THE MAKING OF THE CHINESE CIVIL CODE

Promises and Persistent Problems

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CAMBRIDGE UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

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www.cambridge.org
Information on this title: www.cambridge.org/9781009336642

DOI: 10.1017/9781009336611

First published 2023

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Names: Jiang, Hao (Law teacher), editor. | Sirena, Pietro, editor.
Title: The making of the Chinese Civil Code : promises and persistent problems / edited by Hao Jiang, Università Commerciale Luigi Bocconi, Milan; Pietro Sirena, Università Commerciale Luigi Bocconi, Milan.
Description: Cambridge, United Kingdom ; New York, NY : Cambridge University Press, 2023. | Includes index.
Identifiers: LCCN 2023018198 | ISBN 9781009336642 (hardback)
Subjects: LCSH: Civil law–China–Codification.
Classification: LCC KNQ500 .M37 2023 | DDC 346.51–dc23/eng/20230703
LC record available at https://lccn.loc.gov/2023018198

ISBN 978-1-009-33664-2 Hardback

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Causation in the Chinese Civil Code

A Comparative Law Appraisal

MARTA INFANTINO AND WEIWEI WANG

8.1 Introduction

Our contribution focuses on the treatment of causation in the newly adopted Chinese Civil Code (CCC), reviewing it in light of recent developments in both Chinese and continental European legal scholarship and case law. After some remarks on the role that legislation can play in governing the assessment of causation (Section 8.2), we will examine from a comparative perspective the location and breadth of provisions on causation in the CCC (Sections 8.3 and 8.4), as well as the contents of some specific rules, such as those on the victim's contribution to the harm suffered (Section 8.5) and on multiple tortfeasors (Sections 8.6–8.7). As highlighted in the Conclusions (Section 8.8), what the CCC says, and, perhaps more importantly, what it does not say, on causation is not only largely concordant with continental European legislative and interpretive choices but also shows a deep awareness of the relentless dynamics underlying tort law discourses and practices.

Before getting there, a few caveats are needed with respect to the terms of our comparative exercise. In regard to the CCC, our analysis is mostly centred on rules contained in Book VII ('Tort Liability') of the Code, the contents of which are largely similar to those of the Chinese Tort Liability Law of 2009 (TLL). Chinese texts were consulted in their original language by one of the authors and in English translation by the other author.[1] Since the core of our analysis lies in the CCC, we selected the continental European legal systems as the relevant locus of comparison.[2]

[1] The transliteration and translation in English of Chinese names, titles and law reviews were done by Weiwei Wang.
[2] The term 'Europe' will be used in this chapter for continental European countries.

This choice is grounded in the circumstances that European countries share with China, including their roots in the civil law tradition and a common faith in a top-down approach to legislation.

8.2 Causation and Codification

Comparative law research on causation in tort law has long made clear that, in all jurisdictions belonging to the civil law tradition, legislators play a very small role in the making of causation rules.

In countries with codified law, the black-letter words of the civil codes usually set out the general architecture of the private law system. Yet, these codes give very limited guidance about what causation is and how it should be assessed.[3] While it is undeniable that, from the French Civil Code to the latest European codifications, there has been a trend towards increasing statutory attention to problems of causation;[4] the expansion in the number of statutory rules has not changed the fact that, in the realm of causation, legislative provisions are the lodestar neither of legal theory nor of legal practice. On the contrary, it is doctrinal debates and judicial opinions that, although in different forms across countries, make up the pillars of causation reasoning, providing answers to causal questions.[5]

This of course does not mean that legislation has no say in the way in which a legal system approaches causation issues. The few rules that codes devote to causation help to effectively channel scholarly reflections and judicial practices. Moreover, there is undoubtedly a correlation between the general requirements of a country's tort law and the space and the role reserved in that country for causation analysis. As shown by many studies in jurisdictions where the general provisions for negligence liability rely solely on the elements of fault, damage and causation, the latter element ends up working as a filter for claims that elsewhere would

[3] For an overview of the mentioned trend, see Marta Infantino, 'Causation Theories and Causation Rules', in M. Bussani and A. J. Sebok (eds.), *Comparative Tort Law. Global Perspectives*, 2nd ed. (Cheltenham: Edward Elgar, 2021), p. 264 at 271–73; Anthony M Honoré, 'Causation and Remoteness', in *International Encyclopedia of Comparative Law* (Tübingen: Mohr Siebeck, 1971), vol. XI, ch. 7, 11, note 91.

[4] Infantino, 'Causation Theories and Causation Rules', pp. 287–88.

[5] For a tentative list of causal questions, see Marta Infantino and Eleni Zervogianni, 'The Place and Space of Causation', in M. Infantino and E. Zervogianni (eds.), *Causation in European Tort Law* (Cambridge: Cambridge University Press, 2017), pp. 3, 12.

be evaluated through the lens of other requirements of liability for negligence, such as duty of care and wrongfulness.[6]

Yet, there is also little doubt that the way in which causation is understood and employed by scholars and courts depends on a variety of factors that may or may not be enshrined in legislation. Such factors may include the aims pursued by the tort law system, the breadth given to non-tort law remedies (e.g., contract law and compensation schemes), the degree of creativity and policy-making that judges are entrusted with, the comparative models by which a given system is influenced, the deeply rooted assumptions about for what one should blame others and what one should accept as inherent risks in life and so on and so forth.[7]

All the above does not mean that any attempt to govern causation assessments by legislation is futile; it rather serves as a reminder that, in this field more than in others, legislation – even in codified jurisdictions – is not the central place where tort law rules and remedies are defined and administered. As we will see, it seems that the drafters of the CCC were fully aware of this. Let us see why, starting from drawing a map of causation rules in the CCC.

