of the basis of transaction) as in BGB 313 yet Art 580 created a common law- inspired concept of frustration of purpose; such a doctrine does not operate as a cause to excuse the liability for breach of contract but rather as a cause to excuse performance. Art 151 resembles the doctrine of unconscionability in American law. See generally, H. Jiang, 'The Making of a Civil Code in China: Promises and Perils of a New Civil Law'

philosophy.

In his seminal piece, the Legal Formants, Rodolfo Sacco taught us that appearance does not tell us much and that a simple reading of statutes is a poor and incomplete way of understanding the law.<sup>2</sup> When dealing with a country as old and sophisticated as China, one can easily miss the whole picture by focusing only on the written statutes.

In reality, massive legal transplants led to logical contradictions, Chinese moral philosophy still plays an important part in Chinese tort law and the legal innovation needs a better roll-out plan. In this article, I will briefly describe the codification history of Chinese tort law and address the three myths in Chinese tort law, respectively created by incompatible legal transplants, legal innovation and the traditional Chinese moral philosophy. More specifically, I will explore the problems raised by the unclearly defined scope of rights to be protected under tort law, the implications of personality rights as an independent body of rights outside tort law and the distributive justice-inspired liability base: the liability in equity.

## II. A Brief Legislative History

After World War II and the Chinese Civil War, the Civil Code of the Republic of China ('ROC') was abolished along with other ROC codes and laws upon the founding of the People's Republic of China in 1949. No official law (neither statutes nor case law) was in place to deal with private law until the economic reform at the end of the 1970s. The first set of rules regarding torts appeared in the 1986 General Principles of Civil Law.

In the first three decades of the Communist regime, tort law was missing along with the private ownership of means of production and contractual transactions. Tort law lost its practical significance when private ownership and contractual freedom were deemed to be illegitimate, and when the protection of private law rights also had to give way to massive political changes taking place during political campaigns such as the anti-rightists campaign and the Cultural Revolution in those thirty years. Though there were civil rights protected by the 1954 and 1975 Constitutions, these bills of rights bore little practical significance, due to the lack of implementing legislation. As a result, the Constitutions were barely applicable in practice. In this period of time, tort law only existed in customs, with some special types of tort in special statutes such as the Environment Protection Law and the Patent Law.

In the late 1970s, after the Cultural Revolution, upon the adoption of the

95 *Tulane Law Review*, 777 (2021).

<sup>2</sup> R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' 39(1) *The American Journal of Comparative Law*, 27 (1991). ('The statutes are not the entire law. The definitions of legal doctrines by scholars are not the entire law. Neither is an exhaustive list of all the reasons given for the decisions made by courts').

reform and openness policy, China reintroduced private ownership in both rural and urban areas through the introduction of a land contract system and urban business households. Through such programs, farmers were allowed to retain the surpluses of grain above their assigned quotas and business households were allowed to operate small-scale businesses. Financial incentives and autonomy were introduced to improve the proficiency and profitability of state-owned enterprises. At the same time, China grew to become the world's second largest recipient of foreign direct investment. All of these changes called for more protection of private ownership and personal liberty, which was essential to stimulate sustainable economic growth. Private law was reintroduced as a result under the framework of European continental civil law. Thus, contemporary Chinese law recognizes four sources that give rise to an obligation: tort, contract, unjust enrichment and *negotiorum gestio*.<sup>3</sup>

As noted above, the first piece of written law that introduced the general principles and rules of tort law was the General Principles of Civil Law (GPCL), which became effective on 1 January 1987. Though GPCL also provides the foundation of Chinese tort law, rules on various perspectives of tort law were fragmentary and can be seen in various parts of the GPCL, which was therefore lacking an organized logical structure on tort law. After years of the drafting process, the Tort Liability Law (TLL), as the first post-1949 tort law code and part of China's continued effort in completing its own civil code, was enacted in 2009 and became effective on 1 July 2010. Other than these two major statutes, several of the Supreme Court's judicial interpretations (which are issued in a codification-like form and are not case specific), the Supreme Court's replies to lower courts' specific inquiries on the interpretations of particular points of law, and several special statutes also deal with tort law. The interpretations on tort law can be seen in: the Supreme Court's Opinions on the implementation of General Principles of Civil Law (1988); the Supreme Court's notice regarding several issues in the application of the Tort Liability Law (2010); the Supreme Court's interpretations regarding issues arising in the adjudication of personal injury cases (2003); the Supreme Court's interpretations on adjudicating moral damage claims arising out of tort liability (2001); the Supreme Court's replies regarding whether a trademark owner can be sued as a defendant in a product liability litigation (2002); and the Supreme Court's replies regarding whether a victim's moral damage claim against a criminal defendant can be accepted by people's courts (2002). Statutes that regulate specific tort law issues include: the Trademark Law (1982); Patent Law (1984); Environment Protection Law (1989); Copyright Law (1990); Product Quality Law of the PRC (1993); Law on the Protection of Consumer Rights (1993); Marine Environment Protection Law (1999); and Right *in rem* Law (2007). The General Provisions of Civil Law was enacted in 2017,

<sup>3</sup> See for example 魏振瀛 (Wei Z.), 民法 (Civil Law) 301 (Higher Education Press/Peking University Press 2000).

which would become the first book of Chinese Civil Code in 2020. The book of torts in Chinese Civil Code superseded the Tort Liability Law as the main source of Chinese tort law since January 2021. Most features of Chinese tort law will remain but certain significant changes have been made.

