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Tort Law Heterodoxy in China

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5.1 INTRODUCTION

Mr. Zhang drowned in a fishpond on the property of the Huludao Jinhui Agricultural Industrial and Commercial Group Company, in Liaoning Province in China's northeast. Zhang's family sued, arguing that the company was negligent in failing to take adequate safety precautions. On appeal, the Huludao Intermediate Court rejected the family's legal claim, finding that Zhang was mentally ill and that there was no way that the company could have completely prevented the tragedy.[1] The court concluded that Zhang's guardians had failed in their responsibility to supervise him, and thus "to hold others responsible . . . has no legal basis."

Nevertheless, the court proceeded to order the defendant company to pay 50,000 yuan in compensation to the family. "It cannot be denied that Zhang's . . . accidental death has given his family huge suffering and economic harm," the court wrote. "In particular, the deceased has elders above and a minor child below, and they are deserving of sympathy." The court's anger at the defendants' conduct was clear. The decision noted that the plaintiffs had accepted an initial settlement offer from the company arrived at through court mediation and expressed frustration that the company had added a new condition to its offer, insisting that the family transfer a piece of land in exchange for compensation. The court noted that the company's decision to withdraw its offer was in accordance with "formal justice," but was "out

[1] (2014) 葫民终字第00645号. The trial court found that the fishpond was a public place, akin to a place of entertainment or any other location open to the public, and thus that Zhang's family had heightened responsibility for supervising him. Although the trial court found that Zhang's family members bore primary responsibility, the decision still ordered the defendant to pay 20 percent of damages, roughly 65,000 yuan. On appeal by the company, the appellate court rejected the analogy to a public place. Portions of this chapter first appeared in R. E. Stern et al., Liability beyond Law: Conceptions of Fairness in Chinese Tort Cases (2023) *Asian Journal of Law and Society* 1–24. Although cases sometimes include the full names of parties, the rules governing online publication call for names of litigants to be redacted so that only family names are listed. In this chapter, we thus include only the family names of litigants.

of step with substantive justice" and "would cause harm to the creation of a spirit of peace and order and public order and morals."[2] The court concluded:

> In light of the above, this court believes that although [defendant company] subjectively was without fault, nevertheless starting from the perspective of taking the people as the basis, our nation's national circumstances, and positive village customs, giving some compensation in light of the circumstances will better reveal the substantive justice of law.[3]

The Huludao court's embrace of substantive justice and "the people as the basis"[4] as grounds for awarding compensation was not unusual for Chinese courts. In cases that involve bad luck, catastrophic loss, and even commonplace accidents, Chinese courts routinely ask defendants to pay damages without evidence of negligence. At times, courts make such arguments explicitly, as with the Huludao court. In others, courts use less direct terms, including "reason," "discretion," or "actual circumstances," or cite legal provisions that allow courts to adjust outcomes based on equity. Prior to 2021, Chinese courts that did so often relied on a legal provision that explicitly authorized payment of damages based on "actual circumstances," regardless of fault. Commonly referred to as the "equitable liability" provision of the 1986 General Principles of Civil Law and the 2010 Tort Liability Law, Chinese law authorized courts to impose liability by relying on fairness, not just fault. But courts often went beyond the provisions of statutory law. And they have continued to do so even after China's new Civil Code, which became effective in 2021, curtailed the use of the provisions.

China's use of equitable liability provisions and references to concepts such as substantive justice or discretion demonstrates how tort law can serve heterodox policies and goals. Comparative scholarship on tort law has long noted the range of different goals that tort law may seek to achieve, from corrective justice to deterrence to loss spreading to supplementing a weak social safety network.[5] In many ways Chinese tort law resembles legal orthodoxy in the Global North: in most situations, tort compensation is awarded either due to the negligence of a tortfeasor or based on the application of strict liability to a specific, limited subset of cases. Yet Chinese law, both on the books and in practice, has gone further,

[2] (2014) 葫民终字第00645号.

[3] Ibid.

[4] The phrase "taking the people as the basis" (以人为本) is commonly attributed to Guan Zhong, a Legalist thinker who lived in the seventh century BCE. The phrase re-emerged as a key CCP slogan under General Secretary Hu Jintao, after he used it in a speech at the Third Plenum of the 16th Communist Party Congress in 2003, and became a key part of Hu's Theory of Scientific Outlook on Development. China Central Television, 中国共产党第十六届中央委员会第三次全体会议公报 [*Report of the Third Plenum of the 16th Party Congress of the Chinese Communist Party*] (2021).

[5] For an overview of the contested goals of US tort law, see K. Abraham, *The Forms and Functions of Tort Law* (St. Paul: Foundation Press, 2022), pp. 17–23. Abraham notes that, in the United States, compensation alone is not a goal of tort law.

awarding damages even when little or no link is established between a victim's injuries and a defendant, or when a victim appears to be entirely at fault. Chinese courts often use tort cases to spread losses, redistribute wealth, supplement a weak social safety network, build social cohesion, and ensure that losses are compensated and acknowledged. Beyond these specific goals, Chinese tort law often appears to embrace an unwritten principle: that losses should be compensated, even when they occur without negligence.

This chapter explores one example of legal heterodoxy in practice by examining how Chinese courts operationalize fairness and justice (公平公正) in published decisions involving personal injuries that either directly use such language, or reference closely related ideas and legal provisions, most importantly the "equitable liability" provisions of Chinese tort law. We do this by exploring a database of 10,000 judicial decisions, mostly tort cases, that include language about fairness, or the need to take account of actual circumstances or cite provisions of Chinese law that authorize courts to look beyond which party is at fault. We also read and coded at least 250 cases in three categories – injuries to students at school, child drownings, and death due to excessive alcohol consumption – to investigate whether the legal reasoning and outcomes we saw in the larger dataset were also prevalent in a broader swath of similar cases that did not necessarily include the same direct references to fairness, equity, and discretion.[6] To examine the effect of changes resulting from the 2021 adoption of China's Civil Code, which curtailed judicial discretion in tort cases, we also explore a smaller dataset of child-drowning and death-by-drinking cases that arose after the adoption of the Civil Code.

What we find is that Chinese courts try to smooth misfortune by imposing costs on parties with ethical, but not legal, obligations to the victims. The legal reasoning in these decisions reflects two de facto doctrines, or common judicial solutions to recurrent fact patterns, that assign liability to people linked through a relationship. We identify two types of relationship-based liability: participant liability, which assigns liability to those participating in a shared activity, and space-based liability, which assigns liability to those who control a physical space. Sometimes courts are acting within the broad discretion granted to them by Chinese law. Other times, as with the Huludao court already mentioned, Chinese courts expand or reach beyond heterodox legal provisions to resolve disputes in ways that ensure that victims of accidental injury receive compensation. The theme is that judges share an impulse

[6] We did this to address concerns about a self-selected sample, at least partly. In these three categories, we drew a sample based on facts of the case or, in the case of school injury cases, citations to school-specific provisions of Chinese tort law. Using this second pool of cases, we were able to compare legal reasoning and outcomes in decisions that reference fairness directly or cite the fairness-based provisions of Chinese tort law, with those that do not. Of course, questions remain about when and why judges directly discuss fairness in their decisions, and when they do not. Due to missing data, we are also unable to make any frequency claims about how often Chinese courts impose costs on parties with ethical, but not legal, obligations to victims. The number of cases we were able to turn up, however, suggests that this is common.

to assign legal responsibility to certain social relationships and to spread economic losses through a community. The damages imposed range from a de minimis acknowledgment of trauma in cases in which the victim was largely or entirely at fault to substantial sums. When sizable amounts of money are awarded, courts are also acting as agents of redistribution, fashioning an ad hoc social safety net for victims and their families. Together, these cases reflect both the pursuit of specific policy goals and a worldview that appears prevalent within Chinese courts. We also find that Chinese courts continued to decide cases by relying on fairness or equity after the adoption of the Civil Code, either through appeals to fairness or equity or by finding defendants negligent even when they appeared to have only tangential links to the harm that occurred. Heterodox practices persist even after the written law tries to eliminate it by becoming closer to the orthodoxy in the Global North.

Recognizing and detailing how tort law can serve heterodox goals in China raises three questions about the practice and concept of legal heterodoxy. First, how do China's legal traditions fit into the orthodoxy/heterodoxy framework that is the focus of this volume? China's embrace of legal heterodoxy in tort law may not be a rejection of the legal orthodoxy of the Global North but rather may reflect an attempt to combine China's socialist and pre-revolutionary legal traditions with the need for flexibility in practice in a rapidly changing society. Second, China's tort law heterodoxy raises questions about the relationship between legal provisions and legal practice. In particular, when and how do heterodox practices outlive shifts toward legal orthodoxy? The curtailment of the equitable liability provisions in China's new Civil Code suggests that orthodox criticism of such practices may have had an effect in China, even as China's leadership argues that it is developing a uniquely Chinese approach to law-based governance.[7] Those seeking to bring China more into line with orthodox tort law principles of requiring either fault or strict liability as a basis for imposing damages may have won the argument in China's legislature. Yet heterodoxy lives on in actual court practice, suggesting that in at least some situations heterodoxy can outlive changes to written law. Third, is regime type relevant to the idea of legal heterodoxy? Chinese courts' practice of appealing to equitable principles, substantive justice, or just "actual circumstances" is not simply an effort to maintain social stability or avoid protest or escalation.[8] But ensuring that victims of accidental injury receive compensation, that social ties are maintained, and that loss is acknowledged may nevertheless serve both bureaucratic interests and Party-state goals in China. This raises the question of whether a legal

[7] Xinhua News, 20th Congress of the Communist Party of China (2022) 高举中国特色社会主义伟大旗帜 为全面建设社会主义现代化国家而团结奋斗 – 在中国共产党第二十次全国代表大会上的报告 [Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for the Comprehensive Construction of a Socialist Modernized Country – Report at the 20th National Congress of the Communist Party of China], *Xinhua News*, October 25, 2022.

[8] We make this argument more directly elsewhere. See Stern et al., Liability beyond Law.

practice is heterodox if it achieves not just social policy goals but also the goal of maintaining political control and authority, as well as whether the practice of legal heterodoxy differs in authoritarian systems (or countries undergoing democratic backsliding) compared to democracies.