8.3 The Place for Causation

Following the approach of the TLL, Book VII of the CCC provides eight general rules about causation, dealing with multiple tortfeasors (arts. 1168–1172), with the victim's comparative and contributory fault (arts. 1173–1174) and with third parties' acts (art. 1175). Other specific causation rules, mostly about multiple tortfeasors, are then contained in the ensuing chapters of the same Book VI on particular liability regimes.[8] These rules are completed by a few provisions of Chapter VIII ('Civil Liability') of Book I, focusing on multiple debtors and force majeure (arts. 177–178 and 180). Additional rules on multiple debtors (arts.

[6] Cf. Cees van Dam, *European Tort Law*, 2nd ed. (Oxford: Oxford University Press, 2013), p. 309; on the same lines, see Christian von Bar, *The Common European Law of Torts* (Oxford: Oxford University Press, 2000), vol. II, pp. 436 f.; see also, for some refinements, Marta Infantino and Eleni Zervogianni, 'Unravelling Causation in European Tort Laws. Three Commonplaces through the Lens of Comparative Law' (2019) 83 *Rabels Zeitschrift* 647–73.

[7] Infantino and Zervogianni, 'Unravelling Causation in European Tort Laws', 665–72.

[8] For a list of these rules, see Section 8.6. A special mention here goes to art. 1230 CCC, which, in case of environmental harm, establishes a presumption of causation that defendants should rebut in order to avoid liability.

519–520), hardship and force majeure (arts. 533 and 590), compensation of foreseeable losses (arts. 583–584) and creditor's comparative negligence in both causing and failing to mitigate his losses (arts. 591–592) are contained in Book III on contracts.

The issue of topography of causation rules is relevant because causation is a requirement for both contractual and tort liability. This means that a preliminary problem that all code drafters have to face is where they should best place causation in the Code: in the section devoted to contract law, in the section on tort law or in the general part (if any)? Which rules should be placed where? From what we just saw, the CCC adopts a mixed approach. A few general rules on causation are in Book I, some specific provisions are located in Book III on Contracts, while issues that are more specific to tort law are in Book VII.

Rather than being exotic, this mixed solution is very common, at least among the European codifications.[9] In Europe, a few codes place causation rules under the heading of contractual or tort liability only,[10] while others deal with causation in a section devoted to obligations or liability in general.[11] Yet the majority of European codifications adopt a mixed approach, treating causation in more than one section – most often discussing how to assess causation and the victim's contribution to the harm under the heading of obligations in general and then dictating special rules on multiple tortfeasors under the tort law section. For instance, in the German BGB of 1900, § 254 BGB on victim's contributory fault is included in Division I ('Subject Matter of Obligations') of the Book II on the 'Law of Obligations', while §§ 830 and 840 on multiple tortfeasors are in the Title 27 ('Torts') of Division VIII ('Particular Types of Obligations') of the same book. The main rules of causation in the Italian Civil Code of 1942 – arts. 1223, 1225 and 1227 – are located in Title I ('Obligations in General') of Book IV ('The Law of Obligations'),

[9] The text of European rules on causation are collected in Ken Oliphant and Barbara C. Steininger (eds.), *European Tort Law. Basic Texts*, 2nd ed. (Vienna: Jan Sramek Verlag, 2018); Infantino and Zervogianni, 'Causation in European Tort Law', pp. xxvii–xlx.

[10] In the French Civil Code (CC) of 1804, causation rules are mostly to be found under the section devoted to 'breach of contract': see arts. 1231–1233 (former 1150) and 1231–1234 (former 1151). In other codifications, causation rules are mostly dealt with in the section devoted to tort law: see arts. 51 and 53 Bulgarian Law on Obligations and Contracts (LOC) of 1950; arts. 926–927 Greek CC of 1946; arts. 6.279, 6.280 and 6.282 Lithuanian CC of 2000.

[11] For instance, §§ 1301–1304 of the Austrian ABGB of 1811 are in a chapter on 'The Law of Compensation and Satisfaction', common to contractual and tortious liability.

but they should be coordinated with art. 2055 on multiple tortfeasors, which is in Title IX ('Torts') of the same book.[12]

Against such a comparative picture, it seems that the CCC is aligned with many of the existing European codifications. The CCC deals with complex obligations with multiple debtors in general in Book I; it then devotes some provisions on multiple debtors in Book III and adds many special rules in Book VII – a choice that is understandable since the thorniest issues about multiple debtors arise in the context of tortious obligations. Force majeure is discussed in Book I, given that impossibility is a defence to both contractual and tortious liability, and again in Book III, while it is not addressed in Book VII. By contrast, the victim's comparative negligence, which is also an issue that often arises in cases of contractual liability, is dealt with in the Books III and VII on Contracts and Torts but not included in Book I. As it happens in continental European codifications, the task of fleshing out the relationships between these general and special provisions and of determining their precise scope of application is left to the interpretations of scholars and courts.

8.4 The Space for Causation

Apart from deciding where to place rules about causation, another fundamental question for lawmakers concerns the issues that ought to be covered by the Civil Code.

We already mentioned that European codifications are rather concise on the point of causation and attempt neither to provide guidance as to how causation should be intended nor to address the whole possible range of causation problems. The only qualification is that the reluctance to provide a legal discipline for causation has diminished through time. While regulation of causation in older codes is quite minimal, newer texts tend to offer a higher number of provisions covering a variety of possible problems of causal assessment.[13]

The CCC fully fits into this trend. On the one hand, like European codes and like its predecessor, the TLL, the CCC refrains from defining what causation is and from entering into the debate about the criteria against which it should be assessed – a debate that in recent decades was

[12] Along the same lines, cf., the place of causation rules in the Dutch BW of 1992 (arts. 6:98, 6:99, 6:106), the Polish CC of 1964 (arts. 361 and 441), the Portuguese CC of 1966 (arts. 490, 497, 563, 570) and the Romanian CC of 2009 (arts. 1351, 1352, 1369–1371).