Contemporary Chinese tort law has adopted the fault liability regime with the supplements of strict liability and ‘liability in equity’. Though tort law damage is still considered compensatory in nature, punitive damages are allowed in certain areas such as products liability if the producer’s intention or knowledge of the defect can be proved.<sup>4</sup> The victim can also recover for moral damages arising out of torts to personal rights and interests that have caused her severe mental distress.<sup>5</sup> In addition, a departure from BGB § 831, vicarious liability is based on non-fault liability following the Anglo-American and French traditions – an employer will be jointly liable for the tort committed by an employee during the course of employment even if the employer has exercised due care in the selection and control of the employee.<sup>6</sup>

### **III. Myth No 1: What Is the Scope of Rights Protected under Chinese Tort Law?**

Every tort law system has to deal with a fundamental question – do all legal rights have to be protected by tort law? If one only looks at the wording of civil codes, one might be under the impression that there are tort law systems that protect all legal rights from being infringed while other systems might only protect a select list of rights enumerated in the civil code. These two representative positions can be drawn from the French and German civil codes. The French Civil Code provides that

‘(a)ny human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it. Everyone is liable for harm which he has caused not only by his action, but also by his failure to act or his lack of care’.<sup>7</sup>

On the other extreme, the German Civil Code is very specific about the scope of rights protected. § 823 (1) BGB provides that

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

<sup>4</sup> See Chinese Civil Code Art 1207 (modifying from TLL Art 47).

<sup>5</sup> See Chinese Civil Code Art 1183 (modifying from TLL Art 22).

<sup>6</sup> For example, see Supreme Court’s Interpretations on Personal Injury Cases Art 9.

<sup>7</sup> French Civil Code Arts 1240-1241. Codice Civile adopted the same approach. Art 2043 provides that ‘Qualunque fatto doloso, o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno’.

Chinese law, through TLL Arts 2 and 6, appears to have adopted both. As a result, it is unclear whether a constitutional right or a right to pure economic loss can be protected by Chinese tort law. The apparent contradiction in Chinese tort law might come to an end in 2021 when the Civil Code becomes effective. Civil Code Art 1165 endorsed Art 6 of the Tort Liability Law, taking the French approach which had already great influence in the existing judicial practice. It provides: '(w)here an actor harmed another's civil interests and caused damage through his fault, he shall be liable in tort'. However, this supposedly remarkable change seems to have gone unnoticed among legislative and scholarly commentaries. One prominent commentator, Zhou Youjun, a member of the drafting committee, commented that dropping Art 2<sup>8</sup> does not change the law as the interests protected by tort law are still limited to persons and property as indicated elsewhere in the Code.<sup>9</sup> His view was confirmed by his other article on the innovations of tort law in the Civil Code. Zhou, when commenting on the new Art 1165-1, only mentioned the fact that it lays down the fault liability principle.<sup>10</sup> Another drafter, Meng Qiang, in an email exchange, when asked about pure economic loss, expressed his opinion that it should not be protected barring exceptional circumstances as allowing relief will unduly burden the defendants. However, it might receive more protection in the future as Chinese economy progresses and people continue to prosper financially. Again, the perplexing messages call for clarification for the exact scope of protected interests.

Does the doctrinal difference mean that French civil law protects all possible legal rights without limitation, while German law protects only the enumerated rights and ignore those rights that are not specified in the Code? By examining actual cases in each jurisdiction, it appears that this is not the case. Let us take German tort law, for example.

According to the enumerated list set forth by § 823 (§1) of the German Civil Code, along with the wording of Art 253 of the same code, a plaintiff was not supposed to recover for injuries to her dignity or privacy.<sup>11</sup> However, in a 1954 case the German Federal Court protected one's right to privacy by declaring a

<sup>8</sup> 'Harming civil rights and interests will lead to liability in tort. Civil rights and interests used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interest'. TLL Art 2.

<sup>9</sup> For example, Art 3 mentions person and property interest, Art 1164 mentioned civil interests, Art 1167 mentioned safety of person and property. 周友军 《民法典侵权责任编的制度发展》 (Zhou Y., *The Institutional Development of Civil Code Book on Tort Liability*), available at <https://tinyurl.com/7rec9fbu> (last visited 31 December 2021).

<sup>10</sup> 周友军 (Zhou Y.) 《民法典侵权责任编的守成与创新》 *Compliance and Innovation of the Tort Liability Part of the Civil Code*, 当代法学》2021年第一期 (1 Contemporary Jurisprudence (2021)).

<sup>11</sup> See J. Gordley et al, *An Introduction to the Comparative Study of Private Law, Readings, Cases and Materials* (Cambridge: Cambridge University Press 2021), 324.

newspaper had violated the ‘another right’ under § 823 (§1) by publishing a letter written by a lawyer on his client’s behalf.<sup>12</sup> Since such a right is supposed to be protected by the Constitution, the court reasoned that

‘Arts 1 and 2 of the German Constitution protect human dignity and personal freedom, and without a civil action, this protection would be incomplete’.<sup>13</sup>

Still, most systems would only allow individuals to sue the state for infringement of constitutional or fundamental rights outside tort law and normal civil litigation. Does Chinese law impose civil liability to protect rights granted by public law? One of the leading tort law textbooks in China has argued that only civil rights and interests should be protected by Chinese tort law; therefore, rights and interests protected by public law shall not fall within the scope of rights protected under Art 2 (§2).<sup>14</sup> One typical example listed in the book was the right to receive education, which, in my opinion, is a constitutional right that shall not be remedied by imposing tort liability.<sup>15</sup>

Yet, in a most famous Chinese case that indicated the promise of the judicialization of the Chinese Constitution, the case of Qi Yuling, the Chinese Supreme Court imposed tort liability on the defendant’s infringement of the right to receive education, which is a constitutional right.<sup>16</sup>

In this case, the plaintiff, Qi, went to junior high school with the defendant, Chen. Both of them graduated in 1990 and took the same entrance exam in order to further their education at a vocational business school, with guaranteed job upon graduation provided that they graduate from this vocational business school.<sup>17</sup> Qi did well and was supposed to receive the notice of admission from the business school; however, Chen, who did not do well, conspired with her father along with the junior high school to intercept Qi’s notice of admission without Qi knowing, and forged documents that would allow Chen to use Qi’s name to attend the vocational school.<sup>18</sup> Chen subsequently attended this vocational business school under Qi’s name. Chen graduated and started working at the Bank of China’s local branch – the guaranteed employment. Qi, since graduating from junior high school, struggled to find stable employments and had to work temporary jobs in

<sup>12</sup> *ibid* 325.

