

# *Analysis of the Liability Principle of Guardians in Article 1188 of the Civil code*

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**Abstract:** The imputation principle of guardian's responsibility stipulated in Article 1188 of the Civil code is not clear. The academic community has debated whether the imputation principle is fault presumption responsibility or Strict liability since the era of the General Principles of Civil Law. Although the mainstream view holds that the guardian's responsibility is Strict liability. This article attempts to focus on the legislative purpose of this article, and with the help of the research results of Comparative law, to prove that the guardian's responsibility is the responsibility of fault presumption, and fault presumption is in line with China's national conditions. Finally, it proposes relevant paths to assist the judicial practice of this article.

**Keywords:** Guardian responsibilities, Strict liability, Presumption of fault, The principle of attribution of responsibility

## 1. Introduction

A person without civil capacity, also known as a person with limited civil capacity, is referred to as an incomplete person with civil capacity. This civil subject, as a special subject, is not only reflected in its incomplete capacity for conduct, but also in the particularity of its responsibility, which is borne by the guardian. The Civil Code places the responsibility of guardians in the position of "special provisions for the subject of responsibility", which also indicates recognition of its particularity. The logic for determining liability for infringement first involves the act, then the result, then determining the causal relationship, and finally examining whether there is fault. After the above elements are determined, the issue of liability can be considered. However, it cannot be denied that the presence or absence of fault is the basis for whether the infringer can be exempted from liability. Therefore, it is particularly important to confirm whether the principle of attribution of responsibility is fault liability or no fault liability, which is also the logical basis for judicial practice.

### 1.1. The principle of attribution is unclear

Returning to Article 1188 of the Civil Code[1], the first paragraph of this article stipulates that the guardian shall bear the liability for infringement caused by a person with incomplete capacity for civil conduct, but if the guardian fulfills their duties as a guardian, their liability may be reduced. In this provision, the principle of attribution of guardianship responsibility is not reflected. The second paragraph states that the compensation property shall be deducted from the property of the person

with incomplete civil capacity first, and if it is insufficient, it shall be supplemented by the guardian. This article follows the provisions of Article 32 of the Tort Liability Law, but changes the original "fulfilling guardianship responsibilities" to "fulfilling guardianship duties", and still does not clarify the issue of attribution principles.

## 1.2. Journals reviewed

As mentioned earlier, due to the lack of clear attribution principles in Article 1188 of the Civil Code, there is a unanimous debate in the academic community. The current mainstream view in academia is that guardianship responsibility is a no fault responsibility. Chen Bangfeng believes that[2], due to the small difference between presumed fault liability and no fault liability, adopting no fault liability can further protect the rights and interests of the victim. From the perspective of the guardian, it can also strengthen the guardian's obligation to supervise the ward. And regarding the expression of "reduced liability" stipulated in the original text of the law, the scholar also believes that it reflects no fault liability, because the presumption of fault liability should be "exempted liability". However, the author believes that this viewpoint ignores the principle of fairness stipulated by the law and the relativity of rights and obligations. Excessive protection of the victim may impose undue responsibility and obligation on the guardian, without regard to the guardian's fault. Wang Shengming believes that[3] The responsibility of the guardian cannot be broadly defined as presumed fault or no fault responsibility. Although the guardian can only reduce responsibility, they are not responsible for all harmful consequences. If it is difficult for a rational person to pursue responsibility, then there is no need to pursue responsibility for the guardian. However, although this viewpoint can provide a protective guidance for judicial practice by introducing the perspective of a general rational person, it also directly avoids the question of whether the guardian's responsibility is a presumption of fault or a no fault responsibility. Professor Wang Liming believes that[4] the guardian's duty of endless attention is not a prerequisite for assuming liability for infringement. Even if there is a fact of infringement, the guardian should also bear responsibility. Professor Wang Liming also agrees that the guardianship responsibility is a no fault responsibility.