[13] Marta Infantino, 'Causation Theories and Causation Rules', pp. 287–88.

particularly heated in Chinese legal scholarship, especially between supporters of the so-called necessity theory and supporters of the so-called adequacy theory, and eventually ended up with the victory of the latter.[14]

On the other hand, following the path taken by some of the most recent European codifications, as well as by the TLL,[15] Book VII of the CCC contains special rules on multiple tortfeasors (arts. 1168–1172), on the victim's negligent and malicious contribution (arts. 1173–1174) and on third parties' intervening acts (art. 1175). In particular, the Code establishes joint and several liability in cases of multiple authors of the harm (art. 1168), of aiding and abetting (art. 1169), of indeterminate defendants (that is, cases where the plaintiff is able to prove that his injury was tortiously caused by one or more persons within the group of potentially tortious actors but is unable to identify which particular person(s) caused it: art. 1170) and of cumulative causation (that is, cases in which the harm is caused by concurrent events, each of them sufficient to cause the harm: art. 1171). Liability, by contrast, is several in cases in which many tortfeasors contribute to producing different portions of the final harm, provided that the extent of their contribution can be clearly determined (art. 1172). The CCC also establishes that, in cases in which the victim played a role in causing the injury, his negligence should be taken into account as a factor limiting the defendant's liability (art. 1173), while his malicious contribution fully exempts the defendant from

[14] Ming Fang (方明), 'On the Restructuring of Causation Theories in Chinese Tort Law' ('论我国侵权法因果关系理论的构建') (2011) 11 *Shangdong Social Science* (*山东社会科学*) 68–71 (supporting the adequacy theory); Kexiang Zhao (赵克祥), 'The Comparison of the Concepts of Causation in Philosophy and Tort – From the Perspective of Philosophy' ('侵权法上因果关系概念辨析 – 哲学视角为出发点') (2008) 5 *Journal of Kunming University of Science & Technology (Social Science)* (*昆明理工大学学报(社会科学版)*) 32–37 (discussing the limitations of the necessity theory); Yumin Zhang and Yisong Li (张玉敏, 李益松), 'Reflections on the Causation Theories in Chinese Tort Law' ('侵权法上因果关系理论的反思') (2005) 6 *Journal of Yunnan University (law edition)* (*云南大学学报(法学版)*) 1–8 (discussing different causation theories and supporting the adequacy theory); Zhibing Zhou (周植赟), 'Critical Evaluation and Restructuring of Causation Theories in China' ('我国侵权法因果关系理论的批判与重构') (2003) 1 *Journal of Ocean University of China (Social Science)* (*中国海洋大学学报(社会科学版)*) 82–85 (defending the introduction of adequacy theory into Chinese tort law).

[15] See arts. 8–14 TLL. For a comparative analysis of the rules brought by the TLL, see Ken Oliphant, 'Uncertain Causes: The Chinese Tort Liability Law in Comparative Perspective', in L. Chen and C. H. (Remco) van Rhee (eds.), *Towards a Chinese Civil Code: Comparative and Historical Perspectives* (Leiden: Martinus Nijhoff, 2012), pp. 395–408; Helmut Koziol and Yan Zhu, 'Backgrounds and Key Contents of the New Chinese Tort Liability Law' (2010) 1 *Journal of European Tort Law* 328 at 341–42.

liability (art. 1174), as it does a third party's act amounting to a *nova causa interveniens* (art. 1175).

The final picture is one in which no general guideline is given as to the core foundation of causation; the CCC says nothing about the tests against which causation should be affirmed and about the factors that should help in defining which consequences can be attributed to the defendant and which cannot (and who bears the burden of proof and what is the applicable standard of proof). There are instead a few rules dealing with recurring or difficult problems of multiple contributions to the harm, some of which will be investigated later on. What should be stressed now is that the CCC purportedly leaves several issues unaddressed. Among such instances, one might think, for example, of the extent of liability of malicious defendants, of cases of multiple non-sufficient causes (that is, cases in which the harm is caused by concurrent events, each of which is not per se sufficient to cause the harm), of cases in which a natural factor not amounting to force majeure contributes to the production of the injury and of cases in which the final harm is rendered extraordinarily more severe than expected due to a pre-existing concealed disposition of the victim.

Such a legislative restraint, with regard both to the CCC and the TLL, was criticized by many commentators, who noted that the Chinese legislators missed the opportunity 'to clarify the many uncertainties which are discussed in nearly all legal systems'.[16] We respectfully disagree with this conclusion.

If there is a lesson to be learned by causation in European codified tort law (as we saw above in Section 8.2), it is that the task of elaborating tests and factors for assessing causation and of devising special causal rules – such as those applying to malicious defendants, multiple non-sufficient

[16] Koziol and Zhu, 'Backgrounds and Key Contents of the New Chinese Tort Liability Law', 341. On the same lines, see also Pinghua Zhang (张平华), 'An Analysis of Liability of Multiple Tortfeasors in the Civil Code' ('"民法典" 多数人侵权体系及相关法律适用问题') (2020) 5 *Southeast Academic Research* (*东南学术*) 37–46; Lixin Yang (杨立新), 'Research on the Convergence of Tort Liabilities' ('论侵权责任并合') (2017) 34(2) *Studies in Law and Business* (*法商研究*) 101–12, at 101; Zhongyuan Li (李中原), 'Appraisal and Distribution Model for the Liability of Multiple Tortfeasors on the Basis of Comparative Fault' ('论与有过失前提下多数人侵权责任的评估和分担模式') (2016) 33(1) *Studies in Law and Business* (*法商研究*) 82–94, at 82; Rongxia Zhang (张荣霞), 'Reflection on "Jointly" in Case of Multiple Authors of Harm' ('共同侵权之"共同性" 反思') (2016) 11 *Academic Exchange* (*学术交流*) 73–78; Oliphant, 'Uncertain Causes', 396; Mo Zhang, 'Tort Liability and Torts Law: The New Frontier of Chinese Legal Horizon' (2011) 10 *Richmond Journal of Global Law & Business* 415 at 437.

