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RESEARCH ARTICLE

Liability Beyond Law: Conceptions of Fairness in Chinese Tort Cases

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Abstract

Empirical work consistently finds that Chinese courts resolve civil cases by finding a compromise solution. But beyond this split-it-down-the-middle tendency, when and how do Chinese courts arrive at decisions that feel “fair and just” in cases in which they invoke those ideas? Drawing on a data set of 9,485 tort cases, we find that Chinese courts impose liability on two types of parties with ethical, but not legal, obligation to victims: (1) participants in a shared activity and (2) those who control a physical space. In these cases, Chinese courts stretch the law to spread losses through communities and to acknowledge traumatic harm. Considering fairness, then, returns Chinese courts to their long-standing role as managers of communities who respond to misfortune by assigning legal responsibility to relationships that range from intimate to surprisingly tenuous.

Keywords: China; Courts; Authoritarian legality; Socialist rule of law; Interpretive approaches

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 north-east. 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 caused 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.”

¹ (2014) 葫民终字第00645号. The trial court found that the fish pond 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% of damages, roughly 65,000 yuan. On appeal by the company, the appellate court rejected the analogy to a public place.

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 article, we thus include only family names of litigants.

The court's anger at the defendant's 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 their offer was in accordance with "formal justice," but was "out 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.

In the English-language scholarship on Chinese courts, one consistent empirical finding is that litigants care more about how their case turns out than they do about whether the process was fair. In other words, they prioritize substantive justice over procedural justice.⁵ It is also well documented that Chinese courts place great emphasis on results,⁶ partly in response to litigants' expectations and also partly reflecting a tradition of adapting law to community mores, especially in rural areas.⁷ Chinese courts have a reputation for wanting to arrive at an outcome that all parties can live with, in particular in cases involving potential unrest, even when doing so requires stretching the law or even ignoring it altogether. In civil cases, this orientation toward satisfying litigants often leads Chinese courts to split the difference between the two sides, typically by awarding some fraction of compensation requested.⁸

² *Ibid.*

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 7th century BCE. The phrase re-emerged as a key Communist Party 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 (CCTV, 2021).

⁵ We use the terms "fairness" and "substantive justice" interchangeably in this paper. On how Chinese litigants care more about substantive justice than procedural justice, see Michelson and Read (2011); He and Feng (2021).

⁶ Clarke (1996), p. 83; Cohen (1997), p. 800; Howson (2010), p. 349; Woo (2017), p. 246.

⁷ The challenges judges face in adapting legal norms to rural society has been a theme of Chinese-language scholarship on Chinese courts, although this line of scholarship has waned over the past decade. The classic discussion is Zhu (2016). In the 2000s, particularly during the period in which the courts were headed by Supreme People's Court President Wang Shengjun, the dominant view among judges was that courts should adapt their decisions to local traditions. See Tang and Wang (2020), p. 100 (finding that 77% of a survey of 284 judges found that it was appropriate to consider cultural practices and custom, 69% considered it appropriate to consider public policy, and 56% considered it appropriate to consider morality).

⁸ Stern (2013) calls this "rough justice" on p. 129. See also Hurst (2018), p. 142. Others have observed similar dynamics in a range of contexts, including divorce litigation (He, 2021), child custody disputes (Michelson, 2022), traffic accident litigation (Liebman, 2020), and criminal cases (Liebman, 2015).

The pursuit of fairness and justice continues to be an explicit goal of the legal system under General Secretary Xi Jinping and the slogan “let the people feel justice in each case” hangs on the walls of many courtrooms.⁹ But, of course, leaving court-users with a sense that justice has been done is no easy task. Beyond their well-known tendency to compromise, when and how do Chinese courts arrive at decisions that feel “fair and just”? Although a great deal of prior scholarship reveals that Chinese courts search out compromise, virtually none has explored the values implicit (and sometimes explicit) in these decisions. How do Chinese courts operationalize fairness and justice (公平公正) in published decisions that either directly use such language or reference closely related ideas and legal provisions? This is a question about China’s contemporary legal culture or the “relatively stable pattern of legally oriented social behavior and attitudes” that undergirds any legal system.¹⁰ Building on a tradition of comparative law research that tries to unpack key hard-to-translate legal ideas in ways that reflect local understandings, we adopt an interpretive approach that examines what Chinese courts *do* in 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 data set were also prevalent in a broader swath of similar cases that did not necessarily include the same direct references to fairness, equity, and discretion.¹¹

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 above, Chinese courts stretch or ignore legal provisions to resolve disputes in ways that go beyond or violate the law as written. The theme is that judges share an impulse to assign legal responsibility to certain social relationships and to spread economic losses through a community. The damages imposed range from a *de minimis* acknowledgement of trauma in cases in which the victim was largely or entirely at fault to substantial sums. When sizeable 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.