<sup>13</sup> BGH, 25 May 1954 – I ZR 211/43, BGHZ 13, 334.

<sup>14</sup> 王利明, 周友军·高圣平(Wang L., Zhou Y. and Gao S.), 《中国侵权行为法教程》(*Textbook on the Tort Liability Law of China* (Beijing Shi: People’s Court Press, 2010), 61).

<sup>15</sup> *ibid*.

<sup>16</sup> A large amount of scholarly attention has been devoted to this case, whose significance was compared to that of *Marbury v Madison* in the U.S. Before this case, the Constitution was not cited as a source of authority in China. See generally R.J. Morris, ‘China’s *Marbury*: *Qi Yuling v Chen Xiaoqi* – The Once and Future Trial of Both Education & Constitutionalization’ 2 *Tsinghua China Law Review*, 273, 274 (2012).

<sup>17</sup> See Supreme Court Gazette 2001 no 5, 158-161.

<sup>18</sup> *ibid*.

factories. Qi discovered the identity theft by chance.

The plaintiff did not realize the identity theft until 1998, when she immediately sued for torts that violated her right to name as well as the right to receive education. The trial court only recognized the tort towards her right to name because the right to receive education was not a right protected by civil law. The reason to bring the constitutional claim is simply that the tort towards one's right to the name is a one-time offense and the damage permitted by law does not reflect the decades of income disparity. On appeal, the provincial high court petitioned to the Supreme Court to seek interpretation on whether violation of a constitutional right can be remedied by imposing civil liability since the right to receive education is not a listed right under the GPCL. The Supreme Court in its reply expressly stated that the infringement of the plaintiff's constitutional right to receive education had resulted in the damage. Therefore the defendant was obliged to bear civil liability.<sup>19</sup> As a result, not only did the plaintiff recover losses arising out of the damage to the right to name, which included the tuition to repeat the junior high and additional tuitions for another trade school; through the claim on right to education, she was also entitled to the consequential economic loss, which included all the salaries Chen earned under Qi's name along with the moral damage.<sup>20</sup>

This case proved that Chinese courts were able to expand the protection of rights outside a seemingly definite list of rights to be protected by tort law. Such a practice is exceptional as it allows private parties to recover in a constitutional claim from another through civil litigation. It should, however, be noted that the Supreme Court's interpretation mentioned above was abolished in 2008 by a Supreme Court notice stating that this 2001 interpretation 'discontinued to be applicable'.<sup>21</sup> This controversial issue seemed to have finally been cleared by a fellow drafter, Zhou Youjun, who explained that public law rights are not within the 'civil interests'<sup>22</sup> protected by tort law under Art 1164, which provides that 'this book

<sup>19</sup> 法释〔2001〕25号 Supreme Court Interpretation no 25 (2001). Zuigao Renmin Fayuan Guanyu Yi Qinfan Xingming Quan de Shouduan Qinfan Xianfa Baohu de Gongmin Shou Jiaoyu de Jiben Quanli Shifou Ying Chengdan Minshi Zeren de Pifu, Fa Shi [2001] 25 Hao (最高人民法院关于以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利是否应承担民事责任的批复, 法释[2001]25号) [Reply on Whether the Accused Shall Bear Civil Liability for the Infringement of the Citizen's Fundamental Rights of Receiving Education under the Protection of the Constitution by Means of Infringing the Right of Name, Judicial Interpretation No. 25 [2001]] (promulgated by the Judicial Comm. Sup. People's Ct., June 28, 2001, effective Aug. 13, 2001).

<sup>20</sup> See Supreme Court Gazette no 5 (2001), 158-161.

<sup>21</sup> See Supreme Court Judicial Interpretation no 15 (2008). See Guanyu Feizhi 2007 Niandi Yiqian Fabu de Youguan Sifa Jieshi` (Di Qi Pi) de Jueding, Fa Shi [2008] 15 Hao (关于废止2007年底以前发布的有关司法解释(第七批)的决定, 法释〔2008〕15号) [Decision on Abolishing Some Judicial Interpretations (the Seventh Batch) Issued Before the End of 2007, Judicial Interpretation No. 15 [2008]] (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 8, 2008, effective Dec. 24, 2008) SUP. PEOPLE'S CT. GAZ., Feb 1, 2009, at 7.