causes, contribution of natural factors and victims' fragility – is always taken up by scholars and judges. Causation is a flexible requirement, whose assessment can be made only against the background of the issues that, under the circumstances of each kind of situation, end up being the most relevant to the liability claim – be they the nature and extent of the losses claimed by the plaintiff, the magnitude of the risk posed by the defendant's activity, the number of potential and actual victims and tortfeasors, the availability of alternative remedies and/or of insurance coverage, the functions that judges assign to tort law and to themselves, as well as policy reasons of various kind.[17] Needless to say, scholars and courts perform this role in dissimilar ways across different jurisdictions, adopting styles that might be more or less openly policy-oriented and paying diverse degrees of respect for each other and for the black-letter law. But what remains valid is that many, if not most, of the basic ingredients of the causation recipe are not determined by statutory provisions.

In fact, the legislative restraint of the CCC as to causation in general is to be praised because it allows flexibility in causal judgments. At the same time, the silence of the Code on the notion of causation in general and the criteria to be employed to assess does not leave courts without guidance, since Book VII pays attention to specific causal problems that are more frequent or harder to solve. We will now go into more detail on some of them – namely, the role of the victim's predispositions (Section 8.5) and issues involving multiple tortfeasors (Sections 8.6 and 8.7).

8.5 The Victim's Contribution to the Harm

According to arts. 1173 and 1174 of the CCC, the victim's contribution to the harm might operate as a full or partial defence to liability, depending on whether the victim acted negligently or maliciously. The CCC thus embraces a general principle that, whether codified or not,[18] is widely shared by continental European (contract and) tort laws. In particular, under art. 1174 CCC (former art. 27 TLL) the defendant's liability is

[17] Infantino and Zervogianni, 'Unravelling Causation in European Tort Laws', 661–62.
[18] The majority of European codifications provide an express rule in this regard, but the principle is accepted even in jurisdictions in which it is not codified: Marta Infantino and Eleni Zervogianni, 'Summary and Survey of the Results', in Infantino and Zervogianni (eds.), *Causation in European Tort Law*, pp. 587, 654–57.

excluded 'for any damage intentionally caused by the victim'.[19] Under art. 1173 CCC (former art. 26 TLL), the defendant's liability may be mitigated when the victim 'is also at fault for the occurrence or aggravation of the same damage to himself'. A similar rule applies to the creditor's own fault in contractual liability (art. 592 CCC).

In this regard, it is interesting to note what the CCC does not regulate. For instance, art. 1174 CCC avoids specifying what is meant by 'any damage intentionally caused by the victim', leaving it unclear as to which forms of plaintiff's intentional misconduct the provision refers. The literal meaning of the provision seems to always exclude liability when the victim knowingly contributed to producing the final harm. Yet, Chinese literature regarding art. 27 TLL makes it clear that the notion of the victim's intention is to be interpreted restrictively, referring only to cases in which the plaintiff deliberately harmed himself.[20] This means that courts are open to appreciate the victim's 'intentional' act against the circumstances of the case, which is not different from what happens in continental European legal systems.[21]

As to art. 1173 CCC, it says nothing about what happens in the quite frequent cases in which the victim's own predispositions (that is, victim's physical or psychological features, such as a concealed condition, latent disease or susceptibility to disease), combined with the defendant's act, give rise to an extraordinarily serious personal injury that the latter could not have reasonably anticipated. Yet, the so-called eggshell skull rule, which prohibits consideration of the victim's pre-existing predispositions as a factor reducing defendant's liability, is well-known in the Chinese legal system. The Chinese Supreme People's Court officially adopted this position in 2014, when it included the decision *Rong* v. *Wang &*

[19] The victim's intentional act is further mentioned as a defence available to the defendant by several other provisions: cf. arts. 1237–1240 and 1245 CCC.

[20] See Mo Zhang, 'Tort Liability and Torts Law', 460 (with regard to the TLL). On the complex meaning of 'intention' in Chinese tort law, see Hao Jiang, 'Chinese Tort law: Tradition, Transplants, and Some Difficulties', in Bussani and Sebok (eds.), *Comparative Tort Law*, pp. 397, 415–16; Mo Zhang, 'Tort Liability and Torts Law', 434–37, 460–61.

[21] In continental Europe, the principle that the victim bears the loss she intentionally caused is (generally uncodified and yet) widely agreed. The principle is however flexibly understood and applied; it does not preclude recovery, for instance, in cases in which the tortfeasor, who had a duty to take care of the self-harming victim, failed to do so or acted maliciously, knowing that his behaviour would stimulate the self-damaging reaction of the victim: Marta Infantino, *La causalità nella responsabilità extracontrattuale. Studio di diritto comparato* (Bern: Stämpfli, 2012), pp. 132–33, 227; Honoré, 'Causation and Remoteness', p. 131.

Yongcheng Insurance Company in the series No. 24 of its Guiding Cases.[22] In this case, the defendant, a car driver, ran over the plaintiff, an old woman who was crossing the street on the crosswalk lines. The first instance court admitted the expert opinion that assessed the victim's osteoporosis as a causative factor at 25 per cent of her harm. On the basis of this evidence, the court reduced the victim's award for damages by 25 per cent. Upon the claimant's appeal, the Intermediate People's Court of Wuxi Municipality clarified that the victim's old age and her predispositions to osteoporosis could not be taken into account as a factor mitigating the liability of the defendant, also considering that the latter was in breach of traffic rules, while the plaintiff was not.