But there are also scholars in academia who support the presumption of fault liability, Professor Yang Lixin believes that[5] the assumption of guardianship responsibility is the responsibility caused by the guardian's violation of the duty of care, and is a constituent element of the tort liability for the guardian's violation of guardianship responsibilities. Article 1188 of the Civil Code adopts the rule of reversing the burden of proof in proving whether the guardian has fulfilled their guardianship responsibilities. However, what I cannot fully agree with is that Professor Yang Lixin did not specify why it only reduces responsibility rather than exempts it. Guo Zhongmei believes that[6] on the premise of improving the protection system for minors, it is reasonable to assume the responsibility of the guardian as a presumption of fault; However, no specific method for constructing a system for the protection of minors has been proposed. MoFei believe that[7] the principle of presumption of fault based on the responsibility of the guardian is more conducive to balancing the interests between the victim and the guardian. However, the author believes that the problem with this viewpoint is that it is difficult to debate in explanatory theory why it is not to exempt responsibility but to mitigate it. Chen Qihang believes that[8] the presumption of fault liability is more suitable for China's national conditions, which is also the result of drawing on foreign legislative experience. But it ignores the emphasis on the responsibility of guardians outside the domain, focusing on both the perpetrator and the victim. In China, the main focus is on the internal relationship between guardians and ward.

## **2. Interpretation of the Principle of Guardianship Responsibility Attribution**

### **2.1. Analysis of Legal Interpretation**

For the responsibility of a guardian, it is only necessary to assume that the ward has objective elements that meet the criteria for infringement, which is in line with the responsibilities of the guardian and the legislative purpose of Article 1188 (1) of the Civil Code. Because in the original text of the law, it only indicates that the guardian's responsibility is based on the premise that the person with incomplete civil capacity has infringed, without specifying whether there is a need for the ward's fault as a prerequisite.

The original intention of legislators is to present an objective trend in the current standards of fault, and the criteria for determining fault should not only be judged based on the behavior exhibited by the actor, but also measured by an objective rational person's standard to determine whether the actor's behavior has been wrong, that is, the general duty of care that a general rational person can fulfill. However, within the framework of special entities, there are also actors engaged in high-risk industries such as lawyers and doctors. These individuals in specific professional fields should have a duty of care that is higher than that of a general rational person. However, similarly, the duty of care for individuals with incomplete civil capacity, such as minors, is relatively lower than that of a general rational person. [3]Legislators adopting an overly extreme objective standard for determining fault may overlook the subjective differences in damage occurrence between individuals. Based on this, legislators have adopted a relatively moderate compromise interpretation to stipulate the responsibility of guardians, that is, the ward does not need to explain whether their behavior is at fault, only the occurrence of infringement, and the burden of proof for fault is changed to a guardian with full civil capacity.

The author does not reject the interpretation of legislators. Perhaps in the current situation where the protection system for minors in China lacks maturity, if the legal provisions rashly stipulate that the responsibility of the guardian needs to be based on the fault of the ward as a constituent element, it will lead to a gap in responsibility between the guardian and the ward, that is, it will result in the separation of the guardian's responsibility and their own guardianship responsibilities. However, the interpretation of legislators does not indicate whether the fault of the guardian can exempt the guardian from liability in the case of infringement by a person with incomplete civil capacity. It can only indicate that under this provision, the ward bears no fault liability. That is to say, from the legislative interpretation, it is unclear whether the guardian's own responsibility is presumed to be at fault or not. Analyzing guardians' responsibility from a legislative interpretation standpoint, whether presuming fault or applying no-fault liability, raises a new theoretical issue regarding whether such responsibility is intrinsic to the guardian or substitutive. This will involve the foundation of the guardian's responsibility and create a cycle of unresolved difficulties. If the responsibility of the guardian is one's own responsibility, it is difficult to explain where the significance of the guardian's responsibility applies to this provision. Since the violation of the guardian's responsibility can be a mitigating factor, why cannot it be a mitigating factor? This is unclear.

