

## Comparative Study on the Liability for Harm Caused by Animals between China and America

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### Abstract

Along with the rapid development of social economy and gradual increase of people's living standard, here come more and more pets living with human. Since the amount of domestic animals increases, the time and frequency that people stay with animals also increase. We can find the same increasing tendency of relevant cases. The promulgation of *Tort Liability Law of People's Republic of China* leads the development of tort liability law for domestic animals to a new stage. But there still exist blank fields. This paper refers to the Restatement (Second) of Torts. According to different law cultures and regulations in the two countries, comparison on the tort liability laws for animals between China and America would be made in this paper, mainly including animals' legal status, dangerous propensities, concept of keeper and the judgment of causality.

**Key words:** Liability for harm caused by animals; Legal status; Dangerous propensities; Causality

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### INTRODUCTION

In the area of Tort Liability Law, liability for harm

caused by animals is always being paid much attention to. Following social development, modern families show increasing interest in pets' raising. As a result, the incidence rate of cases on liability for domestic animals in human settlement is climbing. In Shanghai, it is a universal phenomenon for families to raise pets. According to the statistics from relevant study (Ma, 2012), in Shanghai, there are 160 thousand registered domestic dogs, and 600 thousand unregistered dogs. Since 2006, thousands of incidents that dogs hurt people have happened. In other countries, domestic animals' attack is also a very serious social problem. According to a research from American Pet Product Committee, 62% American families, which means 72.9 million families, raise pets. As a result, both citizens and scholars pay more attention to liability for harm caused by animals.

Before the People's Republic of China was established, China's Tort Liability Law drew more lessons from Soviet Russia. Later, *General Principles of Civil Law of People's Republic of China* was influenced to great extent by *Russian Civil Code*, and the relevant articles for animals were established in this legislation. According to Article 127 of *General Principles of Civil Law of People's Republic of China*: "If a domesticated animal causes harm to any person, its keeper or manager shall bear civil liability. If the harm occurs through the fault of the victim, the keeper or manager shall not bear civil liability; if the harm occurs through the fault of a third party, the third party shall bear civil liability." After this law carried out, two different opinions on doctrine of liability fixation formed in Chinese academia—one is strict liability, the other is presumed-default liability. This argument caused divergence of attitudes toward methods of undertaking liability, which increased difficulties in judicial practice. The *Tort Liability Law of the People's Republic of China* was enacted at the twelfth meeting of the Standing Committee of the Eleventh National People's Congress on 26 December 2009. It settled this controversy well

by unifying the focus issue as strict liability. According to this doctrine of liability fixation, plaintiffs in relevant cases should take the burden of proof for three elements—animal's dangerous behavior, the fact of harm on victim and the causality between them, but not including the subjective fault of defendant. In turn, if a defendant raises a plea that plaintiff has gross negligence or the tort is caused by third party, the defendant will take the burden of proof.

Although the *Tort Liability Law of the People's Republic of China* solves parts of problems about liability for harm caused by animals, only seven articles cannot cover theoretic and practical plights of such kind of cases. Next I will discuss several relevant issues from the perspective of comparative law.

## 1. DEFINITION OF ANIMAL'S LEGAL STATUS

Defining the legal status of animals is the base when we talk about liability for harm caused by animals. Chinese scholars generally hold the two following different attitudes toward this issue:

One defines animal as Thing, which belongs to the concept of object in Civil Law. This is accordant to the essence of *Tort Liability Law of the People's Republic of China*. Although animals are life entity, they cannot be unities of both rights and obligation. The concept of Thing in Civil Law means outward property which can be controlled by human and also has economic value. Animals implement injurious act but cannot take liability independently.

The other side holds that animals have legal personality like human so animals have the rights of life and health. Animals have both rights and obligations. However, since animals cannot take obligations by themselves, that will be transferred to their keepers or managers. But the essence is still letting animals take obligations for their injurious act. So rights and obligations can be unified to animals themselves. It's just the difference of implementation manners of undertaking obligation compared with human. In the Green Civil Code Draft (Xu, 2004), the author thought animals have legal subject status which can be called as associate objects. Xu also thought that animals are creatures in between human and objects, and they enjoy particular rights protected by specific animal protection institutes.

According to Section 90a of German Civil Law: "Animals are not things. They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided." I agree with this definition. Animals have no legal subject status since they cannot take obligations or responsibility by themselves. But they are not equal to general concept of Thing. Protecting animals' basic

rights has been social consensus, which also has relevant legislation. Human cannot dispose animals casually like other ordinary private property. Therefore, I tend to regard animal as a kind of Special Thing which has no status as legal subject but deserves special protection. This makes keeper taking obligation for animals' injurious act, and also provides theoretical basis for protecting animals that attacked victim because of their nature as animals.