It should however be noted that, outside the realm of traffic accidents, the principle seems to have little application. Following the publication of *Rong* v. *Wang & Yongcheng Insurance Company*, many Chinese courts have refused to see the decision as a proclamation of the applicability of the 'eggshell skull' rule in all tort law litigation and have rather opted, in non-traffic cases, for treating the victim's predispositions as a causal factor that might reduce the defendant's liability.[23] This approach seems

[22] Wuxi Binhu Dist. People's Court, *Rong Baoying* v. *Wang Yang & Yongcheng Property Ins. Ltd., Jiangyin Branch*, 8 February 2013, at http://cgc.law.stanford.edu/guiding-cases/guiding-case-24/ (in English). Besides the power of adopting quasi-legislative guidance opinions that interpret and clarify the law for lower courts (under art. 127 of the 1982 Chinese Constitution and art. 32 of the Organic Law of the People's Courts of the People's Republic of China), the People's Supreme Court also regularly selects exemplary local decisions and publishes them in order for all local courts nationwide to follow: see Jinting Deng, 'The Guiding Case System in Mainland China' (2015) 10 *Frontiers of Law in China* 1; Ding Qi, *The Power of the Supreme People's Court: Reconceptualizing Judicial Power in Contemporary China* (London: Routledge, 2020).

[23] See Tong'an District Court (Xiamen), *Du Moumou* v. *Chen Moumou et al.* (selected by the Supreme People's Court on 25 July 2014 as one of the four model cases), at www.lawinfochina.com/display.aspx?id=17631&lib=law&EncodingName=gb2312 (in both English and Chinese) (a eighty-eight-year-old man was knocked down by the minor defendant on the streets nearby his residence home. The plaintiff broke his bones, was hospitalized and died six months later because of an infection caused by the fractures; according to the District Court, the victim's predisposition was a factor that contributed to his death for 50 per cent); Hefei Intermediate Court (Anhui), He Min Yi Zhong Zi, No. 00571 Civil Decision (2014) (the plaintiff, while working for the defendant, was stung by a bee and died; the court found that the plaintiff's physical sensitivity contributed for 25 per cent to cause his death); Hezhou Intermediate Court (Guangxi autonomous zone), He Min Yi Zhong Zi, No. 138 Civil Decision (2014) (while a couple was quarrelling with the victim, the latter fell to the ground abruptly; despite hospitalization, the victim died. The court found that the couple's tortious conduct triggered the victim's death but held that the latter was mainly caused by the victim's own predispositions). See also Peng Sun (孙鹏), 'Reconsideration and Deconstruction of the Egg-shell Skull Rule' ('"蛋壳脑袋"规

to have been confirmed by the Supreme People's Court, which in October 2020 included the decision *Liu Minglian, Guo Lili and Guo Shuangshuang* v. *Sun Wei* & *Lanting Property Management Co. Ltd* in the series No. 142 of its Guiding Cases.[24] In the case, the victim was a sixty-seven-year-old man who was caught pickpocketing two eggs in a supermarket. He suddenly died during the ensuing quarrel with the supermarket employees. The wrongful death action brought by the relatives of the victim against the supermarket was dismissed by the first instance court, which found that the resort to self-help by the supermarket's employees was legitimate and had no causal effect on the victim's death. The decision was confirmed on appeal by the intermediate court of Nantong city and then included by the Chinese Supreme People's Court in the series No. 142 of its Guiding Cases. Such a restrictive approach towards the universal application of the egg-shell skull rule has been applauded by the majority of legal scholars. However, legal scholars have also invited the Supreme People's Court to identify the situations in which the victim's predispositions might play no role and to provide Chinese judges with plausible standards for deciding cases involving aggravated harm due to the victim's predispositions.[25]

In continental Europe, none of the existing codes have an express rule on fragile victims. Nevertheless, scholars and courts generally agree that the defendant has to 'take the victim as he finds him' – in other words, he shall be held liable even though the plaintiff's weakness made the injury greater than would have normally been the case. The rationale underlying this conclusion is that one cannot expect the fragile victim either to refrain from any social activity, to always wear special protections to

则之反思与解构') (2017) 1 *China Legal Science* (中国法学) 268–87 at 270; Yinpo Xu (徐银波), 'Tort liability for Causing Harm to Victims of Particular Predispositions: On the Basis of No. 24 Guding Case Series of the Supreme People's Court' ('侵害特殊体质者的赔偿责任承担—从最高人民法院指导案例24号谈起') (2017) 6 *Law Science* (法学) 64–78 at 65–66; Xiaowei Yu, 'Causal Uncertainty in Chinese Medical Malpractice Law – When Theories Meet Facts' (2016) 9 *Tsinghua China Law Review* 23–62 at 48–50.

[24] Xinyang Pingqiao District People's Court, *Lui Minglian GuoLili and Guo Shuangshuang* v. *Sun Wei & Lanting Property Mangement Co. Ltd., Xinyang branch*, 30 December 2019, at www.court.gov.cn/fabu-xiangqing-263591.html (in Chinese).