### **2.2. Analysis of legislative purposes**

The main purpose of Article 1188 of the Civil Code is to protect victims from receiving the compensation they deserve. Determining the principle of attribution for guardianship responsibility in legislation involves not just interpreting provisions but also considering legislative policies. [7]The consideration of policies reflects the legislators' consideration of the legislative purpose. Legislative interpretation is only based on the original text of the law to explain its meaning and application, which has great limitations. However, purpose interpretation can break the dimension of time and

space to think about what the original purpose of legislation is, and based on this, there will be a deeper and closer understanding to the legislators' original intention.

Firstly, if the responsibility of the guardian is fault responsibility, then the purpose of legislation is to protect the rights and interests of the guardian, because under this principle of attribution, the injured party must bear the burden of proof for the guardian's infringement. However, based on the legislative purpose in China, it is clear that legislators want to protect the interests of victims. Therefore, if the responsibility of the guardian is stipulated as fault responsibility, it goes against the legislative intention of China, is not conducive to protecting the legitimate rights and interests of the victim, and will also make the guardian ignore their duty of education and supervision towards the ward, which will expand the potential risks to society.

Secondly, the principle of no fault liability is more inclined to protect the victim, even if the guardian proves that they are not at fault, they need to unconditionally bear the tort liability. Although the mainstream view in academia holds that guardian responsibility is a no fault responsibility, this would make the ward appear as a dangerous creature, as no fault responsibility is generally applied only in particularly dangerous situations, which is contrary to the original intention of legislators in terms of ethics and morality.

### **2.3. Guardian responsibility is a presumption of fault responsibility**

Scholars who believe that the responsibility of a guardian is a liability without fault are all convinced that this is the direct reason why they consider it a liability without fault, as the guardian must bear a certain degree of responsibility no matter what. Moreover, they excluded the responsibility of the guardian by stating that even if it was proven that the guardian was not at fault, it would only reduce responsibility rather than exempt responsibility, which is a presumption of fault. However, this statement is still only based on the interpretation of legislative texts, discussing legal provisions based on legal provisions. The Legislative Affairs Committee of the National People's Congress also recognized in its interpretation that the nature of guardianship responsibility is neither fault presumption responsibility nor simple no fault responsibility. [3] That further illustrates that in judicial practice, it is impossible to 100% confirm that the responsibility of the guardian is innocent responsibility, and the Judicial Committee has not denied that the responsibility of the guardian is presumed to be fault responsibility, which has left room for debate in the academic community.

The author believes that for scholars who believe that the responsibility of guardians is not purely a presumption of fault, the first paragraph of Article 1188 of the Civil Code is divided into two different attribution principles. The part where the guardian can prove that they have fulfilled their guardianship duties is considered as a presumption of fault liability, and the part that cannot be exempted from liability is included in the category of no fault liability. However, the author believes that the part that cannot be exempted from liability is not a manifestation of no fault liability, but a supplementary liability based on the principle of fairness under the presumption of fault liability. Because if the guardian can exclude their own responsibility, they can still use this principle of fairness to impose certain compensation responsibilities on the victim.

## **3. Examination of Guardian Responsibility from the Perspective of Comparative Law**

In the legislative direction of infringement by persons with incomplete civil capacity in civil law countries, if the infringement and damage are caused by the person with incomplete civil capacity as the ward, the guardian should provide evidence to prove that they are not at fault, in order to exempt them from infringement liability. This approach is based on the presumption of fault by reversing the burden of proof. In today's world, countries such as Italy, Germany, Greece, Portugal, Spain, Japan,

and Taiwan adopt the principle of presumption of fault as the basis for assigning guardianship responsibility.

The main reason why the presumption of fault liability has become the mainstream attribution principle of guardian liability in civil law countries is mainly due to the development of individualistic philosophy and the progress of industrial civilization, which allows the presumption of fault liability to reflect the individual's responsibility for the results caused by their free actions, which can reflect the dignity of the individual. The presumption of fault liability can better reflect individual freedom and the overall interests of society. If everyone can fulfill their duty of care, in addition to the inevitable disasters caused by human labor, general damages can also be avoided, and this time the safety and interests can be guaranteed.[9]

The basis of a guardian's responsibility lies in the externalization of their obligation to educate and manage the ward. [8]Guardians should not only promote the healthy growth of the ward, but also avoid any infringement by the ward that may cause social danger. This kind of responsibility is a broader responsibility beyond the provisions of Article 1188 of the Civil Code. Therefore, if the guardian fails to fulfill this guardianship duty, it can be determined that they are at fault, and there is subjective liability for the ward's infringement. The guardian's assumption of responsibility based on this is considered fault liability.