5.2 FAIRNESS IN LAW AND EQUITABLE LIABILITY

Chinese law includes numerous provisions that give courts discretion to consider fairness (公平) in their decisions, from contract law, to takings law, to intellectual property law.[9] Yet two of the most controversial legal provisions in Chinese language scholarship do not actually use the term "fairness" – the equitable liability provisions of the 1986 General Principles of the Civil Law and the 2010 Tort Liability Law.[10] Most legal systems impose liability for personal injuries based on negligence, strict liability, or a combination of the two. Prior to 2021, Chinese tort law included a third category: liability based on the "actual circumstances." Both Article 24 of the Tort Liability Law and Article 132 of the General Principles of the Civil Law state that if none of the parties are at fault for damages, they can nevertheless share liability "according to the actual circumstances."[11] These "equitable liability provisions" authorized courts to allocate damages based on fairness in situations in which a defendant's actions had contributed to harm but the defendant was not found to be negligent or strictly liable.

The 1986 equitable liability provision had explicitly heterodox roots. Scholars reported that the 1986 provision was inspired by a mixture of the 1900 German Civil

[9] Article 533 of the Civil Code (2020). The provision governs court determinations that a contract should be modified because it is impractical, and states, in part, "the people's court or an arbitration institution shall rectify or rescind the contract in compliance with the principle of fairness, taking into account the actual circumstances of the case." Along similar lines, Article 117 of the Civil Code requires "fair and reasonable" compensation in takings cases, and Article 47 of the Patent Law requires patent-related fees to be refunded when a patent that had been in use was subsequently and nonretroactively declared invalid, if "the principle of equity" is contravened.

[10] Article 132 of the General Principles of the Civil Law (1986); Article 24 of the Tort Liability Law (2009).

[11] The phrasing of the two provisions differs slightly. Article 24 of the Tort Liability Law stated that "when the injured party and the actor both lack negligence regarding the injury, both parties may share the loss according to the actual circumstance." Article 132 of the General Provisions of the Civil Law, adopted twenty-four years before the Tort Liability Law, stated that "when neither party has been negligent in respect to the harm that has occurred, the parties may share civil liability in accordance with the actual circumstances." The Tort Liability Law's phrasing is narrower than that in the General Provisions, referring specifically to "the actor" and suggesting that a causal link is required between the defendant's non-negligent actions and the harm to the plaintiff. The phrasing in the General Principles allows someone whose actions had no causal link with the victim's injuries to be partially or fully liable. In accordance with the general principle that specific laws are meant to prevail over general laws, courts are supposed to rely on Article 24 of the Tort Liability Law in tort cases rather than Article 132 of the General Provisions of the Civil Law. In the cases we read, courts sometimes cited both provisions.

Code as well as Yugoslav and Soviet civil law.[12] The provision also reflected the relative lack of development of Chinese tort law in the mid-1980s[13] and thus the need for courts to be flexible in adjudicating cases. One influential scholarly discussion of Yugoslav law at the time, authored by the primary drafter of the General Principles of the Civil Code, made clear that the Yugoslav provision that served as a model for those drafting the General Principles was intended to reject the norms of capitalist systems.[14] The article argued that the adoption of the equitable liability provision in the General Principles reflected a fundamental shift in when and how damages are awarded: "in the conditions of modern technological and civilized society, the basis for liability is no longer exclusively fault-based, but rather, liability is established without the need for a connection to fault. The emergence of liability is due to the occurrence of harm."[15]

The equitable liability provisions were unusual when placed in a comparative perspective. Although other legal systems permit the parties' circumstances (including relative wealth) to be considered in determining damages in some circumstances, these factors come into play only after liability is established. In China (and apparently in Yugoslavia), in contrast, courts were authorized to look to "actual circumstances" to impose liability, even absent negligence or strict liability. This reflected the view, that "under no circumstances can the causer of harm be exempt from liability by proving the absence of fault for the occurrence of the harm."[16] The link to socialist ideology was also made clear in the explanation that "socialist fairness and unity … sometimes require not applying provisions that exclusively mandate compensation from the responsible party."[17] In the view of Chinese scholars, this "fairness" or "equitable liability" provision became an independent form of socialist tort liability, in addition to liability based on fault and strict liability.

[12] Z. Wang, 我国侵权法上"公平责任"源流考 [An Examination of the Origins of "Equitable Liability" in Chinese Tort Law] (2008) 3 *甘肃政法学院学报 [Journal of the Gansu Institute of Political Science and Law]* 138–44; C. Liu, Socialized Liability in Chinese Tort Law (2018) 59 *Harvard International Law Journal* 16–44; X. Cheng, 中国民法典侵权责任编的创新与发展 [The Innovation and Development of Tort Liability in the Chinese Civil Code] (2020) 3 *中国法律评论 [China Law Review]* 46–61.

[13] Cheng, 中国民法典侵权责任编的创新与发展 [The Innovation and Development of Tort Liability in the Chinese Civil Code].

[14] The article first appeared in 1980 in the journal *Legal Studies Translation Series* and was later republished in a 1983 book, *Selected Foreign Civil Law Materials*, published by the Editorial Department of Legal Textbooks. The book had a print run of 20,000 copies – extremely large for a legal publication at the time. Wang, 我国侵权法上"公平责任"源流考 [An Examination of the Origins of "Equitable Liability" in Chinese Tort Law].

[15] Ibid., quoting Editorial Department of Law Textbooks, Compilation Group of Materials on Civil Law Principles, 外国民法资料选编 [Selected Foreign Civil Law Materials] (Beijing: Law Press, 1983).

[16] Ibid.

[17] Ibid.

The equitable liability provisions have been controversial in China.[18] By the early 2000s, scholars had begun to recognize that the vagueness of the provision made it open to misuse in practice. Nevertheless, the provision was maintained, albeit in a slightly different form, when China adopted its Tort Liability Law in 2009, despite calls from leading scholars to limit the use of equitability liability to specific situations. More detailed criticism followed in the 2010s. Much of the criticism centered on how equitable liability has been applied outside of its intended sphere of torts cases,[19] or misapplied. For example, a study of a hundred cases citing the provision found that nearly half involved a finding of fault, even though the provision is only supposed to apply when neither party is at fault.[20] Another criticism is that the language of "actual circumstances" in the law is stretched by courts to impose liability based on a wide range of factors, including the severity of damages, parties' financial status, ethical concerns, and the goal of achieving social harmony.[21] Courts sometimes ignore causation to impose liability on defendants with only tenuous links to an accident because they have the ability to pay.[22]

[18] The Supreme People's Court appeared to recognize the possibility that the provision was excessively vague when it issued its "1988 Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law." The Opinions stated that article 132, the equitable liability provision, should be limited to situations where one party acts for the benefit of the other party or the parties have mutual interests. Supreme People's Court, 最高人民法院印发《关于贯彻执行<中华人民共和国民法通则>若干问题的意见 (试行)》的通知 [Notice of the Supreme People's Court on Issuing the Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation)] (1988). Yet the Opinions appear to have had limited impact on court practice.

[19] For example, D. Mao writes that the principle has been applied "with no limits" and has often been used beyond what is legally permitted. See D. Mao, 公平责任典型案例探析 [Analysis of Typical Cases Involving Equitable Liability] (2019) 9 *法制与经济 [Legal System and Economics]* 15–16. See also X. Yu, 公平责任"是否"公平" – 以二十世纪新侵权法理论为视角 [Is "Equitable Liability" Really "Equitable" – A Perspective from New Tort Liability Theory in the Twentieth Century] (2017) 12 *政治与法律 [Politics and Law]* 107–22, 107; G. Shi and C. Xie, 前民法典时代公平责任的适用: 裁判误区与应然路径 [Application of Equitable Liability in the Pre-Civil Code Era: Adjudicatory Errors and the Normative Path] (2019) 9 *河南社会科学 [Henan Social Sciences]* 25–37, 31.

[20] K. Chen, 公平责任一般条款的司法适用: 以100份侵权案件判决书为分析样本 [Judicial Application of Ordinary Provisions Employing Equitable Liability: Using 100 Tort Cases as a Sample for Analysis] (2015) 1 *法律适用 [Applied Law]* 11–16, 12. For more criticism of equitable liability, see also X. Cheng, 民法典侵权责任编的体系结构及总则部分的完善 [The Systematic Structure of the Civil Code's Tort Liability Book and Improvements to the General Provisions] (2018) 6 *财经法学 [Economic and Financial Legal Studies]* 5–22, 11–12.

[21] H. Dou, 侵权法中公平分担损失规则的司法适用 [Judicial Application of Equitable Loss-Sharing Rules in Tort Law] (2016) 5 *法商研究 [Research into Law and Commerce]* 125–36, 129; Y. Zhang, 论公平责任的不当适用及其规范 [Discussing Erroneous Application of Equitable Liability and Its Regulation] (2019) 4 *法制与社会 [Legal System and Society]* 14–15.

[22] Dou, 侵权法中公平分担损失规则的司法适用 [Judicial Application of Equitable Loss-Sharing Rules in Tort Law], 127–28; Zhang, 论公平责任的不当适用及其规范 [Discussing Erroneous Application of Equitable Liability and Its Regulation]; Shi and Xie, 前民法典时代公平责任的适用 [Application of Equitable Liability in the Pre-Civil Code Era], 26.

Chinese scholars' criticism of the equitable liability provisions appears largely to have been rooted in their belief that courts were misapplying the provisions—not that the provisions did not conform to global practices. Widespread misapplication of the law likewise appears to have been the primary factor that led legislative drafters to curtail the use of equitable liability provisions under China's new Civil Code (which came into effect in 2021), limiting it to cases explicitly authorized by law.[23] The revision attracted little scholarly or media attention in China. Nevertheless, the larger project of adopting the Civil Code was clearly linked to China's pursuit of legal modernization and the goal of having a "complete legal system." Part of this effort involved removing legal provisions viewed as outdated.[24] The Civil Code was also in significant part an effort to reduce judicial discretion by clarifying (and in some cases limiting) existing legal provisions.

China has also maintained some other provisions in the torts section of the Civil Code that reflect its communitarian or socialist traditions. Most notably, Article 1254 of the Civil Code provides that, when objects falling from a building cause harm and the specific source of the object cannot be identified, all residents or the building shall share in compensating the victim. Leading Chinese scholars have also noted that the fundamental purpose of Chinese tort law is to "care for victims and provide relief for them."[25]

In contrast to the robust debate over equitable liability in Chinese language scholarship, however, the provisions have attracted scant attention in the English language literature on Chinese law. One notable exception is a 2018 article by Chenglin Liu, who sees the "primary purpose" of equitable liability provisions as

[23] Article 1186 of the Civil Code states that equitable liability shall only be permitted where specifically authorized by law. "Where neither the victim nor the actor is at fault for the occurrence of a damage, both of them may share the damage according to the provisions of the law." Article 1190 is one example of a specific provision authorizing the continued use of equitable liability. The provision states that in situations in which a person causes harm due to temporary loss of consciousness or control, a defendant who is not at fault may nevertheless be asked to pay compensation "according to the actor's economic circumstances." The Civil Code likewise authorizes the imposition of damages based on fairness in cases involving defendants with limited capacity. In commentary that accompanied the issuance of the draft Civil Code, the Standing Committee of China's National People's Congress stated that the vagueness of the equitable liability provisions had resulted in "excessively broad application of the provision, with negative social effects." National People's Congress Standing Committee, 关于《民法典各分编（草案）》的说明 [Explanations of Each Separate Part of the Civil Code (Draft)] (2018).