[25] Sun, 'Reconsideration and Deconstruction of the Egg-shell Skull Rule', 282–87; Xu, 'Tort Liability for Causing Harm to Victims of Particular Predispositions', 64–67. There are also authors who support the general use of the egg-shell skull rule: see, for example, Xiao Cheng (程啸), 'The Victim's Special Constitution and the Mitigation of Tort Liability – A Commentary on the Guiding Case No. 24 of the Supreme People's Court' ('受害人特殊体质与损害赔偿责任的减轻 – 最高人民法院第24号指导案例评析') (2018) 1 *Chinese Journal of Law* (法学研究) 67–86, at 82–86.

protect himself from the risk of accidents or to inform potential defendants of his special morbidity. Moreover, it is stated that the discrepancy between the defendant's negligence and the extraordinary consequences it generated is, in these cases, less significant than the imbalance between the victim's innocence and the gravity of these consequences the latter suffered.[26]

What should be stressed, however, is that, in continental European legal thought and practice, the rule and its rationale are to be appreciated in the context of each case. European courts are reluctant to apply the principle that 'the tortfeasor shall take the victim as he finds him', for instance, when the victim cannot demonstrate with certainty that the extraordinary magnitude of the loss is due to his concealed fragility or when the defendant proves that he was slightly negligent or that the accident simply anticipated the exceptional consequences that the victim, sooner or later, would have suffered anyway because of his exceptional conditions.[27]

In other words, absent statutory provisions indicating otherwise, continental European courts acknowledge that the defendant should answer for all of the consequences stemming from his conduct, even if they are due to the concealed morbidity of the victim. Yet, similarly to what happens in China, European courts are ready to abandon such a rule when there are reasons justifying a different outcome.

8.6 Multiple Tortfeasors: General Rules

Besides the victim's own actions, accidents are often the result of the combination of the behaviour of multiple persons. In Chapter I ('General Rules') of Book VII, as many as five provisions of the CCC (arts. 1168–1172, largely corresponding to arts. 9–12 of the TLL) are devoted to multiple tortfeasors. In particular, art. 1168 states the general rule of joint and several liability, which is extended by the following articles to cases of aiding and abetting, indeterminate defendants and cumulative causation (respectively, arts. 1169–1171).[28] Liability is, by contrast,

[26] On all the above, see the scholarly references and cases cited by Infantino and Zervogianni, 'Summary and Survey of the Results', 657–60; Ulrich Magnus and Miquel Martîn-Casals, 'Comparative Conclusions', in U. Magnus and M. Martîn-Casals (eds.), *Unification of Tort Law: Contributory Negligence* (The Hague; London: Kluwer, 2004), pp. 290–91.

[27] Infantino and Zervogianni, 'Summary and Survey of the Results', 659.

[28] Joint and several liability is also the rule in contract law: see arts. 519–520 CCC.

several when many tortfeasors contribute to producing the final harm, but the contribution of each of them can be easily determined (art. 1172). One should add to this list art. 1175 CCC (former art. 28 of the TLL), which clarifies that, when a third party's act operates as an autonomous cause of the damage, the defendant may not be held liable.

Further, a number of provisions in the ensuing Chapters of Book VII, on special liability regimes, deal with cases in which multiple persons might be sued as defendants for the same harm, not because they all contributed to cause the damage, but rather because one or more did it, while the others answer for what happened under either vicarious or strict liability.[29] In all of these instances, one or more persons are the concrete authors of the harm, and the others are involved insofar as they legally respond for such harms under the same or a different heading of liability. These cases should be distinguished from two further groups of cases where multiple persons are involved but joint and several liability is not established. In 'unreal' joint and several liability cases, the CCC allows the plaintiff to sue either the tortfeasor or another person; in case that other person makes the victim whole, he then has a right of full recourse against the original tortfeasor.[30] Still, in other cases, a person

[29] See, for instance, arts. 1197 (former art. 36(2) TLL), 1211, 1214 (former art. 51 TLL), 1215 (former art. 52 TLL), 1241 and 1242 (former arts. 74 and 75 TLL), 1252 (former art. 85 TLL) of the CCC. One should further add to the list art. 1254(1) CCC (former art. 87 TLL), which provides that, in cases in which an object falling from a building causes damage to a person and yet it cannot be determined from which apartment the object fell, 'any user of the building who may have caused the damage shall make compensation'. Differently from former art. 87 TLL, art. 1254(2) and (3) CCC provide that the manager of the building is liable for the damage caused by the fallen object if he did not adopt adequate safety measures and that the police has a duty to promptly investigate the accident. In this way, art. 1254 overcomes many limitations that affected art. 87 TLL: see Kai Feng (冯恺), 'A Systematic Interpretation of the Liability of Throwing Objects from Buildings in the Civil Code of PRC: Limitations and Solutions' ('民法典高空抛物致害责任规则的体系性解读：局限与克服') (2021) 1 *Journal of Comparative Law* (*比较法研究*) 76–89; Xinbao Zhang (张新宝) and Xintian Zhang (张馨天), 'From Article 87 of the Tort Law to Article 1254 of the Civil Code: The Improvement of the Tort Law for Harm Caused by Throwing (Falling) Objects from Buildings' ('从 "侵权责任法" 第87条到 "民法典" 第1254条："高空抛（坠）物"致人损害责任规则的进步') (2020) 6 *Journal of Comparative Law* (*比较法研究*) 91–104; Liming Wang (王利明), 'Complimenting the Rule for Harm Caused by Throwing Objects from Height' ('论高楼抛物致人损害责任的完善') (2020) 1 *Law Science Magazine* (*法学杂志*) 1–9; Xianfeng Cao (曹险峰), 'The Tort Liability Rule for Throwing Objects from Height' ('侵权法之法理与高空抛物规则') (2020) 1 *Law and Social Development* (*法制与社会发展*) 48–61.

[30] See arts. 1203 (former art. 43 TLL), 1223 (former art. 59 TLL), 1233 (former art. 68 TLL), 1250 (former art. 83 TLL) of the CCC.

who did not concretely bring about the harm and yet had some sort of duty to avoid its occurrence assumes 'corresponding' liability in case a third party causes harm to the victim; but, the person who bears 'corresponding' liability answers for his own fault and does not become a solidary debtor with the author of the harm.[31]

This complex picture prompts several considerations; we will start in this section by making some observations with regard to the general rules and then briefly move in the next section to special cases of multiple defendants.