Recognizing Chinese courts’ tendency to spread losses through communities and to attach legal responsibility to relationships adds nuance to the conventional wisdom that when they ignore or stretch the law, it is due to concerns about maintaining social stability or to protect the interests of powerful parties. Most writing on Chinese law (including

⁹ He, *supra* note 8, p. 249. For more on Xi’s emphasis on fairness and justice, see People’s Daily (2019); Xinhua News (2020).

¹⁰ Nelken (2004), p. 1.

¹¹ 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.

some of our own earlier work)¹² tells a story of courts that seek to apply the law except when obligations to maintain social stability¹³ or to protect powerful economic interests push them to other outcomes. Looking at a large number of tort cases that involve largely accidental misfortune reveals other reasons courts stray from or stretch the law: to achieve outcomes that recognize the ethical as well as legal obligations that arise out of relationships. Courts also actively seek to ensure that losses are spread within communities, even when no one is at fault. In so doing, Chinese courts are active participants in the broader state project of creating a good society. 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.”¹⁴ 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 Chinese Communist Party (CCP)’s theory of “the good life” has blurred to the point at which it is hard to discern much beyond the oft-repeated public commitments to socialist core values, Communist Party leadership, and continued economic growth.¹⁵

If the role of Chinese courts is to help ensure a well-ordered society, is that stability maintenance work in another guise? On the one hand, resolving conflict and strengthening communities help bolster political stability in a broad sense. Judges, too, may well have stability on their minds, even when they talk about fairness or substantive justice in their written decisions. On the other hand, though, the cases discussed in this article have nothing to do with suppressing political opposition and there is rarely any indication that plaintiffs are inclined to gather even a few people to protest. For all that focusing on stability is a powerful stating point to understand Chinese courts, then, treating stability as the sole factor that explains when courts depart from the law obscures other values openly discussed in court decisions.¹⁶ What becomes visible in cases dealing with misfortune is the caretaking role Chinese courts take on in managing relationships in society. In times of loss, Chinese courts actively intervene to ensure that those who have suffered are compensated, family and neighbourly ties are preserved, and emotional harm is acknowledged. To be sure, concerns about social stability may also be influencing courts’ approach to these cases. But the written opinions cite other values as well and the decisions lean heavily on relationships—even tenuous ones—to ameliorate the harm of accidental injury.

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 neighbours long after the case concludes.¹⁷ It is also a familiar theme in the literature on twentieth-century socialist legal systems, which tended to view trials as an educational

¹² Liebman (2014).

¹³ “Stability above all else” (稳定压倒一切) is a mantra repeated by China’s political leaders and observers of Chinese law alike. As Peking University law professor Xin Tong writes, “maintaining social stability is overwhelmingly significant in China, so all levels of courts have to serve that political interest first” (2019). See also Ng and He (2017), p. 139 and Clarke (2020). The idea that Chinese courts primarily exist to buttress state power has dominated English-language writing about Chinese law for decades. Alford (1984) notes on p. 1185 that scholars of Qing law “whether explicitly or otherwise” have “painted a picture” in which law serves the state above all.

¹⁴ Damaska (1986), pp. 80, 82.

¹⁵ Of course, the party’s vision of the good life is also subject to revision. Recent calls for “common prosperity” suggest renewed interest in taming income inequality alongside economic growth.

¹⁶ We follow sociologist Ke Li (2022) in trying to chart a path toward a “historically charged, culturalist perspective” on Chinese law, rather than exclusively defaulting to a functionalist account of how Chinese judges and courts serve the Chinese Communist Party (p. 5).

¹⁷ One classic discussion of this dynamic is Nader (1993).

opportunity to reinforce societal values by punishing outcasts.¹⁸ Our point is that stretching the law to ensure communal sharing of losses has remained an important strand of Chinese legal culture even following decades of urbanization, a parade of legal reforms aimed at fostering stricter adherence to law, 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 smoothes 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.