[24] The official explanation issued by China's legislature, the National People's Congress, alongside the Civil Code noted that the Civil Code "involves the compilation and revision of existing civil legal norms, the modification and improvement of provisions that are no longer in line with the current reality, and the formulation of targeted new regulations to address emerging situations and issues in economic and social life." National People's Congress Standing Committee, 关于《中华人民共和国民法典（草案）》的说明 [Explanations of the Civil Code of the People's Republic of China (Draft)] (2020).

[25] L. Wang, *侵权责任法研究（上卷）[Research on Tort Liability Law (Volume I)]* (Beijing: China Renmin University Press, 2010).

"maintaining social stability."[26] Liu's interpretation accords with a good deal of empirical work on Chinese tort law, which documents how courts sometimes stretch the law to ensure compensation. This is especially likely when cases are prone to give rise to instability[27] and in cases involving insurance companies, hospitals, or other institutions seen as having deep enough pockets to help shoulder the cost of injuries.

Although prior work in both Chinese and English offers important insight into the origin and use of the equitable liability provisions, this scholarship has also tended to focus on cases in which the equitable liability provisions are cited directly. In practice, however, courts often rely on equitable principles without citing the provisions, through reference to principles such as "taking the people as the basis," "actual circumstances," or simply basing an outcome on a court's discretion.[28] Indeed, one of the insights gained from the methods we use in this article is that the use of equitable principles extends far beyond cases that cite the specific equitable liability provisions. Prior scholarship has generally also focused on the types of situations in which courts apply equitable liability and has not discussed the norms and relationships courts uphold in such cases.

5.3 DATA AND METHODS

Our primary source of data is 44.2 million Chinese court decisions, publicly released between 2013 and 2018 on a website run by the Supreme People's Court called "China Judgements Online" (中国裁判文书网).[29] In order to navigate a dataset this large, we combined computer-assisted content analysis with close reading. To start, we identified 9,485 court decisions citing either the equitable liability provisions of the Tort Liability Law or the General Principles of the Civil Law.[30] These were all cases we were confident would be concerned with substantive justice and equity-based adjudication. Then, we applied topic modeling, a text-mining tool that is frequently used to discover topics in large collections of documents, to the 9,485

[26] Liu, Socialized Liability in Chinese Tort Law, 36.

[27] Medical disputes are a prime example of this. See B. L. Liebman, Malpractice Mobs: Medical Dispute Resolution in China (2013) 113 *Columbia Law Review* 181–264.

[28] Traffic accidents are another area in which courts frequently ignore or stretch the law in the interests of fairness but virtually never cite the equitable liability provisions while doing so. B. L. Liebman, Ordinary Tort Litigation in China: Law versus Practical Justice? (2020) 13 *Journal of Tort Law* 197–228.

[29] We believe that our dataset includes all cases made public on the China Judgements Online website between July 1, 2013, when the website was launched, and September 2, 2018. For more on why China began requiring courts to upload decisions to a centralized website, see B. L. Liebman et al., Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law (2020) 8 *Journal of Law and Courts* 177–201.

[30] These cases represent all civil cases in our database that cite either Article 24 of the Tort Liability Law or Article 132 of the General Principles of the Civil Law. Our database includes 25,395,376 civil cases. Of these, 2,070,498 cite the Tort Liability Law.

decisions.[31] Topic modeling gave us a way to group this still-sizable corpus into themes to select cases for close reading. Our topic model yielded seventy-one topics.[32] Since these topics are generated by a computer, a close read is needed to understand the context of each topic. Research assistants helped us assign each topic a label (e.g., worker injury cases, sports-related injury cases) by reviewing the high-frequency words associated with each topic and reading twenty cases associated with each topic.[33]

In addition to topic modeling, we selected cases for close reading in two ways. First, we read decisions that included two specific phrases associated with fairness in the holding section of the opinion ("substantive justice" and "taking the people as the basis"). We read all 77 decisions that included the phrase "substantive justice" (实质正义), and a random sample of 200 of the 1,507 decisions that included "taking the people as the basis" (以人为本). Second, we read and coded a sample of 250 cases in three types of cases in which our own background knowledge, conversations with legal professionals in China, or reading of the topic model suggested that courts were likely to give strong consideration to substantive justice: cases involving injuries to students at school,[34] child drownings,[35] and death due to excessive alcohol consumption.[36] We took this second step to try to uncover cases

[31] For a brief introduction to how topic modeling works, and a discussion of how it can be used as a tool of discovery to surface themes in a large corpus, see Liebman et al., Mass Digitization of Chinese Court Decisions.

[32] We estimated the number of topics from the data using an algorithm developed by M. Lee and D. Mimno, Low-dimensional Embeddings for Interpretable Anchor-based Topic Inference (2014) *Proceedings of the 2014 Conference on Empirical Methods in Natural Language Processing*, implemented in the STM package in R. See also M. E. Roberts, B. M. Stewart, and D. Tingley, STM: An R Package for Structural Topic Models (2019) 91 *Journal of Statistical Software* 1–40.

[33] For each topic, we draw the ten documents that the model determines are most representative of the topic, as well as a random sample of an additional ten documents that have an estimated topic proportion above 0.3, meaning that 30 percent or more of the words in the case were estimated to be from the topic. We explain this methodology in more detail in Liebman et al., Mass Digitization of Chinese Court Decisions.

[34] We read a random sample of 250 cases that cite two articles of the Tort Liability Law that specifically apply to injuries at school (Articles 38 and 39). Article 38 of the Tort Liability Law concerns injuries at school to younger children who lack civil capacity. Article 39 concerns injuries at school to older children deemed to have limited civil capacity. Our dataset includes 6,202 cases that cite Article 38 and 8,283 cases that cite Article 39.

[35] We searched for the cases through a combination of terms reflecting drowning (溺水身亡,溺水死亡,溺亡) and terms suggesting that the victim or one of those involved in the case was a minor (限制民事行为能力人,无民事行为能力人,未成年,监护人). The search yielded 5,273 cases. In the random sample, 231 cases were tort claims arising from child drownings. The remaining cases involved adult drownings, non-tort claims, or were duplicate cases. Six of the 231 cases were decisions on whether to grant a rehearing and thus did not include information on whether or not the defendant was ordered to pay compensation.

[36] In searching for death by drinking cases we ran two searches that sought to identify cases in which drinking had occurred in social contexts, by combining a search for terms relating by death by drinking (死亡, 猝死, 过量饮酒, 醉酒) with terms suggesting of drinking in a public

where courts were strongly concerned with substantive justice, but did not cite the equitable liability provisions directly. Indeed, our coding suggests that this happens fairly frequently. Although both child drowning and death-by-drinking cases do appear in the topic model of equitable liability cases, the samples of cases that we read suggest that court decisions often reference to the "actual circumstances" of the case or the court's discretion to justify outcomes, without citing the equitable liability provisions. Altogether, our research team read 2,170 cases.[37] We are not aware of any prior scholarship that has attempted to look at these cases on this scale.

To examine court practices after the adoption of the Civil Code, we also examined a separate database of 100 million cases uploaded during the years 2018 through 2022. Because this dataset was obtained from a commercial data provider, not directly from the SPC website, we cannot be sure that it precisely mirrors cases made public on the China Judgements Online website. Yet a rough look at the total numbers per year suggests that the dataset includes most such cases. Within this dataset, we looked for cases involving two of the common fact patterns we discuss, cases involving death-by-drinking and cases involving child drownings, that arose after the Civil Code came into effect in 2021. We located 85 relevant child drowning cases and 116 death-by-drinking cases that arose under the new Civil Code.

The advantage of our approach was it yielded a large and transsubstantive set of legal decisions, virtually all of which directly or indirectly considered fairness in resolving the case. The cases we read also came from across China, and included hundreds of cases from China's rich provinces and big cities as well as from poorer, more rural areas, refuting the common argument that better-financed urban courts adhere closely to the law and would be more reluctant to consider amorphous, non-legal notions of fairness.[38] Although our primary focus is cases involving physical injuries in tort law, the topic model reveals how concerns about fairness have spread into other areas of the law as well, including employment law and sexual

place, such as a restaurant, bar, or hotel (房间, 包厢, 酒吧, KTV). The two searches we ran yielded 1,169 cases. We read a combined random sample of 250 cases. Twenty-three of the cases did not relate to death-by-drinking. Our analysis thus relies on 227 cases. We also explored several other categories of cases where we thought that fairness considerations might also be apparent. Not all of these searches were successful. We read random samples of 500 cases involving financial products, 220 cases involving peer-to-peer lending, and 200 contract disputes that referred to either the phrases "manifestly unfair" (显失公平) or "major error" (重大误解) in the holding section – substantive areas that we expected might likewise show strong signs of equity-based reasoning. Examination of these cases did not reveal dynamics similar to the cases we examine in this chapter, and these cases are not included in the total number of cases we read.

[37] We read a total of 1,420 cases from the topic model of cases citing to the equitable liability provisions of the General Principles of the Civil Law or the Tort Liability Law.

[38] At least in our dataset, courts in big cities and rich provinces frequently cite to the equitable liability provisions of the Tort Liability Law or the General Principles of the Civil Law. Our topic model includes 706 cases from Jiangsu province and 402 cases from Zhejiang province, as well as a sizeable number of decisions from Beijing (382), Chongqing (244), Tianjin (106), and Shanghai (55).

relations.[39] The disadvantage of our methodology is that written court decisions only tell us how cases turned out, and the public justifications judges choose to offer for their decisions. They cannot tell us how judges thought about a case, or what a judicial panel discussed in private. We also cannot see cases that are settled or withdrawn prior to the issuance of a final court judgment; judges may pressure litigants to do so by signaling likely outcomes if litigants do not settle or withdraw their cases. Further research interviewing judges, or observing court proceedings, is needed to better understand when and why judges frame their decisions in terms of fairness, and whether that language cloaks other concerns.[40] But court decisions are not a bad place to start, as the primary place where judges offer public rationales for their decisions. In the cases we examine, courts often acknowledge fairness, equity, and justice as an explicit justification for their decisions, despite the risk that discussing values may open up the court to criticism for going beyond the law.