## 2. CLASSIFICATION OF ANIMAL: DANGEROUS PROPENSITIES

The standards of regulations for different animals should be different because of their different levels of danger. Hill (1982) said that animals generally fall into two categories from a point of view of legal liability. There are those animals which are wild by nature and there are those which are considered tame by nature. Domestic animals are those which are not as a species savage or vicious, though individual members of that species may be (Ashton-Cross, 1953). As for the Semitic tradition, they classified animal into "Non-Warned" one and "Warned" one. And the distinction between the "Non-Warned" and the "Warned" animal is popularly referred to as the "one free bite rule": every dog is entitled to one free bite (Jackson, 2011). In America, law classifies animals into domesticated animals and wildlife. The distinguish standard is if they can serve for human. And England's law divided animals into dangerous and non-dangerous animals (Yang, 2010).

According to the distinction of animals in *Tort Liability Law of People's Republic of China*, animals are classified into two groups – animals raised humanely and wildlife. Raising animals can be further divided to four groups – domestic animals, animals raised in zoo, lost or deserted animals and ferocious animals. Different animals apply to different doctrine of liability fixation. Since danger levels of animals are different, liability for harm caused by animals should be taken differently. In this respect, *Tort Liability Law of People's Republic of China* has systematic and comprehensive regulations. Article 80 says where any damage is caused by a ferocious dog or other dangerous animals, the keeper or manager thereof shall bear tortious liability. And Article 81 says where any damage is caused by zoo animals, the zoo shall bear tortious liability unless it can prove that due diligence has been exercised in managing said animals, in which case the zoo shall not be liable. Taking different approaches upon different animals' tort cases can reflect the equitable liability principle in General rules of Civil Law, and be more beneficial for dispute resolution and disposal of special situation.

However, the definition in *Tort Liability Law of People's Republic of China* still demonstrates some confusion and blank space. For example, seven relevant

articles seem only apply to animals raised humanely. But many varieties of animals which attack human actually belong to wildlife. And there exists keeper raising wildlife. What's more, the classification of animals raised humanely only mentions "a ferocious dog or other dangerous animals" without specific concepts partition. But how to define what is dangerous animals and what is non-dangerous animals? I think, upon these issues, we can refer to dangerous propensities in American law to discuss or even learn from it.

## 2.1 Dangerous Propensities

### 2.1.1 The Definition of Dangerous Propensities

American law classifies animals in tort cases as wildlife animals and domestic animals (American Law Institute, 1987). According to Restatement (Second) of Torts (sec 506, et seq.), as for wildlife animals, generally speaking, strict liability does not apply (These so-called strict liability torts include: 2. Keeping of wild or ferocious animals).

Dangerous Propensities is the most important rule in recent American law to handle cases on liability for harm caused by animals. According to this rule, strict liability does not apply to common liability for domestic animals, unless the damage is caused by a sort of unusual dangerous trends of the animal while the owner knows or ought to know the exist of the dangerous trends. One example is section 2(2) of the Animals Act, which provides for a limited degree of strict liability for the harm done by a domestic animal. The general idea behind this provision was to make the keeper of domestic animal strictly liable for the harm it does if, contrary to the nature of its kind, it has a vicious streak, and the keeper knows of it: a rule which is quite sensible (Spencer, 2014). Here is another example. Missouri rule and that followed in most jurisdictions is "a possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing harm". Restatement (Second) of Torts (sec 506(a) (1987)) rules that if plaintiff cannot prove that the defendant was fully aware of the dangerous trend of the animal, the court cannot apply strict liability to the defendant. The plaintiff can only prove that the keeper has fault to obtain indemnity. At the moment, the burden of proof to apply strict liability is on plaintiff's shoulder. Because in the conscious of American Law, it's already hash enough to let the keepers of domestic animals take the strict liability. To balance each party's interest and realize the justice, the burden of proof is naturally on plaintiff.

### 2.1.2 Identification of Dangerous Propensities

Dangerous propensity ranks animals' danger levels. In a general way, animals are classified by species. Some species of animals are directly classified as dangerous ones. Keepers should know if animals raised by them have relatively dangerous trends. Keeper should notice

the common and specific characters of this kind of animal although it does not belong to dangerous species. This sets higher demands for keepers to notice anomaly in advance.

To judge if an animal has dangerous trend, we must take the essence of the animal's attack into consideration. For example, in the case of dog biting man, if we can prove that the biting dog often howls, exposes teeth and tightens leash, it is convincing that the dog has dangerous trend. And a cattle hits land by hoof and breaths heavily, or a cat arches its back and meows angrily, can be appearance of dangerous trends (Zhang, 2006). Sometimes plaintiff will take fact that the animal had attacked human before as evidence to deduce that the animal has dangerous trend. But only this fact cannot prove animal's dangerousness. The judgment should be made by comprehensive consideration depending on the situation.