<sup>22</sup> 周友军 《民法典侵权责任编的制度发展》(Zhou Y., *The Institutional Development of Civil Code Book on Tort Liability*), available at <https://tinyurl.com/7rec9fbu> (last visited 31 December 2021).

regulates civil relations arising from harms to civil interests'. Unfortunately, the myth is not yet solved. There were calls to revive the *Qi Yuling* case in 2020 right after the passage of the Code. There was a surge of similar cases where people discovered that they lost the opportunity to attend college because their fellow classmates stole their identities. Still, the view among practitioners is that without resorting to right to education, damages can only be nominal.<sup>23</sup> According to these commentators, the practice people had seen from the *Qi Yuling* case could be revived by the Civil Code through personality rights law.<sup>24</sup>

What about pure economic loss? It is not clear whether Chinese law recognizes economic right as a right under the protection of tort law. The Civil Code on its face dropped the German approach that enumerates the rights but kept the French approach as we have seen in Art 1615. Commentators still think the protected interests are limited to personal and property rights. The principal drafter, Wang Liming, made it clear that only absolute rights are protected by tort law rather than relative rights such as contractual rights. According to Wang, pure economic loss is not an absolute right and therefore shall not in principle be remedied by tort law unless the causation was proximate and loss is certain and foreseeable<sup>25</sup> It is almost like saying the nature of the harm does not matter. Physical or not, recovery is permitted so long as causation and damage can be proved. Through a thorough study of existing cases and interviews with judges, it is abundantly clear that the French approach is widely used in judicial practice as judges and practitioners were almost never bound by the exclusionary rule on recovery of pure economic loss as in German law.

I interviewed twenty-seven elite Chinese judges enrolled in the master and doctoral programs at City University of Hong Kong. It became clear that even when the German approach was in the law, it never stopped the judges from rewarding damages for pure economic loss as in France. Overwhelmingly with the exception of two judges, they either do not appreciate why law should only protect rights of property and person or they consider economic right as a property right. For the judges who did recognize pure economic harm, they were not sure whether economic right shall be protected by law. Overwhelmingly, judges would allow parties to recover from pure economic loss citing Art 6 instead of Art 2.

Having done a survey of close to one hundred cases identifying pure economic loss since the promulgation of TLL, less than a dozen of them did so correctly. Others confused pure economic loss with physical loss. The confusion towards recovery for pure economic loss is evident. Out of these cases, courts only awarded pure economic loss in four cases. Within these four cases, the grounds

<sup>23</sup> A cluster of identity theft cases in college admission found: Civil Code had shown the roadmap in how to deal with them, available at <https://tinyurl.com/8htc2mmx> (last visited 31 December 2021).

<sup>24</sup> *ibid.*

<sup>25</sup> 王利明, 周友军·高圣平(Wang L., Zhou Y. and Gao S.), 《中国侵权行为法教程》*Textbook on the Tort Liability Law of China* n 14 above, 60-63.



for relief were highly questionable. For example, in two cases, pure economic loss was deemed an indirect loss that shall be remedied.<sup>26</sup> In another case, the court recognized that pure economic loss is a civil interest and shall be protected by law.<sup>27</sup> In another, pure economic loss caused by intentional act shall lead to liability in tort.<sup>28</sup> In cases where recovery for economic harm was rejected, reasons unrelated to the nature of the harm were given. In several cases, causation was not found.<sup>29</sup> In some other cases, damage was not certain.<sup>30</sup> In others, the harm was not foreseeable<sup>31</sup> and the act was not intentional<sup>32</sup>.

In some cases, the court does not think it was a problem to extend the protection of tort law into rights of expectancy, such as an economic right. They do care, however, whether causation can be established between the act and damage and the certainty of the extent of the damage. In a recent case decided in 2018, the court was not bothered by the fact that part of the claims was based on the economic loss.<sup>33</sup> They awarded partial damages citing Art 6 of Tort Liability Law, which bears the French view. In this case, plaintiff's production activities at their pig farm were interrupted by the three defendants and resulted in the loss in revenue.<sup>34</sup> The defendants dug a hole and damaged the road leading to the farm and used a tractor to block the way so that baby pigs could not be delivered to the farm. The interruption lasted from early 2016 until late 2017, the plaintiff sued for the loss of profit in the amount of RMB one hundred and fifty thousand yuan. The court recognized defendants' conduct as a tort and that the loss resulted was a pure economic loss. However, the court did not award the whole damage. They reasoned that the plaintiff did not fulfill their duty to mitigate the damage as they did not start repairing the road until after two months. In addition, the alleged profit could have been affected by uncertain market conditions and the cost. As a result, only partial alleged damage of RMB twenty thousand was awarded.

On the other hand, there are courts that expressly denied recovery for pure economic loss when the loss was in connection to a physical loss. In a case decided in 2016, after a car wreck, the court awarded plaintiff damages resulting from the personal injuries sustained but did not allow recovery of a paid tour that

<sup>26</sup> (2017) 京03民终5262号; ((2017) Jing 03 Min Zhong No 5262); (2017) 苏04民终3967号. ((2017) Su 04 Min Zhong no 3967).

<sup>27</sup> (2014) 渝一中法民终字第06265号. ((2014) Yu Yi Zhong Legal Explanation Min Zhong no 06265).

<sup>28</sup> (2017) 粤0224民初615号. ((2017) Yue 0224 Min Zhong no 615).

<sup>29</sup> Eg (2017) 黔0303民初137号. ((2017) Qian 0303 Min Chu no137); (2016) 鄂08民终219号. ((2016) E 08 Min Zhong no 219).

<sup>30</sup> Eg, (2016) 粤06民终9266号. ((2016) Yue 06 Min Zhong no 9266).

<sup>31</sup> Eg, (2016) 苏06民终4451号. ((2016) Su 06 Min Zhong no 4451).

<sup>32</sup> Eg, (2016) 黔0303民初5006号. ((2016) Qian 0303 Min Chu no 5006); (2016) 黔0303民初5005号. ((2016) Qian 0303 Min Chu no 5005); (2016) 黔0303民初5004号. ((2016) Qian 0303 Min Chu no 5004).

<sup>33</sup> (2017) 粤0224民初615号. ((2017) Yue 0202 Min Chu no 615).