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.¹⁹ 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.²⁰ 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 is at fault for damages, they can nevertheless share liability “according to the actual circumstances.”²¹ 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. Scholars report that the 1986 provision was inspired by a mixture of German, Yugoslav, and Soviet civil law,²² and also that it reflected the relative lack of development of Chinese tort law in the mid-1980s.²³ Nevertheless, the

¹⁸ Many socialist legal systems drew inspiration from how the USSR used courts to try to help mould 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 Berman and Spindler, 1963, pp. 854–5).

¹⁹ Art. 533 of the Civil Code (2020). This provision 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, Art. 117 of the Civil Code requires “fair and reasonable” compensation in takings cases and Art. 47 of the Patent Law requires patent-related fees to be refunded when a patent that had been in use was subsequently and non-retroactively declared invalid, “or if the principle of equity was contravened.”

²⁰ Art. 24 of the Tort Liability Law (2009); Art. 132 of the General Principles of the Civil Law (1986).

²¹ The phrasing of the two provisions differs slightly. Art. 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.” Art. 132 of the General Provisions of the Civil Law, adopted 24 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 Art. 24 of the Tort Liability Law in tort cases rather than Art. 132 of the General Provisions of the Civil Law. In the cases we read, courts sometimes cite both provisions.

²² Wang (2008); Liu (2018); Cheng (2020).

²³ Cheng, *supra* note 22.

equitable liability provisions were unusual when placed in 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, in contrast, courts were authorized to look to "actual circumstances" to impose liability, even absent negligence or strict liability.²⁴

The equitable liability provisions have been controversial in China. Much of the criticism centres on how equitable liability has been applied outside of its intended sphere of torts cases²⁵ or misapplied. For example, a study of 100 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.²⁶ 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.²⁷ Courts sometimes ignore causation to impose liability on defendants with only tenuous links to an accident because they have the ability to pay.²⁸ Indeed, widespread misapplication of the law was one 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.²⁹

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 "maintaining social stability."³⁰ 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 giving rise to instability³¹ 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 in 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.³² Indeed, one of the insights gained from the

²⁴ Other provisions of the Tort Liability Law likewise embrace loss-sharing and equity. Art. 87, often referred to as the "flowerpot provision" after a case involving a falling flowerpot that led to public debate and contributed to the adoption of the provision, stated that all residents of an apartment building shall be responsible when an object falls from the building and causes injury if the source of the object cannot be identified. The provision was moderately modified and incorporated into Art. 1254 of the Civil Code.

²⁵ For example, Mao (2019) writes that the principle has been applied "with no limits" and has often been used beyond what is legally permitted (pp. 15–6). See also Yu (2017), p. 107; Shi & Xie (2019), p. 31.

²⁶ Chen (2015), p. 12. For more criticism of equitable liability, see also Cheng (2018), pp. 11–2.

²⁷ Dou (2016), p. 129; Zhang (2016), p. 15.

²⁸ Dou, *supra* note 27, pp. 127–8; Zhang, *supra* note 27; Shi & Xie, *supra* note 25, p. 26.

²⁹ Art. 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." Art. 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."

³⁰ Liu, *supra* note 22, p. 36.

³¹ Medical disputes are a prime example of this. See Liebman (2013).

³² 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. Liebman, *supra* note 8.

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.

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).³³ In order to navigate a data set 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.³⁴ These were all cases we were confident would be concerned with substantive justice and equity-based adjudication. Then, we applied topic modelling, which is a text-mining tool that is frequently used to discover topics in large collections of documents, to the 9,485 decisions.³⁵ Topic modelling gave us a way to group this still-sizeable corpus into themes to select cases for close reading. Our topic model yielded 71 topics.³⁶ 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 20 cases associated with each topic.³⁷

In addition to topic modelling, 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 either 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,³⁸ child drownings,³⁹ and death due to excessive alcohol

³³ We believe that our data set includes all cases made public on the China Judgements Online website between 1 July 2013, when the website was launched, and 2 September 2018. For more on why China began requiring courts to upload decisions to a centralized website, see Liebman et al. (2020).

³⁴ These cases represent all civil cases in our database that cite either Art. 24 of the Tort Liability Law or Art. 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.

³⁵ For a brief introduction to how topic modelling 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., *supra* note 33.

