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## Borrowing American Ideas to Improve Chinese Tort Law

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## BOOK REVIEW

### BORROWING AMERICAN IDEAS TO IMPROVE CHINESE TORT LAW

YONGXIA WANG\*

*Mastering Torts: A Student's Guide to the Law of Torts*

Měiguó Qīnquán Fǎ (美国侵权法)

by Vincent R. Johnson, Translated by Zhao Xiuwen

China Renmin University Press, 5th ed., Beijing, China, 260 pages

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#### I. INTRODUCTION

After decades of development, China has built a fairly mature private legal system. However, compared with other fields, tort law in China is far from complete or sophisticated. There are many confusing issues that beleaguer Chinese judges, lawyers, and scholars. Since much of the modern Chinese private legal system has been borrowed from developed

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countries, the main reason Chinese tort law lags behind may lie in the borrowing itself.

A. *Two Paths for Development of Tort Law in China*

As to the law of torts, theoretically, there are two basic paths for development. One is the path of civil law countries; the other is the path of common law countries. For those eager to quickly build up the Chinese legal system, learning and borrowing legal frameworks from developed civil law countries seemed easier than seeking guidance from common law countries. The main source of law in the former is generalized statutes. In contrast, the primary source material in common law countries is an endless stream of judicial opinions. Implementing civil law concepts seemed much more manageable.

Naturally, Germany and France, two major civil law countries, either directly or indirectly served as the main source of legal ideas for China. Borrowing tort law was not difficult since both France and Germany have generalized clauses on tort liability in their civil codes. However, after decades of learning and borrowing, Chinese judges, lawyers, and scholars in this field still face many problems and unanswered questions. The reason for this situation, in short, is that a large part of the law of torts in France or Germany lies in cases, not in statutes.

The French Civil Code “imposes liability on a person for an action or omission which constitutes a ‘fault’ and which causes harm (*dommage*) to the claimant.”<sup>1</sup> Except for fault and *dommage*, there are no limits on imposing tort liability in the Code. This terse and broad provision makes it necessary that French courts “perform the real task of creating comprehensive rules and standards to determine the substance and limits of a tort claim.”<sup>2</sup> Consequently “the modern French law of tort is basically pure judge-made law and that its rules have often only a very tenuous connection with the text of the Code itself.”<sup>3</sup>

Realizing the negative outgrowths of French tort law, the German civil code, Bürgerliches Gesetzbuch (BGB), lays down three heads of general tort liability: (1) “liability for causing injury in an unlawful and culpable

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1. JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW 364 (2d ed. 2008).

2. KONRAD ZWIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 617 (Tony Weir trans., Oxford Univ. Press 3d ed. 1998).

3. *Id.*

manner [when] the injury affects the victim in one of the legal interests enumerated in the text”; (2) liability “when ‘a statute designed to protect another’ is culpably contravened”; and (3) liability when one party “intentionally causes harm to another in a manner which offends *contra bonos mores*.”<sup>4</sup> Even though German legislators, contrary to their French counterparts, limited the range of tort claims and offered seemingly clear clauses to confine judges’ power, this attempt did not succeed. Not long after the BGB came into force it became clear that the three heads of tort liability leave considerable areas unaddressed.<sup>5</sup> As a result, Germany’s highest court has assumed the task of enlarging the range of tort claims.<sup>6</sup>

Besides the essential issue of whether a statute can define a proper range of tort liability, there are other problems which can only be resolved by courts instead of legislators. For example, negligence constitutes fault which is the basis of general tort liability in both France and Germany. However, in both countries the standards for determining the existence of negligence lies in cases, not statutes, even though their codes offer concise interpretations of this concept. The fact that a large part of tort law lies in cases is not a serious problem for France and Germany, but it is problematic for outsiders if they want to learn and borrow rules to build up and develop their own legal systems efficiently. Lacking a well-developed way of thinking about case law, and being reluctant to reveal that fact, civil law countries rarely offer outsiders a clear and precise text of the rules generated by their cases.

Professor Dan Dobbs, an eminent American scholar, has said that “tort law is very much litigation law[.]”<sup>7</sup> He points out that the real path of the development of the law of torts lies in cases, not in abstract codified clauses. For China, the lesson of past decades is that learning and borrowing from civil law countries might not be a good choice due to the nature of tort law. Studying the jurisprudence in case law of common law countries might be a more productive path.

#### B. *Illuminating American Tort Law for Chinese Readers*

As the most important common law country, with centuries of guidance from brilliant judges, lawyers, and scholars, America has developed the most

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4. *Id.* at 599–603.

5. *Id.* at 603.

6. *Id.* at 603–604.