According to dangerous propensities, the precondition of applying strict liability to domestic animal includes keeper's full awareness of the animal's dangerous trend, such as the keeper has seen the animal attacking others before and that was the animal's natural instincts, or has already noticed that the animal was barking furiously or exposing teeth or biting. It's similar to "one-bite" rule for dogs. Under this rule, a dog's owner is liable for injuries the dog causes only if the owner knew or had reason to know that the dog was likely to cause that kind of injury. So if your dog tries to bite someone, from that moment on you're on notice that the dog is dangerous, and you will be liable if the dog later bites.

## 2.2 Evaluation of Dangerous Propensity

Dangerous propensity actually gives judges great discretion. Different species of animals have different levels of danger. Although it's feasible to define the concept of wildlife by standards set previously, the analysis of the dangerousness of domestic animals relies more on specific details of cases. Therefore, courts usually invite vets to judge animals' dangerous trends. Although those vets are not professional enough to play the roles as experts on species behavior, this way seems to be most possible to get professional judgment which is also easier to realize. In addition, someone consider that dangerous propensity makes plaintiffs harder to collect evidence and then win a lawsuit because they are under too heavy burden of proof. Plaintiffs at least have to prove that the animals in cases have appearance of dangerous trends and defendants know about that. This kind of burden of proof is not realistic. Plaintiffs can hardly achieve.

There is no law which can be applicable everywhere. The differences of cultural backgrounds and law cultures about animals between China and America determine the differences of regulations in the two countries. In American culture, animals are not only human's friends, but our own humanity to some extent. This is reflection of tolerance and respect for animals in American culture. Therefore, American law uses strict liability cautiously

which is embodied in dangerous propensity that plaintiff has to take the burden to prove the animal has unusual dangerous trend and the keeper is fully aware of this. However, in Chinese traditional culture, animals are more like instruments of production and human's living. Human is the core of all creatures. To protect human's safety we have to set higher requirements which will cause higher cost for once they are broke. For this reason, Chinese law tends to take strict liability as basic doctrine of liability fixation. No matter the keeper has fault or not, he/she has to take liability so long as the case comprises three elements: injury behavior, fact of damage and causation, unless there is exemption. This applies more to Chinese social situation nowadays and urges keepers to take more responsibility for managing animals. But we can still learn something from the dangerous propensity, especially the way of defining animals' danger levels. We can try to use different doctrine of liability fixations to different animals by their species or danger trends.

### 3. THE CONCEPT OF ANIMAL'S KEEPER AND MANAGER

Academia identifies keeper as animal's owner who has rights to possess, use, dispose and profit from the animal. And animal's manager is the one who manages and controls his/her animal. According to law, keeper or manager should take the liability for harm caused by animals. Therefore, identifying animal's keeper and manager is the key to determine undertaker of liability.

#### 3.1 The Way of Identification

I consider that there are two ways to confirm keeper or manager – registered one and true one. The former one means owner has registered for the animal specifically in relevant institution which confirms the feeding relationship procedurally. This owner is the keeper. It's the main way to tell animal's keeper in modern society. The latter means owner raises and manages the animal practically with secular stability and shows the possession publicly in an unregistered feeding relationship. This is secondary way of identification. In some rural areas where animal's management system is weak, it's even the primary way.

America has a more mature system of feeding and managing animals. Registration, vaccination and physical examination for animals have formed a set of system. In addition, confirmation of animal's owner depends on situations. However, neither Chinese administrative regulations nor governmental public policies pay enough attention to feeding and managing domestic animals. Less concrete measures were carried out. And the existing rules and regulations haven't been executed well. The populace lacks correct conscious in aspects of taking registration, vaccination, controlling dogs by chain, training pets and avoiding to public places, which leads to frequent damages from domestic animals.

#### 3.2 Keeper and Manager of Abandoned or Escaping Animals

According to Article 81 of *Tort Law of the People's Republic of China*: "Where any damage is caused by an animal that is abandoned or at large after being abandoned or escaping, the original keeper or manager thereof shall bear tortious liability." This Article aims at situations that we can tell keeper and manager by neither registration nor actual possession. However, this Article doesn't make it clear that who should take the liability when we can't find original keeper or manager. There are still major flaws in definition of liability subjects in China's courts. Judiciary tends to protect infringed people and public interest. In many cases that stray animals hurt human, courts adjudged those "good-hearted" people who only fed the animal several times in purpose of aid to take the liability for damage. This caused negative influence on social morality. It went against not only aid for stray animals, but also basic concept and function of Tort Liability Law.