³⁶ We estimated the number of topics from the data using an algorithm developed by Lee and Mimno (2014), implemented in the STM package in R. See also Roberts and Stewart (2019).

³⁷ For each topic, we drew 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% 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., *supra* note 33.

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

³⁹ 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 or non-tort claims,

consumption.⁴⁰ We took this second step to try to uncover cases in which 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 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.⁴¹ We are not aware of any prior scholarship that has attempted to look at these cases on this scale.

The advantage of this approach was it yielded a large and trans-substantive 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.⁴² 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 relations.⁴³ 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. 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.⁴⁴ But court decisions

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.

⁴⁰ 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 to death by drinking (死亡, 猝死, 过量饮酒, 醉酒) with terms suggestive of drinking in a public 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 in which 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 “misunderstanding” (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 article and these cases are not included in the total number of cases we read.

⁴¹ We read a total of 1,420 cases from the topic model of cases citing the equitable liability provisions of the General Principles of the Civil Law or the Tort Liability Law.

⁴² At least in our data set, courts in big cities and rich provinces frequently cite 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).

⁴³ To limit scope, this article 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 non-contractual relationships. In other words, the cases in this article are all situations in which the court—rather than a contract—imposes legal obligations onto everyday interactions.

⁴⁴ Interviews with judges were not possible due to the travel restrictions created by the COVID-19 pandemic. Another limitation is that our data set is unlikely to be comprehensive. There are well-documented problems with missing cases on China Judgements Online. Liebman *et al.*, *supra* note 33. 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.

Table 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 Public institutions and their users	If you profit off people, you should share the loss when customers or employees suffer harm Harm requires compensation and those who can pay should pay, in particular when in a custodial relationship (schools, hospitals)

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.

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 1).⁴⁵ 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% or less of what they requested as a *de minimis* acknowledgement of trauma and understand larger awards to be a form of redistribution that shifts significant sums to victims and their families.

4.1 Participant liability

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 bee stings and died. The trip had been organized informally through a “senior university” (老年大学), a social organization for retired cadres, 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.⁴⁶

⁴⁵ 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.

⁴⁶ (2018) 豫17民终290号.

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 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.⁴⁷ The court found no evidence that the defendants were negligent or had contributed to the accident, and stated 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.⁴⁸

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,⁴⁹ 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” (应当适当补偿经济损失为宜).⁵⁰ Similarly, in a case from Shandong,⁵¹ 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’ behaviour 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,⁵² the victim was 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

⁴⁷ (2018) 粤1323民初422号.

⁴⁸ 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 3 days later. The court ordered the other 11 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-travellers 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 Art. 24 of the Tort Law. (2014) 都江堰民初字第11号; (2014) 都江堰民初字第10号. For another example, see (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% of the plaintiff’s loss).

⁴⁹ (2016) 辽0122民初583号.

⁵⁰ *Ibid.* For another example, see (2014) 灋民初字第644号 (in which the victim died of suffocation after heavy drinking).

⁵¹ (2015) 梁民初字第2584号.

⁵² (2016) 内25民终27号.

evidence that the defendants were at fault for the plaintiff's death but nevertheless ordered the defendants each to pay 40,000 yuan in compensation, stating that it was doing so in consideration of the conduct of the two defendants and the "economic situation of the parties."⁵³

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 a causal link between the actions of the surviving children and the accident. Thus, for example, in a case from Sichuan,⁵⁴ 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.⁵⁵ Even the family of the boy who spent the whole time playing games on his phone and never left the riverbank 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.⁵⁶

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 haemorrhage while her boyfriend was at work.⁵⁷ Although the court found no connection between the boyfriend's behaviour 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.⁵⁸ 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

⁵³ *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).

⁵⁴ (2014) 旺苍民初字第110号.

⁵⁵ The court decision notes that the families of the four defendants had agreed to pay compensation prior to litigation but could not agree on an amount.

⁵⁶ 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.

⁵⁷ (2015) 沙民初字第5830号.

⁵⁸ *Ibid.*

negligence on She's part. Regardless, the decision noted that Zhan was a widow and she left behind a son as well as an ageing parent. In light of the family's financial situation, the court ordered She to pay 60,000 RMB in compensation.⁵⁹

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 that 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."⁶⁰ Notably, the court cited the equitable liability provision of tort law to justify its decision.⁶¹

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 require 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% of the time.⁶² In a sample of 250 death-by-drinking cases, plaintiff success was even more likely, with 85% of the cases resulting in damages paid to plaintiffs.⁶³ Victims also recover in both rural and urban

⁵⁹ (2016) 湘0105民初1855号.