7. DAN B. DOBBS, *THE LAW OF TORTS* 29 (2000).

dynamic and sophisticated tort law system in the world. For today's China, America is certainly the best candidate from which to borrow ideas. The question is, how will China learn from a common law country which is so very different from itself? Reasonable persons might have different answers, but learning through hornbooks is definitely an effective way.

For most American law schools, the textbooks for learning tort law are case books, volumes filled mainly with edited judicial opinions. However, hornbooks—short treatises written by preeminent scholars—have long been a necessary supplement to case books. On the one hand, hornbooks provide a clear narrative picture of a field of law; on the other hand, their exposition of the law is enriched by the writer's insights and analyses, which interpret and evaluate illustrative cases and summarize abstract doctrines for readers. Without the guidance of these books, a beginner will be lost in the ocean of common law cases. For an outsider from a civil law country trying to learn and borrow from America, studying hornbooks is convenient and efficient.

*Mastering Torts: A Student's Guide to the Law of Torts*, written by Professor Vincent R. Johnson is an excellent hornbook for Chinese readers, as well as their American counterparts. Thanks to Professor Xiuwen Zhao of Renmin University, the fifth edition of *Mastering Torts*, originally published in English in the United States, has been translated into the Chinese language and published by China Renmin University Press in November 2017.<sup>8</sup> Professor Zhao was assisted in her work by Professor Changgeng Yang, who teaches at the Beijing University of Civil Engineering and Architecture, and by Professor Chenglin Liu, Professor Johnson's colleague and co-author on other books.

Professor Johnson is the Interim Dean and Charles E. Cantu Distinguished Professor of Law at St. Mary's University in San Antonio, Texas, USA, where he teaches and writes on tort law and in other areas. He received his J.D. from the University of Notre Dame, LL.M. from Yale University, and an Executive LL.M. from the London School of Economics. As a Fellow at the Supreme Court of the United States, he assisted Chief Justice William H. Rehnquist with his duties as head of the federal judiciary. Professor Johnson is a prolific scholar. His articles have been cited in more than two hundred law reviews, sixty federal and state court decisions, and

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8. VINCENT R. JOHNSON, MĒIGUÓ QĪNQUÁN Fǎ (美国侵权法) (Zhao Xiuwen trans., China Renmin Univ. Press 5th ed. 2017) (2013) [hereinafter JOHNSON, MĒIGUÓ QĪNQUÁN Fǎ].

various treatises.<sup>9</sup> *Mastering Torts* offers a clear, doctrinal overview of American tort law which provides readers with a firm understanding of the main features of this field.<sup>10</sup>

*Mastering Torts* “is organized along traditional subject lines and follows a mainstream approach to the task of learning” American tort law.<sup>11</sup> In the introductory chapter entitled “An Overview of Modern Tort Liability,” Professor Johnson points out that there are three categories of tort liability in America: intentional torts, negligence, and strict liability. Following this chapter, the first part of the book is about intentional torts, including the concept of intent, the basic intentional torts, defenses and privileges, and the rules on recovery of damages (which also apply to the other two categories of tort liability). The second part is about negligence, which is the most important category of tort liability in America. This part includes discussion of the basic principles of negligence, ways of proving negligence, and important causation and duty issues. The third part of the book is about strict liability, including certain types of employer liability and products liability. The fourth part is about joint torts, trespass and nuisance, misrepresentation, defamation, invasion of privacy, defenses based on plaintiff’s conduct, immunities, and statutes of limitations.

Whether the author can offer a comprehensive and precise summary is an important standard for evaluating a hornbook. Professor Johnson does an excellent job in this regard. For example, proximate causation is an extremely complex and confusing issue due to tangled logic and policy issues. *Mastering Torts* nevertheless offers a very clear summary. Professor Johnson first points out that proximate causation is a policy decision on fairness. That is, “it is a policy determination on the issue of how far liability should extend for harm factually caused by tortious conduct.”<sup>12</sup> Then Professor Johnson summarizes four ways of talking about the fairness of imposing liability and thus different ways of phrasing the proximate causation inquiry: (1) directness: “it is fair to hold a defendant liable for harm that directly results from tortious conduct, and unfair to impose liability for harm that is indirect, attenuated, remote, or the product of

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9. Faculty: Vincent R. Johnson, ST. MARY’S UNIV. SCH. OF LAW (last visited Oct. 13, 2019), <https://law.stmarytx.edu/academics/faculty/vincent-johnson/> [https://perma.cc/V8KK-SX43].

10. VINCENT R. JOHNSON, *MASTERING TORTS: A STUDENT’S GUIDE TO THE LAW OF TORTS* xi (5th ed. 2013) [hereinafter JOHNSON, *Mastering Torts*].