5.4 SUBSTANTIVE JUSTICE IN AND BEYOND THE LAW: COURT PRACTICE

Reading thousands of cases through a topic model and guided reading suggests that what is fair depends at least in part on the underlying relationship between the parties. We divide the cases we read into two categories of relationship-based liability: participant liability and space-based liability (Table 5.1).[41] Neither type of liability is specifically recognized in Chinese law. Rather, they are what we call de facto doctrine, or common judicial solutions to a recurrent similar fact pattern. Below, each type of liability is illustrated with typical cases, followed by a discussion of the judicial rationale we see as implicit in the text of these decisions. Although it is difficult to know whether court-ordered compensation counts as a significant amount of money to the parties involved, we differentiate between two different logics of court-ordered compensation, depending on how much money changes hands. We see smaller awards where plaintiffs receive 20 percent or less of what they

[39] To limit scope, this chapter does not look at the fairness provisions of the Contract Law, which have also been controversial. Rather, our focus instead is on the cases in which courts overlay legal obligations onto noncontractual relationships. In other words, the cases in this chapter are all situations in which the court – rather than a contract – imposes legal obligations onto everyday interactions.

[40] Interviews with judges were not possible due to the travel restrictions created by the COVID-19 pandemic. Another limitation is that our dataset is unlikely to be comprehensive. There are well-documented problems with missing cases on China Judgements Online. Liebman et al., Mass Digitization of Chinese Court Decisions. In addition, many tort cases are likely to be resolved through court-brokered mediation and mediated cases are not released to the public. It is also likely that courts are concerned with substantive justice in areas of law not picked up by or included in the topic model or in our guided reading.

[41] In tort law scholarship in English, "participant liability" is sometimes used to discuss liability arising from shared participation in a sporting event. We use the term more broadly here, to refer to liability resulting from participation in any shared activity.

TABLE 5.1 *Types of relationship-based liability*

Type of Liability	Relationship between parties	Implicit rationale
Participant Liability	People participating in the same activity.	Terrible things happen and those present share in the loss.
Space-based Liability	Businesses and their customers or employees.	If you profit off people, you should share the loss when customers or employees suffer harm.
	Public institutions and their users.	Harm requires compensation, and those who can pay should pay, in particular when in a custodial relationship (schools, hospitals).

requested as a de minimis acknowledgment of trauma and understand larger awards to be a form of redistribution that shifts significant sums to victims and their families.

5.4.1 *Participant Liability*

5.4.1.1 Social Companions

In September 2016, a group of retirees went on a road trip together to Zhumadian, in Henan. At lunch, the owner of a restaurant warned the group about wasps in the area. While hiking later in the day, two of the retirees, a married couple surnamed Li and Cui, suffered wasp stings and died. The trip had been organized informally through a "senior university" (老年大学), a social organization for retirees, but the court found no evidence that the senior university had done anything wrong. Instead, the court noted that all of the participants had shared the costs of the trip. Although there was no negligence and no way to anticipate the accident, the court reasoned that, because the participants were members of a "temporary mutual self-assistance group," they should share a portion of the loss and compensate the surviving family members. Citing the equitable liability provisions of the Tort Liability Law, the court ordered each defendant to pay 10,000 yuan in compensation.[42]

The Zhumadian case is representative of a common theme that emerges from reading equitable liability cases: presence at the scene is often enough to give rise to a duty to compensate when a fellow participant is injured. We refer to this court-imposed obligation to share losses among a group of fellow participants as "participant liability." In some cases, the defendant's actions contributed to the plaintiff's injury, but courts find no negligence. In others, there is no causal link, only presence at the scene. Nevertheless, courts rely on arguments about fairness to

[42] (2018) 豫17民终290号. The court found that the "senior university" was not legally registered, but that fact did not appear to affect how the court assessed liability.

ensure that plaintiffs receive some compensation. In a similar case to the bee sting case, but this time involving surfing, the court ordered three defendants to pay compensation after their surfing companion drowned.[43] The court found no evidence that the defendants were negligent or had contributed to the accident, stating that the death was the result of an accident. Nevertheless, the court ordered each defendant to pay 10,000 yuan in compensation in accordance with the equitable liability provisions of the Tort Liability Law, noting that they had shared the costs of the trip.[44]

5.4.1.2 Drinking and Illicit Activities

Heavy social drinking is another shared social activity that likewise often gives rise to loss-sharing, even when the court finds the deceased to be wholly responsible for their own death. Thus, for example, in a case from Shenyang,[45] Mr. Zhao died from a car accident after drinking with friends. The court found that Zhao's friends, who had been eating and drinking with him to celebrate a birthday, were not responsible for the death, and that Mr. Zhao was "solely responsible" for the accident. Nevertheless, the court ordered the two defendants to pay Zhao's surviving family members 40,000 yuan as "appropriate economic compensation" (应适当补偿经济损失为宜).[46] Similarly, in a case from Shandong,[47] Mr. Xiao died of suffocation after drinking heavily with friends and riding his motorbike home. The court found that there was no evidence showing that defendants' behavior caused the death, but nevertheless ordered each of the defendants to pay 33,900 yuan in compensation.

In other cases, courts appear to impose liability in part because defendants were engaged in a common illicit activity, such as gambling, despite there being no link between the injury and the activity. In a case from Inner Mongolia,[48] the victim was

[43] (2018) 粤1323民初422号.

[44] In a somewhat similar case from Sichuan, two victims were found dead on a rafting trip after disappearing one morning. After a night of heavy drinking, the victims had set up tents on a riverbank, while others in the group slept in rooms they had rented for the night. Local villagers found their bodies in the river three days later. The court ordered the other eleven participants on the trip to pay compensation of 2,500 yuan each. The court noted that there was no evidence of negligence, that the co-travelers had acted appropriately in searching for the victims and calling the police, and that no one had gained financial benefit from the trip. Nevertheless, the court stated that the members of the group "bore certain responsibility for caring for each other" as they had formed a "temporary mutual self-assistance group" and thus should pay compensation according to Article 24 of the Tort Law (2014) 都江民初字第11号; (2014) 都江民初字第10号. See also (2016) 渝05民终2577号, holding that a defendant who was knocked into the plaintiff by a wave in the ocean was not negligent but should share 10 percent of the plaintiff's loss.

[45] (2016) 辽0122民初583号.

[46] Ibid. See also (2014) 瀍民初字第644号 (in which the victim died of suffocation after heavy drinking).

[47] (2015) 梁民初字第2584号.

[48] (2016) 内25民终27号.

gambling with three other people, including one of the defendants, when a second defendant knocked on the door, pretending to be the police. The victim and one of the defendants then jumped out of the apartment window, apparently out of fear that they would be arrested for gambling. The victim died from a brain injury suffered during the fall. The court stated that there was no evidence that the defendants were at fault for the plaintiff's death, but nevertheless ordered the defendants each to pay 40,000 yuan compensation, stating that it was doing so in consideration of the conduct of the two defendants and the "economic situation of the parties."[49]

5.4.1.3 Children

Courts' emphasis on communal sharing of loss is even clearer when the victim is a child. In a series of cases, courts use equitable liability to order compensation to the parents of children who drowned while swimming, despite the lack of causal link between the actions of the surviving children and the accident. Thus, for example, in a case from Sichuan,[50] a 15-year-old boy surnamed He drowned on a hot Friday afternoon in June while swimming in the river with four friends. Contrary to the claims of He's parents, who brought the lawsuit, the court found that swimming had been He's idea. None of his friends had goaded him into the water, or to the dangerous middle of the river. Even so, the court ordered the families of the four other boys to pay compensation in order to "provide comfort" to He's parents in light of their suffering and economic loss.[51] Even the family of the boy who spent the whole time playing games on his phone, and never left the river bank, was asked to pay 1,000 yuan. In cases like He's, it is not clear that significant sums are changing hands. Rather, courts seem to be focused less on meeting the economic needs of the victim's family than on publicly acknowledging catastrophic emotional loss.[52]

[49] Ibid. In other cases, participating in an argument was sufficient to give rise to liability. In a case from Guangdong, a woman surnamed Shen died following an argument about a parcel of land. The court stated that there was insufficient evidence to show that the argument directly caused Shen's death, but held that the defendant should pay compensation "according to the actual situation of the case." (2018) 粤02民终89号 (appellate decision quoting trial court decision).

[50] (2014) 旺苍民初字第110号.

[51] The court decision noted that the families of the four defendants had agreed to pay compensation prior to litigation but could not agree on an amount.

[52] Chinese courts also use participant liability to ensure compensation for the loss of a child in cases involving suicide. In a case from Gansu, for example, the plaintiffs' son killed himself after being accused of stealing a phone from his friends. The court ordered each of his friends, who were defendants in the case, to pay compensation of 30,000 yuan because the death caused emotional and financial distress to the parents. The court provided little explanation for this imposition of liability, other than stating that they should pay "in accordance with fairness principles." See (2014) 成民初字第26号.

5.4.1.4 Sexual Relationships

The idea that certain types of social interaction result in an obligation to compensate extends to sexual relationships. A good example comes from the city of Dalian, in a 2015 case brought by the parents of a woman surnamed Zhang who died of a sudden cerebral hemorrhage while her boyfriend was at work.[53]Although the court found no connection between the boyfriend's behavior and the victim's death, the "great suffering" (很大痛苦) caused by Zhang's death was enough reason for the court to order Zhang's boyfriend to pay the parents 40,000 yuan.[54] Even a one night stand can be enough to trigger de facto legal liability for the death of a sexual partner. In a 2016 case from Hunan province, Ms. Zhan was found dead in a hotel room after having sex with a former elementary school classmate, Mr. She. The two had gone to a Changsha hotel following a dinner the previous night, and Mr. She called for help when Ms. Zhan did not wake in the morning. Should he have noticed that Ms. Zhan was making unusual noises in her sleep and sought help earlier? Mr. She argued that the two were not a couple, and he had no way of knowing how she ordinarily slept. He also suggested that her death was the result of drug use. A police report found no evidence of foul play, and the court ultimately decided that there was no evidence of negligence on She's part. Regardless, the decision noted that Zhan was a widow, and she left behind a son as well as an aging parent. In light of the family's financial situation, the court ordered She to pay 60,000 RMB in compensation.[55]

Disputes over who should pay for an abortion are another context in which courts layer financial obligations on top of an extramarital sexual relationship. These cases also show how courts sometimes extend and blend tort law references to equitable liability with contract law claims based on fairness. Men are typically ordered to pay part of the cost of an abortion based on "the principle of fairness" (公平的原则), a phrase drawn from contract law, even when the court decides neither party is legally at fault. These disputes are especially tricky because they often take place against the backdrop of a strained relationship. One such estranged couple came to a district court in Guangxi Province in 2012, having already lived through the death of a first premature child because they could not pay for an incubator, fighting over who should pay for a subsequent abortion. Relying on the equitable liability provisions from tort law, the court asked Mr. Wu, the defendant in the case, to pay half the costs of terminating the pregnancy under the umbrella "principle[s] of fairness and upholding women's rights."[56] Notably, the court cited the equitable liability provision of tort law to justify its decision.[57]

[53] (2015) 沙民初字第5830号.
[54] Ibid.
[55] (2016) 湘0105民初1855号.
[56] (2012) 南民初字第1474号.
[57] Abortion cases were common enough to manifest as a specific topic in the topic model (Topic 54), with a topic proportion of 1.12 percent, meaning that, on average, 1.12 percent of the words in all documents related to the topic.