⁶⁰ (2012) 南民初字第1474号.

⁶¹ Abortion cases were common enough to manifest as a specific topic in the topic model (Topic 54) with a topic proportion of 1.12%, meaning that on average 1.12% of the words in all documents related to the topic.

⁶² 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% of the cases in the sample (55 of 99 cases).

⁶³ As in the drowning cases, courts that made reference to fairness virtually always awarded damages: only four 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.

Table 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%

courts.⁶⁴ 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 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.

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% of cases and less than a quarter of what they requested in 55% of cases.⁶⁵ In the death-by-drinking cases, plaintiffs received less than half of their request in 85% of cases and less than a quarter in 57% of cases.⁶⁶ 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.⁶⁷ 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 channelling 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 impose an implied social compact that requires those present at the scene to share the burden of loss when things go awry.

4.2 Space-based liability: businesses and institutions as insurers

4.2.1 Businesses: bars, hotels, and bathhouses

Mr Song died following heavy drinking at the somewhat innocuously named Latte Bar, in Beijing.⁶⁸ Instead of suing his drinking companions, as in the participant liability cases

⁶⁴ There were also not significant differences by level of court.

⁶⁵ This analysis is limited to the 203 cases that included information on how much plaintiffs initially requested.

⁶⁶ In the drinking cases, 202 of the 227 cases included data on amounts claimed and awarded.

⁶⁷ 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 20 times the 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, 2003).

⁶⁸ (2015) 朝民初字第04635号.

above, Song's parents sued the bar, arguing that its employees failed to meet their obligations to protect their customers.⁶⁹ 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 from 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,⁷⁰ 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.⁷¹

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 Tijing Women's Club, after a 72-year-old customer, Ms Xu, died of cardiac arrest.⁷² 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.⁷³ 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

⁶⁹ The court decision made no mention of drinking companions and thus it is not clear whether the victim was drinking alone or with others.

⁷⁰ (2014) 泌民初字第94号.

⁷¹ 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.

⁷² (2017) 辽0105民初5490号.

⁷³ (2017) 粤02民终1127号.

the shop to bear 20% of the plaintiffs' loss "according to the actual situation" of the case. The court appeared to be signalling that it disapproved of the shop's marketing tactics, even if there was no direct link to the victim's death.

4.2.2 Employers

Courts also routinely rely on arguments about fairness based on 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 labour 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 company owner to pay damages, even though there was no link between the death and the employee's job.⁷⁴ The decision noted that the plaintiff was working for the bus company at the time of his death and that he acted to the benefit of the company when he managed to stop the bus without harming passengers when he became ill.⁷⁵ Similarly, a court in Jiangxi relied on arguments about fairness when a worker died of a bee sting while working on a construction site.⁷⁶ The court ordered the employer to pay 110,000 yuan in compensation.⁷⁷ 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"⁷⁸ or based on "fairness."⁷⁹ These cases place employers in a custodial or quasi-parental role vis-à-vis their employees and hold them responsible for anything that happens to workers on the job.⁸⁰ In so doing, they extend far beyond employment law and regulations on work-related injuries.⁸¹

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.⁸² The court justified

⁷⁴ (2014) 陈民初字第02004号.

⁷⁵ The court ordered the company to pay 20,000 yuan and the owner of the company to pay 30,000 yuan. *Ibid.*

⁷⁶ (2016) 赣07民终61号.

⁷⁷ 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 each to pay 30,000 yuan.

⁷⁸ (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).

⁷⁹ (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).

⁸⁰ 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% 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, *supra* note 67.

⁸¹ State Council (2003) states 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.

⁸² The court ordered the four shareholders in the cafe 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.

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.⁸³

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.⁸⁴ 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 common⁸⁵ 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 8 years old or younger (10 years old or younger prior to 2017), schools have the burden of proof to show that they were not negligent.⁸⁶ For older children, the burden of proof is on plaintiffs.⁸⁷ 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 Shanxi,⁸⁸ a fifth-grade student surnamed Xu injured his arm when he fell while running in an 800-metre race. He was hospitalized for 10 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% of the cost of the first injury, roughly 11,000 yuan, “in accordance with the actual situation.”⁸⁹ Similarly, in a case from Nanjing,⁹⁰ 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 that led to a 5-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

⁸³ In another case involving an injury off-premises, the victim died of heart disease while travelling 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 point of balancing the financial situation and property loss of each party” in compelling compensation. (2017) 粤13民终3235号.