As to arts. 1168–1172 of the CCC, their ensemble, including provisions on causal over-determination and of indeterminate defendants, seems to be inspired by a pro-plaintiff attitude and to favour joint and several liability rather than several or proportional liability (although it should be noted that, whenever it is possible to distinguish individual contributions, Chinese courts often opt for several or proportional liability awards).[32]

These rules are generally aligned with those emerging from continental European tort law, whether codified or not. In the European continent too, in cases in which the harm can be attributed to the behaviour of more than one person (other than the victim), tortfeasors' liability is joint and several, unless the contribution of each of them can be precisely determined, in which case responsibility is several.[33] Similarly, although only a few continental European countries explicitly provide for joint and several liability of those who aid or instigate others to commit a wrongful act,[34] all European countries recognize that joint and several liability

[31] See, for instance, arts. 1189, 1191 (former art. 34 TLL), 1198 (former art. 37 TLL), 1201 (former art. 40 TLL), 1209 (former art. 49 TLL), 1256 of the CCC.

[32] Cf. Zhang Pinghua, 'An Analysis of Liability of Multiple Tortfeasors in the Civil Code', 37–46; Lixin Yang, 'Research on the Convergence of Tort Liabilities', 101.

[33] Cf. § 1302 ABGB; art. 53 Bulgarian LOC; § 2915 Czech CC of 2012; § 137 Estonian Law of Obligations Act (hereinafter LAC) of 2002; § 840 BGB; art. 926 Greek CC; art. 2055 Italian CC; arts. 6:99 and 6:102 BW; art. 6.279 Lithuanian CC; art. 441 Polish CC; arts. 490 and 497 Portuguese CC; art. 1382 Romanian CC; art. 186 Slovenian Code of Obligations (hereinafter CO) of 2001. The same rule also applies in jurisdictions in which the principle is not codified: see Mauro Bussani and Marta Infantino, '西方侵权法中的多数人侵权：一种比较法的视角' ('Multiple Tortfeasors in Western Tort Law: A Comparative Outline') (2014) 35 *Journal of Soochow University* 80–93.

[34] See § 1302 ABGB; § 2915(2) Czech CC; § 830(2) BGB; art. 1781 Latvian CC of 1997; art. 422 Polish CC; art. 490 Portuguese CC; art. 1369 Romanian CC; art. 186(2) Slovenian CO. Other codifications rather specify that intentional tortfeasors are responsible for any direct damage caused, albeit unforeseeable: see art. 1231–1234 French CC; art. 82 Bulgarian LOC; art. 1225 Italian CC; art. 1107(2) Spanish CC of 1889.

should apply to cases of psychological causation, that is, to cases in which one person commits the wrong under the inducement of another.[35] When the harm is brought by an unidentifiable member of a group of people, there is little doubt that all of the people who participated in the enterprise that resulted in the harm should be jointly and severally liable, no matter which one of them actually caused it[36] – although in some countries there is a discernible trend in favour of establishing proportional liability (that is, liability only for the extent to which it is likely that each defendant caused the harm).[37] Even though few legal systems have expressly codified rules on cumulative causation,[38] there is general consensus that, when different persons put the victim at risk with the result that, had not the victim been harmed by one of them, it would have been harmed by another one, they should all be liable.[39]

Yet, the continental European practice also shows that – in line with what we described above, in Section 8.5, with regard to the victim's contribution to the harm – all the above rules are applied with some degree of flexibility.

For instance, while joint and several liability for all of the authors of the harm is the rule, it may happen that, considering each defendant's behaviour and position vis-à-vis each victim's, their respective degrees of fault, the proximity in time and the extent of the involvement of each

[35] See Mauro Bussani, 'Intention et lien de causalité dans le droit comparé de la responsabilité civile (la fable très peu convenue de la malice qui accroche)', in *De tous horizons. Mélanges Xavier Blanc-Jouvan* (Paris: Société de législation comparée, 2005), pp. 459–60.

[36] The rule is codified in several codes: see § 1302 ABGB; § 2915(1) Czech CC; § 138 Estonian LAC; §§ 830(1) and 840(1) BGB; arts. 6:99 and 6:166 BW; art. 926 Greek CC; art. 1370 Romanian CC; art. 186 Slovenian CO. But see also the references quoted by Bussani and Infantino, 'Multiple Tortfeasors in Western Tort Law', 86–89; Infantino, *La causalità nella responsabilità extracontrattuale*, pp. 157–64.

[37] The trend is discernible not only in the case law of countries, such as Austria and the Netherlands, where judges openly apply rules of proportional liability (see Bernhard A. Koch, 'Proportional Liability for Causal Uncertainty: How It Works on the Basis of a 200-Year-Old Code', in M. Martín-Casals and D. M. Papayannis (eds.), *Uncertain Causation in Tort* (Cambridge: Cambridge University Press, 2016), pp. 67–86; Anne L. M. Keirse, 'Going Dutch: How to Address Cases of Causal Uncertainty', in I. Gilead, M. D. Green and B. A. Koch (eds.), *Proportional Liability: Analytical and Comparative Perspectives* (Berlin-Boston: de Gruyter, 2013), pp. 227–48), but also in the most recent codifications: see, for instance, § 138(3) Estonian LAC.

[38] On cumulative causation, see, for instance, § 2915(2) Czech CC.