<sup>34</sup> *ibid.*

plaintiff could no longer go to due to the accident.<sup>35</sup> The court maintained that such a loss is independent of property and person and originates from the contractual relationship between the plaintiff and the travel agency. The court furthered reasoned that the law shall limit the scope of potential victims and the extent of the pure economic loss given their uncertainty and unforeseeability. Strikingly, the court did not recognize that the economic loss in this case stemmed from a physical harm but it seemed clear to the court that pure economic loss cannot be recovered by law. However, if it was that clear, the court could have stopped right there. Yet, it might be that the difficulty in providing relief really lies in the uncertainty of damage and the lack of proximity of causation. Such a practice seems to be no different than the French courts. Supposedly, French law would allow plaintiffs to recover from pure economic loss. However, courts also found it necessary to limit the recovery of pure economic claims resorting to other doctrinal barriers. When a plaintiff is suffering from a loss that comes from a risk that should be borne by himself, claim for economic loss would be denied. Such loss is either 'hypothetical',<sup>36</sup> when a man who was about to close a deal was injured and the deal went sour, or 'indirect'<sup>37</sup> when the debtors were both killed and creditor could not collect debt.

The contradictory positions taken by Art 2 and Art 6 led to a clash between court decisions. In another recent case where a driver negligently drove a truck into the power line cutting off the electricity in the neighboring area and causing the interruption of production in a bottling factory, the appellate court and the trial court were at odds as to whether economic loss shall be remedied by tort law.<sup>38</sup> Citing Art 6, the trial court allowed full recovery of economic and property loss of RMB one hundred eighty-seven thousand and one hundred. The decision was reversed by the appellate court on the ground that tort law should only protect rights that are of property and person in nature, citing Art 2. As a result, appellate court held that only loss related to the loss of bottles and waste of diesel fuel due to the loss of electricity could be recovered in the amount of RMB fifty-seven thousand. Still, the court was of the view that the loss of profit could not be recovered because it was uncertain or had not been accrued. The outcome might be different if loss of profit were certain.

<sup>35</sup> (2016)黔0303民初5005号((2016) Qian 0303 Min Zhong no 5005).

<sup>36</sup> Cour de cassation (Cass.) (Supreme Court for Judicial Matters) 2e civ., 12 June 1987 (cited in J. Gordley et al, *An Introduction to the Comparative Study of Private Law, Readings, Cases and Materials* 410 (Cambridge: Cambridge University Press, 2021)).

<sup>37</sup> Cour de cassation (Cass.) (Supreme Court for Judicial Matters) 2e civ., 21 February 1979 (cited in J. Gordley et al, *An Introduction to the Comparative Study of Private Law, Readings, Cases and Materials* (Cambridge: Cambridge University Press, 2021), 410.

<sup>38</sup> (2016)鄂08民终219号 ((2016)Er 08 Min Zhong No.219).

## IV. Myth No 2: What Are the Limits to the Application of Liability in Equity?

### 1. An Overview of Liability in Equity

The fault liability regime is a reflection of commutative justice or corrective justice,<sup>39</sup> while liability in equity is a liability based on distributive justice<sup>40</sup> – the foundation of the traditional Chinese legal system. Where a harm that is not subject to strict liability is suffered but neither party was at fault, there would be no recovery under Western tort laws as doing so would be tantamount to imposing liability on a party for a harm caused by accident. However, letting the victim bear the entire damage has never been the solution preferred by the distributive justice system which China traditionally embraces. Distributive justice promotes the even distribution of losses. Therefore, liability in equity became a liability regime that reflects traditional Chinese values and supplements the fault liability regime that is borrowed from the West. In the new Code, the law tries to limit the unbridled application of liability in equity yet all that is said is that its application must be ‘according to law’. Here comes the second myth: what does ‘according to law’ entail and what are the exact limits imposed on liability in equity?

This principle first appeared in Art 132 of the GPCL, which provides that ‘(w)here no party was at fault in resulting in the harm, civil liability can be, according to the actual situations, shared among the parties’.<sup>41</sup> This rule is rephrased in Art 24 of the TLL, which provides that ‘(w)here neither the victim nor the actor is at fault for the occurrence of a damage, both of them may share the damage based on the actual situation’.<sup>42</sup> The allocation of damages here is an allocation based on the property statuses of the parties. The rule, in part a legal transplant from Art 406 of the 1922 Russian Civil Code, adheres to the traditional Chinese philosophy of distributive justice.<sup>43</sup>

### 2. Social Status as the Determining Factor in Finding Liability in Imperial China

Throughout Chinese history, distributive justice rather than commutative justice has been the core standard in Chinese tort law.<sup>44</sup>

On the one hand, in absence of the principle of commutative justice, which relies on the objective, reasonable person standard and the duty of care, tort liability functioned to determine property status and provide restitution when there was

<sup>39</sup> *ibid* 171.

<sup>40</sup> *ibid*.

<sup>41</sup> GPCL Art 132.

<sup>42</sup> TLL Art 24.

<sup>43</sup> See Wang Liming et al, n 14 above, 171.

<sup>44</sup> See generally Deng Feng, *Corrective Justice in Confucian Legal Tradition: A Nonexistent Concept* (undated) (unpublished manuscript), 5, <https://tinyurl.com/muespu85> (last visited 31 December 2021).

damage to another's property.<sup>45</sup> The idea was to share the loss evenly. As a result, negligence and fault became irrelevant in determining liability.