⁸⁴ Most schools and hospitals in China are public and we did not see significant numbers of private large institutions in the cases we reviewed.

⁸⁵ Two topics were primarily cases involving injuries at schools, with a combined topic proportion of 1.94%.

⁸⁶ Arts 19 and 20 of the General Principles of the Civil Law, and Arts 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 10 to 8 years old. Those who are at least 16 years old are considered to have full capacity and are treated as adults.

⁸⁷ Art. 40 of the Tort Liability Law; Art. 19 of the General Provisions of the Civil Law; Art. 1200 of the Civil Code.

⁸⁸ (2014) 西民初字第01035号.

⁸⁹ The student who collided with Xu was held fully responsible for the second injury.

⁹⁰ (2015) 栖民初字第175号. For additional examples, see (2016) 粤2072民初9006号 (ordering 10,000 yuan compensation “according to the actual circumstances” to a 14-year-old student who fell while running at school); (2013) 涪民初字第7035号 (ordering a school to pay 30% 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.

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,⁹¹ 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 order them to pay 40% 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 states, would violate the principle that “where there are damages, there should be remedies” (有损害则应有救济).⁹²

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 9-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.⁹³ Likewise, in a case from Beijing,⁹⁴ 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 6 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% of cases (207 of 217 cases with data on outcomes),⁹⁵ 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% or more of their demands in 60% of cases,⁹⁶ with an average award of 81,800 yuan.⁹⁷ 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 data set. 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

⁹¹ (2015) 永法民初字第08225号.

⁹² *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.

⁹³ (2014) 确民初字第01570号. On appeal, the intermediate court ordered a retrial. On retrial, the country 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.

⁹⁴ (2016) 京0105民初67665号.

⁹⁵ The random sample was selected from cases citing Art. 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.

⁹⁶ Only 20% of cases (43 of 217 cases) awarded 25% or less of the plaintiffs’ demands.

⁹⁷ School injury cases typically involve injuries rather than death. This explains the lower awards compared with the child-drowning and death-by-drinking cases.

(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 fulfil their duty to adequately supervise.⁹⁸

Following the same logic as for schools, courts also often push hospitals into the role of social insurer. Two topics in the topic model concerned medical disputes,⁹⁹ 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,¹⁰⁰ 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 patients” and the importance of preventing patient-hospital conflict.¹⁰¹ 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.”¹⁰²

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.¹⁰³ 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 pre-dates the CCP, and is also a recurrent theme of CCP governance and contemporary civil litigation.

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-sharing that animated the participant liability cases. But more substantial awards are possible.

⁹⁸ 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% of the cases (97 cases in total). Courts awarded damages in all of these cases.

⁹⁹ The topic proportion of the two topics related to medical disputes was 2.48%.

¹⁰⁰ (2015) 江林民初字第33号.

¹⁰¹ 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.

¹⁰² (2015) 昆民初字第3413号.

¹⁰³ Another good example is the landlord-tenant relationship. Our data set 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 involves 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.

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 writing in Chinese have noted, helps plaintiffs recover in situations in which neither party has insurance.¹⁰⁴

Another way of thinking about participant liability and space-based liability is as two implicit rationales that 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 14-year-old child “had left the world without first repaying his parent's kindness and upbringing.”¹⁰⁵

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 non-parent.¹⁰⁶ In the more recent past, twentieth-century socialist states leaned heavily on law to strengthen social solidarity¹⁰⁷—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 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 re-enforce—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.

¹⁰⁴ Zhang (2019) notes the role the equitable liability provision plays in providing remedies where social insurance is lacking.

¹⁰⁵ (2017) 湘12民终592号.

¹⁰⁶ Bodde and Morris (1967), p. 37.

¹⁰⁷ Markovitz (2010), although she notes that “the East German goal of forging social solidarity by means of law over the years increasingly looked forced and artificial” (p. 201).