5.4.1.5 Rationales

What explains courts' efforts to impose participant liability in such a wide range of social interactions, from social outings, to heavy drinking and illicit activities, to children playing together, to sexual relationships? Certainly it is not the law. Many of these cases do not fit the equitable liability provisions of the Tort Law, which required a causal link between defendants' conduct and plaintiffs' injuries. Stability also falls short as a full explanation, unless stability is defined to include every potentially unhappy litigant. It seems unlikely that the illicit gambler, or the family of the deceased sexual partner, was genuinely perceived as a likely petitioner or protester. What emerges in these cases is a particular view of relationship-based liability, which is that certain social interactions give rise to obligations beyond specific legal requirements. Rather than letting losses fall where they may absent a finding of negligence, Chinese courts send a strong message that participation in shared social activities requires a collective sharing of losses.

How predictable are the outcomes in these cases? To get traction on this question, we read and coded 250 cases of each of two types of cases that involve participant liability: child drowning and death-by-drinking. What we found is that courts overwhelmingly allocate at least some compensation to victims, or the families of victims. Across a sample of 250 child drowning cases, courts awarded damages 75 percent of the time.[58] In a sample of 250 death-by-drinking cases, plaintiff success was even more likely, with 85 percent of the cases resulting in damages paid to plaintiffs.[59] Victims also recover in both rural and urban courts.[60] Although victims are slightly more likely to be awarded compensation in rural courts, perhaps because a more communitarian logic holds sway in the tighter-knit communities of the countryside, plaintiffs are likely to receive compensation regardless of the location of the court (Table 5.2). The vast majority of lower court decisions across the country treat participant liability as a de facto doctrine and ensure that plaintiffs recover at least some money in recognition of their losses.

[58] Courts generally find negligence in child drowning cases, but such findings often read as strained, with courts simply mentioning a failure on the part of defendants to supervise without pointing to any specific act of negligence. The logic often appears to be that, because misfortune has occurred, someone must have been negligent. In the 126 decisions that referenced fairness or equity, all but two awarded damages to plaintiffs. In contrast, in cases in which courts did not mention fairness or equity, defendants were more likely to prevail, winning 56 percent of the cases in the sample (55 of 99 cases).

[59] As in the drowning cases, courts that made reference to fairness virtually always awarded damages: only 4 of the 154 cases that made reference to fairness denied recovery. In most cases, courts found negligence, with courts often finding negligence either on the part of drinking companions or the restaurant or bar that served the alcohol. In general, courts found those who drank with the deceased to be liable. Those who refrained from drinking, who were seated at a different table, or who departed before the final round of drinks were not held liable.

[60] There were also no significant differences by level of court.

TABLE 5.2 *Percentage of decisions that award compensation to plaintiffs*

	District courts (mostly urban)	County courts (mostly rural)
Death-by-drinking	82%	92%
Child drowning	69%	74%

Typically, plaintiffs only receive a portion of what they requested. In our sample of child drowning cases, plaintiffs received less than half of what they requested in 82 percent of cases, and less than a quarter of what they requested in 55 percent of cases.[61] In the death-by-drinking cases, plaintiffs received less than half of their request in 85 percent of cases, and less than a quarter in 57 percent of cases.[62] Clearly, courts are trying to split the difference between plaintiffs and defendants. Yet fairly substantial sums are also changing hands. The average award in a death-by-drinking case in our sample was 143,720 yuan and the average award in a child drowning case was 118,274 yuan.[63] We also see little evidence that defendants are better placed than plaintiffs to shoulder losses, at least from what we can gather from the clues sprinkled throughout the text of decisions, particularly occasional references to defendants' occupations. Rather, these cases generally appear to involve parties from the same economic background. Ordering damages in these cases, then, involves sharing the burden of loss within a community rather than channeling money from haves to have-nots. Do Chinese judges think about this kind of loss-spreading as part of their role in society, or do they take a harder-nosed view of it as a tactic to appease grief-stricken plaintiffs so that they neither appeal nor complain? It is impossible to say without interviewing judges, and judicial attitudes are also likely to vary with the circumstances of the case. At least some cases are likely to be influenced by the moral judgment of judges and their views of activities such as drinking, gambling, and sex outside of marriage. But, regardless of the view judges take of the parties involved in the case, or even how they view their role in society, the decisions in these cases are strikingly consistent: Chinese courts routinely

[61] This analysis is limited to the 203 cases that included information on how much plaintiffs initially requested.

[62] In the drinking cases, 202 of the 227 cases included data on amounts claimed and awarded.

[63] In making these award determinations, Chinese courts likely had in mind national standards for how much compensation to award in cases involving injury or death, which vary by province and are based on the per capita income in each province (prior to 2019 each province had separate standards for rural and urban areas). Death compensation is fixed at twenty times local income in each province. The relatively high awards in these cases reflect the fact that they typically involved the death of the victim. Supreme People's Court, 最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释 [Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury] (2003).

impose an implied social compact that requires those present at the scene to share the burden of loss when things go awry.

5.4.2 *Space-based Liability: Businesses and Institutions as Insurers*

5.4.2.1 Businesses: Bars, Hotels, and Bathhouses

Mr. Song died following heavy drinking at the somewhat innocuously named Latte Bar, in Beijing.[64] Instead of suing his drinking companions, as in the participant liability cases above, Song's parents sued the bar, arguing that its employees failed to meet their obligations to protect their customers.[65] But the bar's employees had called an ambulance and had waited outside for it to arrive, leading the court to find no negligence or causal link between the conduct of bar employees and Song's death. Nevertheless, the court noted that Song was a frequent customer at the bar, including the night of his death, and that the bar had profited from Song's presence. The court thus ordered the Latte Bar to pay 120,000 yuan in compensation to Song's survivors "according to equitable liability principles."

Song's case is emblematic of a second category of court-imposed obligation in tort cases: liability based on physical presence, most often from accidents that occur at a place of business or large institutions. Business owners, employers, schools, and hospitals are often ordered to share losses with their customers, employees, or students, even when there is no finding of negligence or even a causal link to the defendants' actions. As in cases involving participant liability, courts use arguments about fairness to impose an implied social contract that businesses and institutions must share in the losses of those off whom they profit, or those over whom they have control, even absent negligence.

Courts sometimes make the economic benefit rationale explicit. In a similar case to the Beijing case, from Henan Province,[66] the Yiyun Hotel was ordered to pay 20,000 yuan to the family of Mr. Shang, who died in the hotel after checking in drunk. The hotel's proprietor found Shang dead in his room the next morning. The cause of death was unknown, and the family rejected an autopsy. The court stated that the hotel was not at fault, but nevertheless cited the fact the hotel was financially benefiting from the victim's presence and said the hotel had failed to meet its "ethical obligation to provide humanistic care" to its guests.[67]

[64] (2015) 朝民初字第04635号.

[65] The court decision made no mention of drinking companions and, thus, it is not clear whether the victim was drinking alone or with others.

[66] (2014) 泌民初字第94号.

[67] In a similar case, a customer died in an internet cafe. The court noted that the death was due to an underlying physical condition, not excessive internet surfing, and that there was no evidence of negligence by the cafe. Nevertheless, the court noted that the staff had failed to discover the body until the next morning, and thus should pay "appropriate compensation" of 140,000 yuan. (2015) 朝民初字第68370号.

In the drinking cases, courts imply that businesses have some duty to care for their customers, or at least supervise them. In other cases, however, courts impose damages even when customers die of a heart attack on the premises. In a case from Liaoning Province, a court imposed liability on a public bathhouse, the Shenyang Dijia Women's Club, after a 72-year old customer, Ms. Xu, died of cardiac arrest.[68] The family declined an autopsy, and the court noted that the bathhouse had acted properly in calling an ambulance. Although the court said that the bathhouse had made "management errors" by failing to enforce the sign at the door refusing service to elderly customers in poor health bathing alone, it clearly stated that these errors did not cause Xu's death. Nevertheless, the court stated that the bathhouse had an obligation to pay because it was financially benefiting from her presence. The court ordered 20,000 yuan in "appropriate compensation" to "balance the rights and obligations of the parties." Similarly, a court in Guangdong Province ordered a health product shop to pay compensation to the family of a customer who died shortly after getting in a heated argument with the shopkeeper.[69] The shop had promised a free bag of eggs to anyone who attended a lecture about its products, and an argument developed when the shop refused to give a bag of eggs to both the decedent and his spouse. Although the court found that the plaintiff failed to show that the shop caused the death, the decision used the Tort Liability Law's fairness principle to order the shop to bear 20 percent of the plaintiffs' loss "according to the actual situation" of the case. The court also appeared to be signaling that it disapproved of the shop's marketing tactics, even if there was no direct link to the victim's death.