11. *Id.*

12. JOHNSON, *Mastering Torts*, *supra* note 10, at 131; JOHNSON, MÈIGUÓ QINQUÁN Fǎ, *supra* note 8, at 96.

intervening forces;” (2) foreseeability: “it is fair to hold a tortfeasor liable for harm that was foreseeable, but unfair to hold a tortfeasor liable for unforeseeable consequences;” (3) risk: it is fair to hold a tortfeasor liable for harm which falls within the scope of the risks that made the defendant’s conduct tortious, but unfair to impose liability for harm that falls outside the scope of those risks; (4) normality: “it is fair to impose liability for results that are ‘normal’ or ‘ordinary’ rather than ‘bizarre’ or ‘extraordinary.’”<sup>13</sup>

Another important standard for evaluating a hornbook is whether the author offers creative insights in summarizing and analyzing cases or other authors’ work. On the issue of proximate causation, Professor Johnson intelligently discusses and evaluates issues related to proximate causation under headings entitled “Direct Causation Versus Foreseeability,” “Modified Foreseeability,” “Result Within the Risk,” “Superseding Causation,” and “Shifting Responsibility.” These parts of the book are very useful.

Under American law, there are theoretically four elements to a negligence claim—duty of care, breach of duty, causation, and damage. However, many students are confused by the relationship between duty and breach of duty because those two elements seem to overlap. Professor Johnson explains this issue in a very helpful way. He divides the duty of care into the general rule on duty and other limited-duty rules. He then points out that “whether a duty exists is in many instances a value judgment (i.e., a question of policy) which depends upon intricate ‘limited-duty rules.’”<sup>14</sup> Those special rules apply in a narrow range of cases involving such matters as alcohol-related injuries, failure to aid another in peril, premises liability claims, and harm to pregnant mothers or unborn children. However, in most other cases, which are governed by the general rule on duty, the central concern is not with duty, but with whether the defendant’s conduct breached the duty that was owed to a foreseeable plaintiff (i.e., whether the defendant has acted unreasonably). In those cases, the issue of breach of duty is a more sensible place to begin the analysis of a negligence claim.<sup>15</sup> This dichotomy between general duty and limited duty is essential to understanding the relationship between the duty of care and breach of duty.

Another feature of *Mastering Torts* is how Professor Johnson chooses,

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13. JOHNSON, *Mastering Torts*, *supra* note 10, at 132; JOHNSON, MÈIGUÓ QĪNQUÁN FĀ, *supra* note 8, at 96–97.

14. JOHNSON, *Mastering Torts*, *supra* note 10, at 77; JOHNSON, MÈIGUÓ QĪNQUÁN FĀ, *supra* note 8, at 56.

15. JOHNSON, *Mastering Torts*, *supra* note 10, at 77–78; JOHNSON, MÈIGUÓ QĪNQUÁN FĀ, *supra* note 8, at 56.

summarizes, and interprets cases. The book uses, as illustrations, more than two hundred cases, including not only classic opinions but also recent decisions.<sup>16</sup> Even for top students from American law schools, it is difficult to precisely summarize court opinions. For example, *Palsgraf v. Long Island Railroad Co.*,<sup>17</sup> the most famous case in American tort law, is included in every case book either as the majority opinion by Judge Cardozo, the dissenting opinion by Judge Andrews, or both. Professor Johnson points out that Cardozo and Andrews have different approaches to the duty issue. The Cardozo view is that “a duty runs only to those who are within the foreseeable ambit of danger;” however, “Andrews’ position is that a duty runs to all plaintiffs, foreseeable or not . . . .”<sup>18</sup> Cardozo’s approach has been widely embraced, but Andrews’ has also been widely contemplated and is even more important because “it points out that even if there is a duty to the plaintiff, other questions, which bear on the fairness of imposing liability, must be considered before liability will attach.”<sup>19</sup> Professor Johnson’s understanding and interpretation of these two famous opinions clarifies their importance for readers.

## II. CONCLUSION

For Chinese readers seeking to understand the common law, and in particular American tort law, the first step is to find the best texts to study. Fortunately, *Mastering Torts* illuminates an important part of the American legal system and many ideas that might be used to build a stronger tort law regime in China.

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16. VINCENT R. JOHNSON, *STUDIES IN AMERICAN TORT LAW* (5th ed. 2013), a case book by Professor Johnson, cites more than 2,500 cases, where authority for the legal propositions advanced in *Mastering Torts* can be found. JOHNSON, *Mastering Torts*, *supra* note 10, at xi n.1.

17. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

18. JOHNSON, *Mastering Torts*, *supra* note 10, at 78; JOHNSON, MÉIGUÓ QĪNQUÁN Fǎ, *supra* note 8, at 57.

19. JOHNSON, *Mastering Torts*, *supra* note 10, at 78–79; JOHNSON, MÉIGUÓ QĪNQUÁN Fǎ, *supra* note 8, at 57.