5. Implications

In any legal system, cases involving misfortune are both rare and also routine. When they 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 the practical need to ensure victims receive some compensation. The range of cases this article examines reveals that courts stretch the law to ensure that compensation is paid and loss is acknowledged. Close reading also permits insight into how courts think about the idea of fairness and the types of relationships courts view as carrying obligations.

Spreading losses through a community also helps smooth the rough edges of one of China's most pressing policy problems: rising economic inequality. Wealth concentration has sharply increased in twenty-first-century China, as it has around the world, with the wealthiest 10% controlling 67% of China's wealth.¹⁰⁸ Against this backdrop, courts that invoke substantive justice, fairness, or "actual circumstances" to determine who needs assistance and who is best able to bear the burden of compensation are backstopping a weak social welfare system. Particularly when significant sums change hands, the courts are blunting the sharp edges of inequality by redistributing wealth. Some instances of redistribution highlight the diverse interests of different parts of the party-state, as the courts impose liability on institutions with relatively deep pockets, such as schools, hospitals, and insurance companies. And some instances of redistribution involve courts asking ordinary people to chip in for compensation in cases involving injuries or death. It is hard to tell from the text of these decisions whether defendants are easily able to spare the money. It seems likely, though, that court-ordered compensation would sometimes be a stretch and that the point of loss-sharing is as much social and emotional as economic. Chinese courts treat catastrophic loss as a community event and, in so doing, use damage awards to signal recognition of traumatic loss and of the social obligation to support others.

Future research exploring whether relationships also surface as the guiding principle outside of tort law would also be welcome. One area of law with clear parallels is family law—another place in which Chinese courts plainly take a relationship-centred view of the world and ask themselves what is fair within the context of that relationship.¹⁰⁹ After all, the parent-child relationship is a dyad so central to China's social structure that children's financial obligation to care for their ageing parents is written into law.¹¹⁰ Although the number of parent-versus-child lawsuits is dwarfed by the number of ageing parents in China, they regularly arise and courts virtually always find in favour of elderly plaintiffs seeking support from their children. In the Supreme People's Court's own analysis of over 52,000 lawsuits filed in 2016 and 2017, the courts either supported or partially supported parents' claims 98.5% of the time.¹¹¹ In elder-care cases, Chinese courts also sometimes not only shift money between the parties, but also take it upon themselves to order children to visit or care for their parents. Inheritance law, too, also is centred on relationships. Rather

¹⁰⁸ By way of comparison, this level of wealth concentration places China between the US (where the top 10% control 72% of the wealth) and France (where the top 10% control 50% of the wealth). Wealth inequality continues to grow in China, even though income inequality stabilized in around 2006. Piketty, Yang, & Zucman (2019).

¹⁰⁹ Preserving relationships is core to family law due to a long tradition of seeing the family as the basic political unit of society. For a brief history of this idea and more on the perception that sustaining marriages is linked to social stability, see Michelson, *supra* note 8, pp. 78–85. See also Kohtz (2021), p. 103.

¹¹⁰ The Law on the Protection of Rights of the Elderly requires children to financially support their parents and also to support them "spiritually" (精神上) and "in life" (生活上) (Art. 14). Parents also have a reciprocal legal responsibility to educate and financially support their minor children as well as adult children who are unable to support themselves (Kohtz, *supra* note 109, pp. 299, 302).

¹¹¹ Supreme People's Court (2018). The report states that 95% of cases involve claims for financial support. Courts fully support plaintiffs' in 46.16% of cases and partially support their claims in 49.7% of cases. Although courts almost always side with parents, they also try to balance the financial needs of elderly parents with children who themselves face economic difficulty.

than dividing inheritance equally between the closest living relatives, as would be the default rule in many jurisdictions, Chinese law empowers courts to reward potential heirs who supported the deceased, both financially and emotionally, especially by shouldering the burden of end-of-life caregiving.¹¹² In family law too, then, we would expect to see Chinese courts routinely working within the law, and sometimes pushing beyond it, to manage relationships.