5.4.2.2 Employers

Courts also routinely rely on arguments about fairness based in the equitable liability provisions of the Tort Liability Law to impose liability on employers for injuries or deaths to employees, even when the harm is unrelated to employment. The implied argument is that the employer benefited from the victim's labor, and also that whoever has physical control over a workplace is responsible for anything that happens there, regardless of cause. Thus, for example, after a bus driver became sick and died on the job, the court asked both the company and the subcontractor who hired the decedent to pay damages, even though there was no link between the death and the employee's job.[70] The decision noted that the decedent was working for the subcontractor at the time of his death, and that he acted to the benefit of the company and its subcontractor when he managed to stop the bus without harming passengers when he became ill.[71] Similarly, a court in Jiangxi relied on arguments

[68] (2017) 辽0105民初5490号.
[69] (2017) 粤02民终1127号.
[70] (2014) 陈民初字第02004号.
[71] The court ordered the company to pay 20,000 yuan and the subcontractor who hired the decedent to pay 30,000 yuan. Ibid.

about fairness when a worker died of a hornet sting while working on a construction site.[72] The court ordered the employer to pay 110,000 yuan in compensation.[73] In similar cases involving sudden deaths at work, courts likewise found no negligence or causation on the part of the employer, but awarded damages "according to the actual circumstances"[74] or based on "fairness."[75] These cases place employers in a custodial or quasi-parental role vis-a-vis their employees, and hold them responsible for anything that happens to workers on the job.[76] In so doing, they extend far beyond law and regulations on work-related injuries.[77]

Other cases extend employers' obligations to compensate even beyond the workplace. In one such case, the victim was murdered on her way to work at a Henan internet cafe. The court found no connection between the murder and the employer, but relied on equitable liability principles to award 20,000 yuan in damages.[78] The court justified compensation "according to the actual circumstances" of the case, and included a note that the murderer had been executed without paying any compensation to the victim's family.[79]

[72] (2016) 赣07民终61号.

[73] There were three defendants in the case: two individuals and a company. The company had subcontracted the work to one defendant, who had then subcontracted the work to a second defendant, who had hired the decedent. The court ordered the individual who had directly hired the decedent to pay 50,000 yuan and the two other defendants to pay 30,000 yuan each.

[74] (2016) 鲁民终757号, holding the defendant liable when the employee died of an underlying heart condition suddenly while working on defendant's fishing boat.

[75] (2018) 新2325民初208号, in which the employee died suddenly while acting as a driver for the defendant, and neither party submitted evidence showing cause of death.

[76] In one such case, an employee was injured in a fight at work with a co-worker. Although finding no negligence, the court nevertheless ordered the employer to share 10 percent of the damages. (2017) 鄂96民终680号. Chinese law includes a provision explicitly imposing liability on beneficiaries of work carried out by victims. But the provisions apply to work undertaken for free where the injury or death results from the work, not employment situations or unrelated injuries. Supreme People's Court, 最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释 [Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury].

[77] State Council regulations state that, in situations involving sudden death, or death within 48 hours of an emergency at work, compensation should be paid from workers compensation insurance rather than directly by the employer. In addition to covering workplace injuries, the regulations state that workers compensation funds shall only cover injuries occurring on the way to and from work arising from traffic accidents that are not primarily due to the worker's negligence. See State Council, 工伤保险条例 [Regulation on Work-related Injury Insurance] (2003).

[78] The court ordered the four shareholders in the café to split the compensation. The appellate court increased damages from 8,000 yuan to 20,000 yuan, noting the amount awarded by the trial court was "inappropriate" given the harm suffered. (2016) 豫07民终4414号.

[79] In another case involving an injury off-premises, the victim died of heart disease while traveling from work to the hospital. The court found no negligence or link to employment and noted that the employer had sent the employee to the hospital when he reported not feeling well. The court ordered both the defendant company and a subcontractor that had directly hired the decedent to each pay 20,000 yuan in compensation. The court stated it was "starting from the

5.4.2.3 Large Institutions

A third example of a space-based relationship giving rise to an obligation to compensate is between large public institutions, such as schools and hospitals, and the people who use them.[80] The principle is that injuries that occur on the premises of public institutions, or that befall those under their supervision, deserve compensation, even when there is no link to defendants' conduct. Litigation resulting from injuries suffered by children at school is a central and common[81] example of how courts have extended tort law to force certain public institutions to serve as virtual insurers of harm suffered on their watch.

Chinese law has clear provisions regarding injuries to children at school. For injuries to children who are eight years old or younger (ten or younger prior to 2017), schools have the burden of proof to show that they were not negligent.[82] For older children, the burden of proof is on the plaintiffs.[83] In practice, however, courts considering claims made on behalf of children injured during the school day virtually always order the school to pay compensation, even in cases involving older children in which plaintiffs fail to introduce evidence that schools were at fault.

In numerous cases, courts find that schools were not responsible for harm suffered by students, but nevertheless order compensation according to principles of equity. Thus, for example, in a case from Xixiang County in Shaanxi,[84] a fifth-grade student surnamed Xu injured his arm when he fell while running in an 800 meter race. He was hospitalized for ten days. Upon returning to school, Xu re-injured his arm when another student collided with him while exiting the classroom, leading to a second hospitalization and surgery. The court found that the school had taken all necessary steps to ensure the safety of its students and was not negligent. Nevertheless, the court ordered the school to assume 30 percent of the cost of the first injury, roughly 11,000 yuan, "in accordance with the actual situation."[85]

point of balancing the financial situation and property loss of each party" in compelling compensation. (2017) 粤13民终3235号.

[80] Most schools and hospitals in China are public, and we did not see significant numbers of private large institutions in the cases we reviewed.

[81] Two topics were primarily cases involving injuries at schools, with a combined topic proportion of 1.94 percent.

[82] Articles 19 and 20 of the General Principles of the Civil Law, and Articles 1200 and 1201 of the Civil Code. Revisions to the General Principles in 2017 shifted the boundary between those who have diminished civil capacity and those who are deemed to lack civil capacity from ten to eight years old. Those who are sixteen or older are considered to have full capacity and are treated as adults.

[83] Article 40 of the Tort Liability Law; Article 19 of the General Provisions of the Civil Law; Article 1200 of the Civil Code.

[84] (2014) 西民初字第01035号.

[85] The student who collided with Xu was held fully responsible for the second injury.

Similarly, in a case from Nanjing,[86] a first grader surnamed Chen was injured on the playground. He was running away from a child who was chasing him and collided with another classmate, suffering an injury to the nose which led to a five-day hospitalization. The court found that the school had not acted negligently, noting also that the children "were playing a game and their play should not be restricted," but nevertheless ordered the school and the guardians of each of the two children involved in the accident to each pay 2,000 yuan in compensation.

In some cases, courts explicitly acknowledge that they are guided by the view that those who suffer an injury should receive compensation, regardless of whether anyone acted negligently. In a case from Chongqing,[87] plaintiff Fan injured his arm while training for a high-jump competition and spent 48 days in the hospital. The court found that Fan himself was primarily responsible for the accident, due to his own lack of ability, rather than anything related to the quality of school facilities or oversight. Nevertheless, the court relied on "substantive justice" to assign secondary responsibility to the school and ordered them to pay 40 percent of the harm suffered. A situation in which there is no one to "settle the bill" for Fan's injury (无人买单的情形), the decision explicitly stated, would violate the principle that "where there are damages, there should be remedies" (有损害则应有救济).[88]

Schools are at times held liable even for injuries that occur outside of school, reinforcing the idea that they bear broad responsibility for their students' wellbeing. In September 2014, a nine-year-old child surnamed Wang drowned in a river flooded by heavy rain while walking home from school at lunchtime. Although a Henan court found that the death was not connected to the school, it nevertheless ordered the school to pay 50,000 yuan in compensation to Wang's family, noting that the death had caused "very large emotional harm" to his parents.[89] Likewise, in

[86] (2015) 栖民初字第175号. See also (2016) 粤2072民初9006号 (ordering 10,000 yuan compensation "according to the actual circumstances" to a fourteen-year-old student who fell while running at school); (2013) 涪民初字第7035号 (ordering a school to pay 30 percent of the harm suffered when the plaintiff fell during gym class); (2017) 川1521民初1026号 (ordering a school to shoulder part of the cost of damages resulting from injuries sustained when an elementary school student cut in front of another student in the lunch line). In all of these cases, courts found no evidence of negligence on the part of the school.

[87] (2015) 永法民初字第08225号.

[88] Ibid. The court went on to suggest that, although the school was not directly negligent, it failed in its "safety protection obligations." This reasoning, invoking a vague reference to an obligation to supervise or to maintain safety, is common in school injury cases.

[89] (2014) 确民初字第01570号. On appeal, the intermediate court ordered a retrial. On retrial, the county court found that the school was negligent because it dismissed students during a rainstorm without adequately warning them of the risks of walking home in the rain. The trial court also increased the damages from 50,000 yuan to 90,000 yuan. (2016) 豫1725民初256号. In its original decision, the trial court had found that there was no causal link between the school's decision to cancel afternoon classes and the injury, as the school had dismissed students at lunchtime as usual. The case suggests that courts may sometimes use equitable liability to avoid finding a defendant negligent, and thus to reduce damages.

a case from Beijing,[90] the plaintiffs' son was a student at a boarding school on the outskirts of the city. After returning home for the weekend he failed to return to school on Sunday. He was found drowned six days later, and the police concluded that there was no evidence of a crime. The court noted that the victim's death had not occurred at school, but that, in accordance with the "case situation," it was using its discretion to order the school to pay 20,000 yuan in compensation.

To check the representativeness of these cases, we read and coded 250 cases that discussed injuries that occurred at school. Courts awarded damages in 95 percent of cases (207 of 217 cases with data on outcomes),[91] confirming that schools are virtually always asked to pay for injuries that occur to children at school. Students, and the families of students, also recover fairly significant sums. In the school injury cases, plaintiffs received 50 percent or more of their demands in 60 percent of cases,[92] with an average award of 81,800 yuan.[93] The takeaway of this coding exercise is clear: schools assume responsibility for most of the damages suffered by children at school, at least during the time period covered by our dataset. Legal provisions that state that schools are not responsible if they can disprove negligence (for injuries to younger children) or if the plaintiff fails to show that schools were negligent (in cases involving older children) appear largely irrelevant. Typically, courts stretch to find some negligence, often relying on a general statement that schools failed to fulfill their duty to adequately supervise.[94]

Following the same logic as schools, courts also often push hospitals into the role of social insurer. Two topics in the topic model concerned medical disputes,[95] with courts generally imposing compensation on hospitals for catastrophic harm to patients, even absent evidence demonstrating negligence or medical malpractice. In a case from Jilin,[96] for example, the court imposed liability on a hospital that had initially treated a patient who had been hit by a car while walking home after drinking. The court found that the hospital had "made some mistakes," though the mistakes did not contribute to the patient's death. However, the court also noted the importance of balancing the interests of hospitals with "the weak position of

[90] (2016) 京0105民初67665号.

[91] The random sample was selected from cases citing to Articles 38 or 39 of the Tort Liability Law, the two primary provisions relating to injuries at school. Ten of the 250 cases were either duplicates or did not relate to school injuries. Twenty-three cases lacked information on amounts claimed or awarded.