On the other hand, parties' social statuses became a factor in determining liability. To aid the weak and suppress the strong has always been the sound governance policy in both governing the country and adjudicating cases. Even for robbers, robbing the rich to aid the needy (劫富济贫) was heroic and commendable behavior for outlaws.<sup>46</sup> In the chapter on the law of punishment of Han Shu (汉书), a leading historical account of the West Han Dynasty, it was pointed out that a sound governance policy should support the weak and suppress the strong (扶弱抑强).<sup>47</sup> Hai Rui (海瑞), perhaps the most well-known judge in imperial China, commented on this philosophy in adjudicating indeterminable cases:

I suggest that in returning verdicts to those cases it is better to rule against the younger brother rather than the older brother, against the nephew rather than the uncle, against the rich rather than the poor, and against the stubbornly cunning rather than against the clumsily honest. If the case involves a property dispute, it is better to rule against a member of the gentry rather than the commoner so as to provide relief to the weaker side. But if the case has to do with courtesy and status, it is better to rule against the commoner rather than against the gentry: the purpose is to maintain our order and system.<sup>48</sup>

All of these efforts were made to help realize distributive justice. What will be the policy benefits in advancing distributive justice? Confucius gave a strong argument:

'the head of the state or family shall not be concerned about poverty as much as they should be concerned about uneven distribution (不患贫，而患不均) ... there is no poverty in even distribution of wealth (均无贫)'.<sup>49</sup>

### 3. Financial Status as the Determining Factor in Finding Liability Under Liability in Equity

Though liability in equity is a rule largely unknown to the West and consistent with traditional Chinese philosophy, it is not a complete innovation by the drafters of the GPCL and TLL. Similarities can be drawn from Russian civil law. Art 406 of the Russian Civil Code of 1922 provided that:

'(i)n situations where, in accordance with Arts 403–405, the person causing the injury is not under a legal duty to recover, the court may

<sup>45</sup> See *ibid* 28.

<sup>46</sup> See Xinhua Dictionary of Chinese. It is considered a positive term. Other similar variations of the phrase include 'kill the wealthy to aid the needy' (杀富济贫).

<sup>47</sup> See Book of Han Dynasty, Chapter of Punishment (汉书 刑罚志).

<sup>48</sup> Ray Huang, *1587: A Year of No Significance: The Ming Dynasty in Decline* (New Haven: Yale University Press, 1981), 131.

<sup>49</sup> See 《论语季氏》 (Analects, Chapter of Ji Shi).

nevertheless compel him to recover the injury, depending on his property status and that of the person injured’.

Here, Arts 403–405 of the Russian Civil Code of 1922 respectively dealt with fault liability; presumption of fault for ultra-hazardous activities, wild animal keepers and building constructors; and liability for people with limited or no civil capacity. Liability in equity was also a supplement to fault liability where the determining factor in finding liability outside fault was the relatively superior property status.

In China, there are a few unstated rules regarding how liability in equity should be applied. Scholars emphasize that the loss shall be fairly allocated.<sup>50</sup> The wording ‘actual situations’ of Arts 132 GPCL and 24 TLL, according to the interpretation of the commentary published by the Supreme Court, refers to the comparison between the financial statuses of the victim and the alleged tortfeasor.<sup>51</sup> The allocation of liability is thus based upon the property status of the parties,<sup>52</sup> and directly related to their respective ‘ability to shoulder the loss’.<sup>53</sup> Yet losses that can be compensated under a fault liability regime – such as moral and punitive damages – cannot be recoverable under a rule of liability in equity.<sup>54</sup>

Though civil liability can be imposed through liability in equity, it is controversial as to whether this liability is the outcome of a legal obligation or of a moral one.<sup>55</sup> It has been argued that this form of liability is a ‘moral aid’<sup>56</sup> that is ‘based on the charitable moral sentiment of certain people’.<sup>57</sup> According to this view, liability in equity cannot be imposed by law, but should be the result of a voluntary negotiation between the parties.<sup>58</sup> Under the leading opinion, however, liability in equity is still a liability imposed by law with a socialist moral foundation.<sup>59</sup> It is argued that the obligation to assume this liability is mandated by law rather than based upon the parties’ agreement – judges have the discretion to enforce this liability when the situation warrants its application.<sup>60</sup> Also, the scope of application of such liability shall be limited to the circumstances expressly provided by law.<sup>61</sup> Such circumstances include harms caused by people with limited or no civil capacity where such persons have property,<sup>62</sup> or harms caused by people with full

<sup>50</sup> See Wang Liming et al, n 14 above, 168.

<sup>51</sup> 奚晓明(Xi Xiaoming), 《中华人民共和国侵权责任法条文理解与适用》(Interpretation and Application of the Tort Liability Law of People’s Republic of China) 185 (People’s Court Press).

<sup>52</sup> See Wang Liming et al, n 14 above, 168.

<sup>53</sup> *ibid* 169.

<sup>54</sup> *ibid* 174.

<sup>55</sup> *ibid* 167.

<sup>56</sup> *ibid*

<sup>57</sup> *ibid*

<sup>58</sup> *ibid*

<sup>59</sup> *ibid*

<sup>60</sup> *ibid*

<sup>61</sup> *ibid*

<sup>62</sup> See TLL Art 32 (now Civil Code Art 1188).

civil capacity but under temporary loss of consciousness,<sup>63</sup> or harms caused by objects thrown out of a building or construction by an unknown person.<sup>64</sup>

However, in China's judicial practice, the application of liability in equity is not limited to the above circumstances.<sup>65</sup> Rather, the application is extensive and with very few limitations. It seems that, when there is a loss and a deep pocket, damage is often awarded in the absence of fault in adherence to distributive justice and principles of equity. In a 2011 case, the seller of an electronic car received 20 percent of damage for his personal injury, which was reduced from the trial court's 50 percent award, without proof of either causation or fault on the part of the defendant.<sup>66</sup> After the completion of delivery, without the knowledge or consent of the buyer (a factory), the seller volunteered to carry a part of an electronic car on the factory's premises to facilitate assembly.<sup>67</sup> The part dropped and hit the plaintiff, which is when he sustained injury.<sup>68</sup> The appellate court held that neither party was at fault, nor did the defendant cause the injury.<sup>69</sup> Nevertheless, the court awarded 20 percent of the damages applying Art 24 of the TLL after taking into account the parties' 'actual situations'.<sup>70</sup> The unstated reason behind the decision was simple – the defendant had a deep pocket and the losses needed to be distributed.