Keeper or manager's actual possession or control is the major characteristic to distinguish true liability subject from others. Those "good-hearted" people who just feed animals several times manage animal to some extent. But the control force is very weak. It doesn't form long-term stable feeding relationship in purpose of occupation. We cannot assert those people as the owners of animals. Therefore, this kind of feeding behavior doesn't lead to legal possession or occupation.

In the case of *Verrett v. Silver*, the jury was instructed on the issue of whether defendant was harboring or keeping a dog as follows: "Now, let us talk about the word owner. You must determine whether or not the Defendant Silver was the owner of the dog that bit Jason. It is the finding by the Court that the Defendant Silver was not the actual owner of the dog. However, it is not necessary that the plaintiff prove that the Defendant Silver was the registered or actual owner since the statute defines an owner as including any person who either harbors or keeps a dog. Harboring or keeping a dog means something more than a meal of mercy to a stray dog or the casual presence of a dog on someone's premises. Harboring means to afford lodging, to shelter or to give refuge to a dog. Keeping a dog, as used in the statute before us, implies more than the mere harboring of the dog for a limited purpose or time. One becomes the keeper of a dog only when he either with or without the owner's permission undertakes to manage, control or care for it as dog owners in general are accustomed to do. Thus in order to find for the plaintiff you must find that the defendant was the owner of the dog as the term is used under the statute either as a harbored, as a keeper, as I have just defined." Taking this statement as the standard, people who just ever provided meals to animals don't need to take liability for damage, which is valuable reference for Chinese law.

#### 4. JUDGMENT OF CAUSATION

“Causation is the causal relationship between damage from animals and the consequence of it (Wang, 2011).” Generally, causation of damage from domestic animals is clear, such as dog bites passenger. But in some cases, causation is really not that obvious. The following situations may exist: direct and indirect causation exist in the meantime, so couples of defendants take unreal joint-liability; animals don’t have direct contact with victim, which means victim’s injury is not caused directly by animal’s behavior but maybe getting scared; victims are not hurt by animals directly, but their normal production or living environment are disturbed or impaired. Article 84 of *Tort Law of the People’s Republic of China* says: “Animals shall be kept in accordance with the law, in the manner of respecting the social morals, and without interference with the life of others.” This general provision provides relief way for victims whose specific interest as normal residents are hurt by animals because of inappropriate feeding model or management on animals, such as disturbing human’s rest by crow or bark, or destruction to environment by animals’ excrements. But regarding to the definition of causality, *Tort Law of the People’s Republic of China* doesn’t give out explanation. Juridical practice hasn’t made common sense yet.

Direct causality can be judged according to personal living experience. And eligible indirect causality also can cause tort liability. For example, Tom’s dog stole meat sold by Dick. Dick hit the dog that ran way and knocked down Harry’s pig, which knocked down Ms. Lady in shock. Here comes the question: who should take the liability for harm on Ms. Lady? Sometimes causality cannot lead us to find exact liability subject directly. We have to further analyze the characteristics of the causality. Is it a direct or indirect one? Is it a positive or incidental one? Only when we refine it can we find out liability subject exactly. As the example case mentioned above, to define the causality between Tom’s dog, Dick’s behavior of hitting the dog, Harry’s pig and Ms. Lady’s injury, we should firstly check if Tom fulfilled the duty of managing his dog well, if Dick’s behavior accorded with common social rules, or if Harry’s pig was guarded reasonably, etc. Right judgment of causality needs judges’ logical thinking and life experience in the premise of clear disposal of case.

*Tort Law of the People’s Republic of China* set strict liability for animals’ keeper or manager. Regardless of fault, so long as their feeding or managing animals cause harm on others, the keeper or manager should be responsible for that. This is already very harsh for them.

If we don’t set strict standards of causality definition, keepers will burden too heavy stress.

#### CONCLUSION

As stated above, *Tort Law of the People’s Republic of China* pushes up the legal development of liability law for animals to a great extent. Many important issues including way of undertaking responsibility and basic concepts in this law accord to China’s national condition and legal ideas. It plays an important role instructing judicial practice. Especially the focus on protecting the rights of the infringed subjects is in favor for realizing right relief. However there still exist many problems, such as the argument on heavy liability of infringer which still needs discussion. Through the comparison between Chinese Law and American Law, I think we can learn much from it combining with China’s national condition. Currently, strict liability works in China. But to make better balance between infringer and infringed’ rights, personal freedom and social stability, law needs to be equipped with rigidity and flexibility at the same time. Learning from abroad laws maybe can give us some enlightenment.

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