[92] Only 20 percent of cases (43 of 217 cases) awarded 25 percent or less of plaintiffs' demands.

[93] School injury cases typically involve injuries rather than death. This explains the lower awards compared to the child drowning and death-by-drinking cases.

[94] Only four cases cited the equitable liability provisions of the Tort Liability Law directly. This is not surprising, given that the Tort Liability Law included specific provisions governing injuries to children at school. But courts did frequently include language relating to fairness or equity, doing so in 45 percent of the cases (ninety-seven cases in total). Courts awarded damages in all of these cases.

[95] The topic proportion of the two topics related to medical disputes was 2.48 percent.

[96] (2015) 江林民初字第33号.

patients" and the importance of preventing patient–hospital conflict.[97] Likewise, in a case from Inner Mongolia, plaintiffs sued after a man died while waiting for an ambulance. The court found no evidence that the delay contributed to the victim's death. Nevertheless, the court ordered the hospital to pay compensation because the ambulance "should have been more prompt" and the plaintiff's family was in a "difficult financial condition."[98]

5.4.2.4 Rationales

In these cases, courts treat liability as a spatial concept. Sharing physical space triggers financial obligations. Businesses are asked to pay for accidents to customers on their premises, just as ordinary people are asked to pay when they are present at the scene of an accident. Courts are particularly likely to invoke space-based liability when the space is being used for profit, or when the space-owner is a public-facing institution such as a school or a hospital.[99] In both situations, courts ask defendants to assume custodial responsibility for those who enter their space, including sometimes injuries that happen off-site. In the case of businesses, part of the logic appears to be that profiting off customers and employees triggers an obligation to care for them. In cases involving state-run institutions, the assumption that the state will pay is anchored in a long history of state paternalism that predates the Chinese Communist Party (CCP), and is also a recurrent theme of CCP governance and contemporary civil litigation.[100]

Reading a range of space-based liability cases highlights variation in the amount of money that changes hands. Sometimes, especially when defendants are closer to struggling mom-and-pop shops than deep-pocketed corporations, courts award fairly minimal sums. In these cases, courts' logic appears similar to the vision of collective loss spreading that animated the participant liability cases. But more substantial awards are possible. Especially in cases involving (relatively) rich business-owners or state-run institutions, courts shift a fair amount of money from society's haves to its have-nots. Court-ordered redistribution effectively creates a social safety net for families experiencing emotional trauma and economic loss and, as legal scholars

[97] In another example, the court awarded 20,000 yuan in damages for the death of an infant strangled by its umbilical cord during birth. The court found no negligence on the part of the hospital but nevertheless relied on equity provisions to ensure the parents of the child received compensation. (2018) 桂08民终382号.

[98] (2015) 昆民初字第3413号.

[99] Another good example is the landlord–tenant relationship. Our dataset includes a number of cases in which landlords are asked to pay compensation to tenants for injuries that happen on their properties, even absent evidence of negligence. One such case involved a tenant who died of carbon monoxide poisoning. The court found no evidence of negligence but held that requiring the plaintiffs – the parents of the deceased tenant – to bear the loss on their own "obviously would violate principles of fairness." (2014) 管民初字第902号.

[100] For discussion of this dynamic, see B. Liebman, Legal Reform: China's Law-Stability Paradox (2014) 143 *Daedalus* 96–109; Liebman, Malpractice Mobs, 250–54.

writing in Chinese have noted, helps plaintiffs recover in situations where neither party has insurance.[101]

Another way of thinking about participant liability and space-based liability are as two implicit rationales Chinese courts use to adjudicate cases involving bad luck and catastrophic loss. To determine who should pay – and how much – Chinese courts look to the law, but also to unwritten expectations about the responsibilities triggered by certain types of relationships. Some types of cases can also be decided according to either logic. Although the vast majority of decisions in child drowning cases, for example, impose participant liability on the families of other swimmers, we also encountered a few space-based liability cases in which courts asked adjacent property owners with no link to the accident to pay compensation. In one such case, which involved a local boy who drowned in a river, a Hunan court ordered a nearby business that had profited from selling stones taken from the river to pay 50,000 yuan in compensation to the victim's family. The court acknowledged that there was no link between the stones and the death, but noted the massive loss suffered by the parents, whose fourteen-year-old child "had left the world without first repaying his parent's kindness and upbringing."[102]

To be sure, neither participant liability nor space-based liability are entirely new ideas. Legal culture is hardy and, at a minimum, Chinese courts are drawing on a centuries-old practice of attaching legal obligations to dyadic relationships as well as a twentieth-century socialist tradition of using law to strengthen social solidarity. The Qing Dynasty Code, to take one well-known historical antecedent, adjusted criminal penalties depending on the relationship between the parties. A son who struck a parent, for example, was punished far more harshly than an assault on a nonparent.[103] In the more recent past, twentieth-century socialist states leaned heavily on law to strengthen social solidarity,[104] a legacy that resurfaces in Chinese courts' impulse to ask the community collectively to share in catastrophic loss. Legal historians, of course, would expect to see these continuities, and could doubtless identify many more connections between past and present. For observers who are less attuned to history, however, these historical continuities serve as an important corrective to the idea that China is forging an entirely new model of justice under Xi Jinping. At the same time, too, the cases we read also show Chinese courts innovating as society changes, particularly by starting to assign legal responsibility in

[101] Y. Zhang notes the role that equitable liability provision plays in providing remedies where social insurance is lacking. See Zhang, 论公平责任的不当适用及其规范 [Discussing Erroneous Application of Equitable Liability and Its Regulation].

[102] (2017) 湘12民终592号.

[103] D. Bodde and C. Morris, *Law in Imperial China* (Philadelphia: University of Pennsylvania Press, 1967), p. 37.

[104] I. Markovitz, *Justice in Lüritz: Experiencing Socialist Law in East Germany* (Princeton: Princeton University Press, 2010). Professor Markovitz also notes, however, that over time "the East German goal of forging social solidarity by means of law over the years increasingly looked forced and artificial." Ibid. p. 201.

a wider range of relationships, such as sexual relationships outside marriage. Another emergent dyad is the relationship between schools and businesses, and the people who either use them or are employed by them. Chinese courts routinely ask schools and businesses to take financial responsibility for accidents that involve their employees, customers, or students beyond what is legally required, or take place on their premises (or even just nearby). The Chinese courts reflect – and also reinforce – a worldview that social order is sustained by family, community, commercial, and institutional relationships, and that part of their role is to make sure these relationships are maintained.

5.4.3 *Continuing Heterodoxy? Cases Adjudicated after the Adoption of the Civil Code*

How did courts respond to the changes to the Civil Code that restricted the use of equitable liability? To check, we ran the same term searches for cases involving child drownings and death-by-drinking cases in our database of cases uploaded from 2018–2022, looking at cases decided after January 1, 2021. For child drowning cases we read all 158 such cases; for death-by-drinking cases, we read a random sample of 500 cases decided in 2021 and all 151 cases decided in 2022.[105] We excluded cases that were not relevant, either because they involved irrelevant fact patterns or because the facts arose prior to January 1, 2021. In total we located eighty-five relevant child-drowning cases that arose after the implementation of the new Civil Code,[106] and 116 death-by-drinking cases that similarly arose under the new Civil Code.

In the drowning cases, courts awarded damages in sixty-four of the eighty-five cases, or 75 percent of cases, the same percentage success rate as in our initial sample of cases. In most of these cases – fifty-nine cases – courts did so by finding negligence, suggesting that courts are shifting from relying on fairness to finding negligence. In many of these cases, the finding of negligence appeared to be a stretch, imposing obligations on landowners to both warn of dangers and construct fences around their property.[107] In one case, a child fell into a ditch that had

[105] The decline in the number of cases decided in 2022 likely reflects both decreased rates of posting cases online and also the fact that not all cases had been uploaded by the time we obtained our dataset. We looked at 500 cases from 2021 (instead of the 250 we used in our original search) because we expected a significant number of cases to have arisen before the Civil Code came into effect. We did not rerun our searches for school injury cases because those cases are governed by specific legal provisions that did not change substantively in the new Civil Code.

[106] We located ninety-three court decisions relating to child drownings, reflecting eighty-five unique disputes. Eight of the judgments were either appeals from first-instance cases also in our database, or judgments against multiple defendants from disputes arising from the same incident.

[107] Other cases involved insufficient numbers of lifeguards at public swimming pools, or failure to warn of water hazards, or the partial demolition of bridges with no warnings posted. These cases appeared to be straightforward applications of negligence standards.

allegedly been dug by defendants.[108] In another, an unattended child drowned in a rice paddy; the court found that there should have been a fence around the field.[109] Damage awards were also significant, averaging 220,000 yuan in cases in which courts awarded damages.[110]

One court explicitly refuted arguments regarding fairness. The court rejected compensation to the family of a child against the local government after a fifteen-year-old drowned while fishing after ignoring posted warning signs, stating that "sympathy and mercy are not the same as judgment, and cannot be made into a duty."[111]

Yet other courts continued to apply fairness principles without citing to the equitable liability provision or noting the change in the law. Five decisions, or 7 percent of the new drowning cases, included reference to fairness principles. In one case, for example, a child drowned when an upstream power plant released water. The court noted that the release of water was a daily occurrence that local villagers knew about, and thus that there was no negligence.[112] But the court nevertheless awarded 40,000 yuan in damages, commenting that it was doing so in light of the fact that the defendant derived economic benefit from its activities and in light of "the parties' ability to pay." Another court noted that "although there was no clear negligence [on the part of two of the defendants], in consideration of the special circumstances of this case and according to principles of fairness, appropriate damages should be awarded."[113] In yet another case in which a child drowned while swimming, the court found no negligence but enforced a prior promise by the families of the surviving children to pay damages, noting that payment of "appropriate compensation" was in line with "socialist core values."[114]

In the death by drinking cases, courts awarded compensation in 91 of the 116 cases, or 78 percent of cases. This figure was slightly lower than the 85 percent success rate in our original dataset. In general, courts did so by finding that defendants were negligent. Yet particularly noteworthy were fifteen cases in which courts declared that defendants had not been negligent, but nevertheless imposed

[108] (2022) 鲁01民终884号.
[109] (2022) 黔2635民初105号.
[110] Average damages were thus significantly higher than the average payouts of 118,274 yuan in child drowning cases in our original dataset. Much of this increase likely reflects increases in income levels, as damage awards in tort cases are scheduled with reference to annual average provincial incomes.
[111] (2022) 宁0202民初956号. Courts awarded damages in only two of the eight cases where government actors were defendants, perhaps suggesting some reluctance to find government actors negligent or responsible.
[112] (2022) 赣10民终314号.
[113] (2022) 陕06民终871号. The court ordered each, both government entities, to pay 5 percent. Two other government defendants were found negligent, and the decision thus distributed the damage payment among additional government actors.
[114] (2021) 豫0225民初6094号.

liability. In twelve of these cases, courts made explicit reference to terms like "fairness," without citing a specific legal provision.