What about the future? Will Chinese courts continue to use their discretion to compel loss-spreading through a community? Certainly, China's new Civil Code tries to limit judicial discretion in this realm. The Civil Code restricts the use of equitable liability to a narrow set of cases involving those with diminished capacity.¹¹³ In addition, Article 1176 states that voluntary participation in a risky recreational sport releases other participants from liability for accidental injury.¹¹⁴ The new provision is in direct contrast with a number of cases in our data set in which such injuries led to a sharing of costs among participants and makes clear that future cases should not be decided based on participant liability. Recent media articles, too, have celebrated courts that adhere strictly to the law rather than bowing to the popular logic of "whoever dies is in the right."¹¹⁵

Yet ambivalence remains inside the party-state about whether Chinese judges should strictly follow the law or allow other principles to influence their decisions. As a result, participant liability and space-based liability are likely to be challenging to stamp out.¹¹⁶ Just a month after the encyclopaedic Civil Code trimmed back judicial discretion in the use of equitable liability principles, the Supreme People's Court issued a Guiding Opinion directing judges to draw on socialist core values in deciding cases, especially cases of public concern.¹¹⁷ The Guiding Opinion, the latest in a series of party and Supreme People's Court documents stressing socialist values, asks judges to integrate non-legal ideas into legal decisions. Early research looking at judicial decisions shows that judges use socialist values to allocate liability,¹¹⁸ which suggests that social and space-based liability considerations may resurface, reframed in socialist language. Chinese judges continue to be asked to bend the law toward fairness and morality—even though parts of the legal profession and the party-state would prefer to anchor judicial legitimacy in strict fidelity to law.¹¹⁹ Nor is the party-state necessarily interested in letting popular ideas about fairness seep into judicial

¹¹² This is not a new practice. Since China passed its first inheritance law in 1985, Chinese courts have enjoyed this discretion. Indeed, a study of just over 100 published court decisions from the 1990s found courts penalizing unworthy heirs and redirecting money to people outside the nuclear family who supported the deceased (Foster, 1998).

¹¹³ See *supra* note 29.

¹¹⁴ Exceptions are made for gross negligence. One of the first cases to cite Art. 1176 involved a badminton game between two friends, Song and Zhou, in the Chaoyang district of Beijing. The district court held that playing badminton involves a certain degree of risk and declined to hold Zhou financially responsible for Song's eye injury (Cheng, 2021).

¹¹⁵ For example, see Liu (2021). This media report discusses a case that grew out of an argument over a poor parking job in Shanghai after which one of the parties returned home and suddenly died of heart failure. The district court held that there was no causal connection between the argument and the death—a decision celebrated by the journalist.

¹¹⁶ For more on the concept of political ambivalence, see Stern, *supra* note 8, pp. 99–100. There is also a related debate in the English-language literature on Chinese law as to whether Chinese courts are in fact more likely to follow the law under Xi Jinping. One insight from our research is that focusing on what is and is not technically legal may be less important than understanding what courts actually do in practice.

¹¹⁷ Supreme People's Court (2021).

¹¹⁸ Finder (2021).

¹¹⁹ For an earlier discussion of the tension between legal formalism and substantive fairness, and the underlying logic of judicial legitimation, see Potter (1994). Judges with a reputation for pursuing substantive justice also continue to be celebrated. The Supreme People's Court selected Sichuan judge Bing Zhou as a "National Outstanding Judge" in 2019, for example, citing his pursuit of substantive justice in a 2018 workplace injury dispute. In this case, substantive justice meant that Zhou went out of his way to obtain documentation of a construction worker's salary and ended up awarding a sum even greater than the worker had requested. Sohu News (2019).

decision-making. Rather, the party-state is taking a leadership role in defining moral norms itself, sometimes building on already-existing cultural scripts and sometimes modifying familiar ideas to better serve the party's own political priorities. The CCP is meant to be the ultimate moral authority, with courts assigned a key role in moulding social solidarity.¹²⁰

Ultimately, is this brand of court-imposed social solidarity successful in increasing the popular legitimacy of the courts or of the Chinese Communist Party? Future research will want to explore how defendants react to decisions that impose participant liability or space-based liability absent negligence and investigate whether court-ordered compensation is actually paid. It is also important to understand how these decisions are received in the broader community. Is there a popular sense that “someone ought to pay” when misfortune strikes? If that sentiment is widespread, then decisions based on participant and space-based liability will be received as righteous, both as a form of redistributive justice that channels money to the needy and as an official emotional acknowledgement of tragedy. And if that sentiment is widespread, strictly following the new and voluminous Civil Code may carry its own risks, at least when the code diverges from popular understandings of who should pay when misfortune strikes.

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¹²⁰ Lin & Trevaskes (2019).

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