Such an unbridled application of liability in equity has been constrained in recent years. In a case where the plaintiff was injured in a casual pick-up basketball game by a fellow player, the defendant was initially found liable by the trial court citing liability in equity.<sup>71</sup> The appellate court overruled the case and held that the defendant was not liable because the plaintiff had assumed the risk of injury by signing up to play basketball. Had a participant of a sport been held liable for causing sports-related injuries, it would be detrimental to the growth of the entire sports industry. In a recent case<sup>72</sup> a doctor warned a 69- year-old man not to smoke in the elevator and a quarrel between the two resulted. Ten minutes later, the old man later died of a heart attack.<sup>73</sup> The doctor was sued for wrongful death.<sup>74</sup> The trial court ruled that the doctor was not at fault and yet was partially liable based on liability in equity. The appellate court overruled the decision and

<sup>63</sup> See TLL Art 33.

<sup>64</sup> See TLL Art 87 (now Civil Code Art 1254).

<sup>65</sup> It has been argued that liability in equity is more about sharing the liabilities and losses than about establishing liabilities. So the application of the principle of liability in equity shall not only be limited to the circumstances provided by law. See Wang Liming et al, n 14 above, 177.

<sup>66</sup> See *Hu v Guanshan Huifu Brick Factory*, (2011) 衡中法民一终字第403号(Heng Zhong Fa Min Yi Zhong Zi No 403 (2011))

<sup>67</sup> See *ibid*

<sup>68</sup> See *ibid*

<sup>69</sup> *ibid*

<sup>70</sup> *ibid*

<sup>71</sup> 2016) 京01民终495号 ((2016) Jing 01 Min Zhong No 495).

<sup>72</sup> 2017) 豫01民终14848号 ((2017) Yu 01 Min Zhong No 14848).

<sup>73</sup> *ibid*

<sup>74</sup> *ibid*

held that the doctor was not liable because there was no causation.<sup>75</sup> This case caused widespread concern<sup>76</sup> and its ripple effect led to a minor legislative change. To warn judges of the danger of abusing the doctrine, the Civil Code reframed the rule: the wording ‘based on the actual situations’ has been changed to ‘according to law’.<sup>77</sup> One of the drafters, Meng Qiang, in an email exchange clarified to me the meaning of the new rule: the relief to be given by liability in equity must come from a harm to one of the protected interests of the tort law. This means that liability in equity cannot remedy pure economic loss. Also, other requisite elements need to be present, despite the absence of fault, in finding liability.

Though sharing the same rule, the Russian courts have been much more cautious in applying this liability regime. One Russian commentator observed: ‘(w)e know of many cases where the Supreme Court refused to apply Art 406 and know of none where they would have applied it’.<sup>78</sup> Art 406 of the Russian Civil Code of 1922, as the Russian textbook just mentioned describes, might have applied only in exceptional cases, where, given the disparity between the parties’ financial statuses, it would have appeared extremely unjust to let the victim bear the entire damages.<sup>79</sup> In such cases, courts might impose part or full damage upon the defendant.<sup>80</sup> In imposing this liability, the Russian Supreme Court held that causation was essential<sup>81</sup> and disqualified actions against the government citing this rule,<sup>82</sup> for the obvious reason that the government is always the deeper pocket.<sup>83</sup>

The deeper resonance of liability in equity with traditional Chinese moral philosophy, as compared with the Russian one, may explain why the principle has enjoyed a wider recognition in China. Still, the scope and limits in the application of liability of equity needs to be better crafted; a vague statement such as ‘according to law’ will likely lead to the abuse of judicial discretion.

## V. Myth No 3: Can Personality Rights Law Operate Outside Tort Law?

Perhaps, the biggest structural innovation in the Code is to have an independent book on personality rights, rights that are of their own category independent of

<sup>75</sup> *ibid*

<sup>76</sup> See for example 电梯劝烟猝死案二审宣判 法院判决：劝烟者无责·不用赔钱 (Second Trial of Case of Sudden Death after Elevator Quarrel due to Smoking: The Persuader is not responsible, does not have to pay), available at <https://tinyurl.com/yckhp56s> (last visited 31 December 2021).

<sup>77</sup> Civil Code Art 1186.

<sup>78</sup> V. Gsovski, *Soviet Civil Law* (Ann Arbor: Michigan University of Press, 1946), 527, (quoting Varshavsky, *Obligations arising from injury*, in Russian, 1929, 170).

<sup>79</sup> See *ibid* 527.

<sup>80</sup> See *ibid*

<sup>81</sup> See *ibid*

<sup>82</sup> *ibid* (quoting R.S.F.S.R Supreme Court, Civil Division, Report for 1926, Collection of rulings, 3d, 1932).

<sup>83</sup> *ibid*.

rights protected by torts and property law. Art 990 provides:

‘Personality rights are rights enjoyed by civil subjects including the right to life, the right to body, the right to health, the right to one’s name, the right to name, the right to one’s image, the right to honor, the right to reputation, the right to privacy etc.’