The themes of space-based liability and participant liability continued to manifest in the cases decided after the new Civil Code. Most of the cases involved courts holding drinking companions liable. In one case, for example, a court held drinking companions liable when a man committed suicide after drinking. The court noted that the defendants had physically restrained the defendant when he tried to jump off a bridge and then had taken him home. When the deceased fled they pursued him and notified the police and family. The court nevertheless found the defendants negligent and ordered compensation.[115] Some courts also imposed space-based liability on businesses. In one case,[116] for example, a court imposed liability on a hotel when hotel staff found a guest passed out from drinking. The court noted that the employees failed to seek help, and also noted that it was imposing liability based on the court's "discretion."

As with the child drowning cases, there were some signs of courts becoming stricter in the application of fairness provisions in the death-by-drinking cases. One appeals court explicitly overturned a judgment against a drinking companion by noting that courts may not rely on fairness principles without applying a specific legal provision.[117] Lawsuits against bars, restaurants, and hotels were much less common than they were in our original dataset.

Taken together, cases decided under the new Civil Code suggest that Chinese courts continue to seek equitable outcomes. To some degree, courts have used the broad discretion they have in making determinations about defendants' negligence to do so. But some courts have also continued to make explicit reference to fairness principles or have shifted from relying on fairness arguments to citing "socialist core values." Legal heterodoxy in tort cases may be more muted under the Civil Code, but it nevertheless persists in practice.

5.5 CONCLUSION

Looking at a large number of tort cases that involve largely accidental misfortune reveals that courts consistently stray from or stretch the law to achieve outcomes that recognize the ethical as well as legal obligations that arise out of relationships. When cases involving misfortune arise in the Chinese legal system, courts often turn to two de facto doctrines – participant liability and space-based liability – to craft solutions that appeal both to notions of fairness and to practical needs to ensure victims receive some compensation. The range of cases this chapter examines reveals that

[115] (2021) 豫1381民初6635号.
[116] (2021) 湘3125民初438号.
[117] (2022) 鲁11民终402号. Co-defendants did not appeal, and thus the trial court's fairness-based decision against them was not reversed.

courts stretch the law to ensure that compensation is paid and loss is acknowledged. Courts have continued to do so even after China's Civil Code restricted fairness-based adjudication.

Worldwide, restoring equilibrium in a community has long been recognized as an important part of what courts do, particularly in small towns where disputants will remain neighbors long after the case concludes.[118] It is also a familiar theme in the literature on twentieth-century socialist legal systems, which tended to view trials as an educational opportunity to reinforce societal values by punishing outcasts.[119] Stretching the law to ensure communal sharing of losses has remained an important strand of Chinese legal culture even following decades of urbanization, a wide range of legal reforms that have in significant part been based on adapting legal norms from the Global North into the Chinese legal system, and a tightening of political control under General Secretary Xi Jinping. It routinely happens in big cities, such as Beijing and Shanghai, as well as in rural areas. And when courts engage in loss-spreading, the economic and social implications take on a new dimension in the twenty-first century. On the economic side, court-ordered redistribution backstops state benefits and smooths the pain of rising income inequality. On the social side, treating catastrophic loss as a community event marks a renewed attempt to create social solidarity through law. In some cases the sums awarded are substantial; in others, the awards appear to be primarily symbolic. But the cases suggest that there is also value in this symbolism, an understanding that even symbolic awards may play a role in fostering social cohesion.

Is this practice of Chinese courts looking to fairness and equity as they seek to spread and acknowledge losses through tort cases heterodox? In many respects, yes. Courts have developed consistent legal doctrine based on a specific legal provision that helps to smooth the rough edges of some of China's most pressing policy problems: rising economic inequality and a weak social safety system. Particularly when significant sums change hands, the courts are blunting the sharp edges of inequality by redistributing wealth. Even when awards are modest, court decisions that treat catastrophic loss as a community event may send important signals recognizing tragic loss and the social obligation to support others. This practice has persisted despite a legal system (and legal academia) dominated for much of the reform era by the importation of foreign ideas and models, and in particular

[118] One classic discussion of this dynamic is L. Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Redwood City: Stanford University Press, 1993).

[119] Many socialist legal systems drew inspiration from how the USSR used courts to try to help mold new Socialist citizens. In his 1959 report to the 21st Communist Party Congress, Party Secretary Nikita Khrushchev called for an overhaul of the courts in order to focus "on questions of everyday behavior and morality … [and] deviations from the standards of public order … It is necessary to undertake such measures as would prevent and then completely eliminate the appearance in individuals of any misdemeanors which cause harm to society" (quoted in H. J. Berman and J. W. Spindler, Soviet Comrades' Courts (1963) 38 *Washington Law Review* 842–910, 854–55).

scholarship and practice from the United States and Western Europe. China's practice of tort law heterodoxy reflects both a particular worldview and the pursuit of specific policy goals.[120] The fact that tort law heterodoxy has persisted in China despite the lack of economic volatility or crisis, and in a system with a very different colonial history than many of the countries examined in this volume,[121] demonstrates that legal heterodoxy may persist and flourish across a wide range of legal systems. It is also a reminder that, despite the focus of much scholarship on the Chinese legal systems on either economic development or social stability and regime survival, other non-modular goals also shape how Chinese courts adjudicate cases.[122]

The Chinese legal system's willingness to award compensation without fault also raises questions about the nature of legal heterodoxy. First, how do socialist legal systems fit into a framework that focuses on differences between the Global North and Global South? China's tort law heterodoxy is a reminder to take socialist legal systems seriously in any discussion of legal heterodoxy in the Global South. What we see in practice in China is not just courts relying on heterodox legal provisions to address inequality or provide social welfare on the cheap, but also to pursue a particular social vision. Chinese courts are active participants in the broader state project of creating a particular conception of a good society.[123] Comparative law scholarship too often views socialist legality as a historical relic. Regardless of whether China is viewed as a developing or developed legal system, the practice of tort law in China shows that the socialist legal tradition persists and remains central to the role courts play. Understanding tort law heterodoxy as part of this tradition also helps to explain why China does not fit perfectly into the framework of this book: scholars who criticized the equitable liability provisions were pushing back against a different sort of orthodoxy, one rooted in China's socialist traditions (although they rarely do so directly). Yet, even if not a perfect fit, socialist tort law heterodoxy helps to illuminate an important contribution of the theory of legal heterodoxy. Much scholarship on China's courts focuses on whether courts follow

[120] K. Davis and M. Pargendler, Chapter 1.

[121] Although China had its own experience with colonialism, including colonial law, China's modern legal development started in 1978 with the reconstruction of the legal system from the ground up after the Cultural Revolution.

[122] On the concept of modularity, see Davis and Pargendler, Chapter 1.

[123] To be sure, this is not a new view of Chinese courts. Nearly four decades ago, comparative law scholar Mirjan Damaska wrote about how activist states strive "toward a comprehensive theory of the good life," such that law is "directive, even hectoring, . . . tell[ing] citizens what to do and how to behave." See M. R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), pp. 80 and 82. In the 1980s, when Damaska was writing, Maoist China would have been an archetypal example of an activist state. Today, our findings suggest that this activist orientation toward law persists, even if the CCP's theory of "the good life" has blurred to the point where it is hard to discern much beyond the oft-repeated public commitments to socialist core values, Communist Party leadership, and continued economic growth.

the law or ignore it: scholars look for legality, sometimes at the expense of understanding what courts actually do. Legal heterodoxy reminds us that focusing on consistent legal patterns of adjudication – examining what courts actually do – is more important than the legal/nonlegal binary that often dominates evaluation of court practice in China (and elsewhere in the Global South).

Second, how and when does legal heterodoxy continue even when formal law shifts toward orthodoxy? China's experience highlights the importance of continuing to examine legal heterodoxy in practice. Substantive law certainly matters – it was the basis on which Chinese courts relied for equity-based decisions, even when they did not cite the specific provisions of the General Principles of the Civil Law or the Tort Liability Law. Yet initial evidence also suggests that legal heterodoxy has persisted even after the equitable liability provisions were significantly curtailed. At one level this is not surprising: the interests of lawmakers and scholars advocating changes to the formal law were clearly different from the interests of judges who not only must adjudicate cases but also meet societal and Party-state expectations and demands. But the deeper point is that as scholarship on legal heterodoxy evolves, comparing when and where heterodoxy persists even when written law shifts toward orthodoxy may yield insights across jurisdictions. In particular, scholars may want to examine differences in approaches among judges based on education, location, age, or other factors.

Third, to what degree does regime type affect theories of legal heterodoxy? On the one hand, there is nothing particularly authoritarian about the practice of tort law heterodoxy in China: other legal systems at times adjudicate cases in very similar ways.[124] But in a world characterized by resurgent authoritarianism and democratic backsliding, is legal practice equally heterodox if it is the product of democratic or nondemocratic processes? One insight that comes from studying tort cases in China is that it is a mistake to view everything that seems unusual when placed in comparative perspective (in particular when compared to the Global North) as due to China's political system and its obsession with social stability. Other legal systems similarly consider fairness and social impact in deciding civil cases. Another insight is that regime type is not irrelevant, either in understanding the roots of heterodox laws or actual court practice. Indeed, much of what appears to be non-modular in China can be explained by a focus on social stability and regime survival. Yet our findings also demonstrate how courts can pursue other nonmodular goals. Our discussion of Chinese tort litigation raises the question of why tort law – and private law generally[125] – have become the site where issues regarding equity and fairness are contested and adjudicated in China. One answer may be the lack of a divide between private

[124] See, for example, the discussion of Brazilian practice in Davis and Pargendler, Chapter 1.

[125] Scholarship on Chinese law has noted a range of areas, from family law to contract to labor disputes, in which courts similarly pursue goals that seek to ensure both stability and fairness. Stern et al., Liability beyond Law.

and public law in China combined with the weakness of public law. Asking the same question across a range of countries in the Global South may yield insights into the sources of legal heterodoxy. As scholarship on legal heterodox continues to develop, scholars may want to consider in greater depth how politics shapes legal heterodoxy – and how our views and understanding of heterodoxy may be dependent on the political systems in which such norms and practices develop.

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