[39] See the references in Marta Infantino and Eleni Zervogianni, 'Comparative Remarks', in Infantino and Zervogianni (eds.), *Causation in European Tort Law* (Cambridge: Cambridge University Press, 2016), pp. 270–71.

defendant, as well as the number of people involved, European courts might deny any liability for defendants who failed to prevent others from bringing about the harm, especially if the latter acted intentionally.[40]

Notwithstanding the fact that collective liability is the accepted rule in the case of indeterminate defendants, one should keep in mind that the rule is applied by courts only when the circumstances and considerations surrounding the case warrant that the plaintiff not be left uncompensated despite his loss – because, for example, the victim suffered a substantial property damage or a highly disabling, if not fatal, injury, the number of potential tortfeasors is limited and the accident occurred while the latter were engaging in a dangerous activity. When elements such as these are missing, reasons to impose collective liability cease to be compelling, and the plaintiff's impossibility in identifying with precision who actually caused his damage may have his claim rejected.[41]

Similarly, in cases of cumulative causation, the ordinary outcome of joint and several liability might be overturned, and one of the defendants might fully or partially escape liability, depending on who brought about the pre-emptive and the pre-empted cause, on whether both causes would have resulted in the same damage or in different ones, on the timing with which the pre-emptive and the pre-empted cause respectively took and would have taken effect, on the numbers of actual and potential causal sequences involved and so on and so forth.[42]

Vis-à-vis the continental European experience, the current phrasing of arts. 1168–1172 of the CCC should be praised. The provisions just mentioned have the merit of providing clear guidelines regarding how courts should establish liability in simple and in difficult cases, combining predictability with fairness, and leaving room for flexibility when needed. As such, these rules represent a commendable compromise between the desire of regulating tort law by legislation and the awareness that tort law is too wide and varied in reality to be fully captured by the black-letter rules.

Different considerations apply to special rules of the CCC on multiple tortfeasors.

[40] Bussani and Infantino, 'Multiple Tortfeasors in Western Tort Law', 89–91; Infantino, *La causalità nella responsabilità extracontrattuale*, pp. 128–38, 226–32.

[41] See the cases quoted in Infantino, *La causalità nella responsabilità extracontrattuale*, pp. 161–64.

[42] See the cases and the scholarly references quoted by Infantino, *La causalità nella responsabilità extracontrattuale*, pp. 150–57, 242–47.

8.7 Multiple Tortfeasors: Special Regimes

As we described above, in addition to arts. 1168–1172 and 1175, a number of provisions in Chapters III–X of Book VII on special regimes deal with cases of multiple tortfeasors. Some of these rules establish joint and several liability on multiple persons; others create instances of 'unreal' joint and several liability, in which the plaintiff is allowed to choose whether to sue the tortfeasor or a different subject, but the latter has a right of full recourse against the tortfeasor; still other provisions impose 'corresponding' liability on persons who breached a duty to prevent harm caused to the plaintiff by third parties but do not make them jointly and severally liable with the actual harm doer.[43]

This collection of rules is very complex and distinct from the style of drafting embraced by continental European codes. The majority of continental European codifications do not try to regulate the inner relationships between multiple liable persons under every heading of liability but rather defer to general rules on multiple tortfeasors for determinations on these relationships. General rules usually provide that, in case of joint and several liability, the inner shares of defendants' liability should be determined in light of each defendant's respective degree of fault – thus allowing those who are vicariously or strictly liable in case of damage caused by others to have a right of full recourse against the concrete authors of the injury.[44] Solving the issue once and for all through a general rule might leave greater discretion to courts but at the same time enhance the legibility and the inner consistency of the whole system.

By contrast, the approach adopted by the CCC is much more detailed and pointillistic. Rules on multiple tortfeasors cover a variety of different scenarios and make them subject to different treatments, depending on the relationships between the persons involved, the liability regime they are subject to and the ways in which their roles encroach. One might wonder to what extent such rules are to be interpreted as applications of

[43] See notes 29–31.

[44] See § 1313 ABGB; arts. 53–54 Bulgarian LOC; § 137 Estonian LAC; arts. 926–927 Greek CC; art. 2055(2) Italian CC; art. 6.280 Lithuanian CC; art. 441(2) Polish CC; art. 497(2) Portuguese CC; art. 1383 Romanian CC; art. 188 Slovenian CO. A few codes set out clearly that, in cases of vicarious liability, the person who is responsible for the act of another has a right of full recourse against the subject who concretely brought the damage in and for the acts of whom the former has to respond: cf. art. 54 Bulgarian LOC; § 840(2) BGB; art. 1384 Romanian CC.

the same general principles or rather as exceptions to them, and what is their relationship with the rules on multiple tortfeasors contained in Chapter I of Book VII. This matters because the rules enshrined in the CCC might be applied by analogy to situations different from those textually envisaged by the Code. The scenarios not covered by the CCC and yet likely to occur are manifold; it remains to be seen whether or not the provisions in the CCC will be interpreted extensively.

8.8 Conclusions

The treatment of causation in the CCC is largely in line with the legislative approaches to causal problems adopted in continental European codifications. As in Europe, the CCC treats causation both as a general principle of civil liability and as a specific tort requirement. As in Europe, the CCC refrains from defining what causation is and from stepping into the debate regarding under which theories and standards it should be assessed. As many recent continental European codes do, specific provisions are devoted to the victim's contribution to the damage and to the thorniest issues of multiple tortfeasors. As in Europe, however, many problems – such as the role of victims' predispositions – are expressly left unaddressed.

This of course does not imply that the CCC does not take an original stance on the subject matter. For instance, the CCC explicitly states many rules (such as the one on the exonerating effect of the plaintiff's intentional act) that in European codes have been determined by scholars and courts. It also provides a detailed regulation of multiple tortfeasors cases and of their relationships vis-à-vis themselves and the victim that remains far away from its civil law homologues.

What the above also shows is that the overall choices made by the drafters of the CCC as to the place and space of causation, and as to the balance between precision and flexibility, detail and simplicity, are highly understandable and plausible. Both general and specific provisions are carefully written and exceptionally designed. What the Code says, as well as what it does not say, strikes a well-balanced compromise between clear statutory guidance and substantial flexibility to maneuver in light of the specific circumstances of each case. We are eager to see how the CCC will work in practice.