Zhou Youjun praised this innovation as an illustration of Chinese ingenuity in making its own civil law and an implementation of the constitutional protection of human dignity.<sup>84</sup> However, when seeking the protections from the Civil Code, one will encounter practical difficulties: what will the basis of a personality rights claim be and what forms of remedy will be available to such a claim? Supposedly, all the rights within the scope of personality rights are already protected by tort law. Yet, according to the principal drafter of the Code, Wang Liming, personality rights alone are a basis of claims independent of tort law.<sup>85</sup> According to him, personality rights are unique: ‘such rights are spiritual in nature and can only be exercised by civil subjects who have an exclusive enjoyment over such rights’.<sup>86</sup> If it is really such an exclusive category, does a party still have a tort law claim in addition to that of personality rights? Will a party still have such a claim when elements necessary for tort liability are lacking, such as subjective culpability or causation?

Liang Huixing, a prominent scholar who opposed an independent book on personality rights, argued that parties will now have to establish claims under both tort law and personality rights law.<sup>87</sup> Wouldn’t that make it harder to get relief? Meng Qiang, a fellow drafter, explained to me that after the Code was enacted that personality rights law would be directly applicable and sufficient in itself as the basis of claim (*Anspruchsgrundlage*).<sup>88</sup> But again, violation of personality rights is either part of tort law or not. If it is, is it beneficial to allow parties to circumvent tort law and obtain relief? If it is not, are we really going to say these traditional tort law protected rights (right to one’s health and body, right to privacy, right to one’s name and honor) are now only protected by personality rights law? Does that mean monetary damage under tort law is out of the question? According to Wang Liming’s definition, personality rights are rights that non-alienable, non-inheritable and not property based<sup>89</sup>. However, if

<sup>84</sup> 周友军 (Zhou Y.), 《民法典人格权编评析》 (*A Commentary on the Civil Code Book on Personality Rights*), available at <https://tinyurl.com/em2764hr> (last visited 31 December 2021).

<sup>85</sup> 王利明, 程啸·朱虎 (Wang L., Cheng X. and Zhu H.), 《中华人民共和国民法典人格权编释义》 (*Annotations on Personality Rights of Civil Code of the People’s Republic of China*), 中国法制出版社 (China Legal Publishing House), 9 (2020).

<sup>86</sup> *ibid* 7.

<sup>87</sup> 梁慧星 (Liang H.), *Suspend the Codification of Separate Provisions of Civil Code*, available at <https://tinyurl.com/ytnyz6ta> (last visited 31 December 2021).

<sup>88</sup> An email exchange between the author and Meng Qiang, a member of the drafting group.

<sup>89</sup> Wang L., Cheng X. and Zhu H., n 85 above, 7-8.



we go around tort law, the relief is clearly insufficient in compensating the loss. Take invasion of privacy. When privacy is invaded, merely stopping the ongoing harm, as the remedies provided for in the personality rights section of the code, is often not sufficient to negate the damage already caused. When private information or pictures have been disclosed, limiting the remedy to unpublishing the information or issuing an apology to undo the influence will undercompensate the harm that has caused the reputational damage or mental distress to the plaintiff. Invariably, it is almost necessary to seek additional financial relief under tort law. Should there be two separate claims? We do not have a good answer.

When the questions were posted, Meng Qiang responded to me in a perplexing and perhaps conflicted tone:

‘(p)rotection of personality rights has its own unique features that are independent of tort law and so it deserves to be standing on its own. But of course, in order to get relief under personality rights law, the elements of tort law need to be satisfied. It will not be harder for the plaintiff to get relief because the civil rights/interests under the Code are open-ended and allow the judges to be creative’.<sup>90</sup>

Such a response will only add to the confusion. First, by requiring the claim to satisfy tort law and personality rights law, it narrows the scope of protection by definition. Second, if the scope of rights is open-ended under the tort law and civil rights and interests under the tort law totally covers personality rights, then everyone could just use tort law instead of resorting to the book of personality rights.<sup>91</sup> If that were the case, the book of personality rights becomes declaratory in nature only. It appears that the only circumstances where an independent body of personality rights can add to what tort law already does is to either allow claims that are outside the scope of rights protected by civil law such as right to education as discussed above, or treat the personality rights claims as non-tort claims. It appears that, according to Meng Qiang, the personality rights are still rights protected by tort law and a personality rights claim has to meet all tort law elements. According to Wang Liming, having an independent book of personality rights would ensure comprehensive protection of personality rights beyond regular tort law such as the availability of the non-monetary remedies such as elimination of bad publicity (消除影响), restoration of reputation (恢复名誉), injunction or cessation of harm (停止侵害).<sup>92</sup> However, even without an independent book of personality rights, such non-monetary remedies have long

<sup>90</sup> *ibid*

<sup>91</sup> Even Wang Liming himself recognized the need for personality rights to be protected by tort law while emphasizing that they are two different bodies of law. He claims ‘(i)nfringement over personality rights is a tort and requires remedies under tort law; yet the personality rights law has a profound impact on tort law and expanded the scope of protection under tort law’. *ibid* 21-22.

<sup>92</sup> *ibid* 9.

been in Chinese tort law since 1986 General Principles of Civil Law.<sup>93</sup>

## VI. Conclusion

There is no doubt that China has enacted a modern and innovative Civil Code that is bound to be influential. History has been made. Now that the drafting process is over, we have moved on to the more challenging task: interpreting the Code. This article addresses the three important doctrinal areas in tort law that would puzzle any tort lawyer. Therefore, it is crucial to know whether Chinese tort law protects all civil law rights or only the enumerated ones; whether there are limitations; if so, what are such limitations that permit courts to give relief to harm caused by accidents using liability in equity simply because the defendants can pay; and how and if personality rights can operate on their own independent of torts.

<sup>93</sup> See 《民法通则》第134条 (The General Principles of Civil Law Art 134) for a complete list of forms of remedies in Chinese civil law.