#### 4. Solution Path

The previous text has explained the legislative meaning and purpose to illustrate that the guardianship responsibility in China is closer to the presumption of fault responsibility, and has also demonstrated the advantages of balancing fairness with presumption of fault responsibility through foreign legislative examples. Therefore, in practice, the presumption of fault liability is more suitable for China's national conditions.

In fact, the purpose of advocating the responsibility of the guardian as a no fault liability is to protect the interests of the victim. It is also clear that, given today's rapid societal changes, many acts of infringement involving individuals with incomplete civil capacity fall outside the Civil Code's safety liability section, making unconditional assumption of responsibility by guardians insufficient to prevent victim losses. For example, combining with commercial insurance, juvenile protection mechanisms, compulsory liability insurance, etc., and dispersing losses through effective social security. The provisions on tort liability need to be combined with other protection mechanisms in modern society in order to truly balance the interests of all parties in society. Ultimately, as long as the damages suffered by the infringed party are effectively compensated, many judicial discretion issues can be avoided. In the absence of a sound social security mechanism, it is not convincing to impose all compensation responsibilities solely on the guardian and make them bear no fault responsibility, just because the guardian has a guardianship obligation towards the ward. This excessive responsibility, on the other hand, will be even more detrimental to the growth of individuals with incomplete civil capacity. On the basis of presumption of fault liability, and gradually increasing the burden of proof for guardians through judicial cases, as in Western countries, can better solve the problem of compensation for victims' damages in both form and substance. As mentioned by the author in the previous text, China should adopt the principle of presumption of fault liability and supplement it with the principle of fairness in the form of guardian responsibility. In judicial practice, even if the infringement of incomplete civil capacity is caused by force majeure, in cases where presumption of fault is not applicable, the principle of fairness can still be used to safeguard the legitimate rights and interests of both parties. This interpretation of the attribution principle in Article 1188 of the Civil Code is not only beneficial for resolving the confusion in principle of this rule, but also provides operability and applicability for judicial practice, rather than simply correcting extreme case situations with no fault liability[10].



## 5. Conclusion

The debate on the attribution principle of guardian responsibility has been ongoing since the era of the General Principles of Civil Law, the era of the Tort Liability Law, and now the provisions of Article 1188 of the Civil Code, all of which do not clearly define the most fundamental attribution principle in tort liability. It seems that legislators are deliberately avoiding distinguishing whether the responsibility of guardians is presumed to be at fault or not, but in real life, the principle of attribution of tort liability does play a significant decisive role in the compensation for damages suffered by infringers. From the analysis above, it is not difficult to know that the misalignment of the principle of guardianship attribution in the text itself has brought many difficulties to judicial practice.

Therefore, this article argues that the responsibility of the guardian is a presumption of fault responsibility, which is more in line with China's national conditions and has a relatively loose ruling space for judicial practice. And it was concluded that after establishing the principle of attribution, corresponding social security mechanisms should be constructed. Finally, drawing on the experience of comparative law theory, it was explained that assuming no fault liability is not suitable for the current situation in China. Many issues remain that require addressing through specific practices to inform legislative improvements.

## References

- [1] *Article 1188 of the Civil Code: "Where a person with full or limited civil capacity causes damage to others, the guardian shall bear tort liability. If the guardian has fulfilled his/her supervisory duties, his/her tort liability may be mitigated. Where a person without or with limited civil capacity who owns property causes damage to others, compensation shall be paid from his/her own property; if insufficient, the guardian shall make up the shortfall."*
- [2] Chen Bangfeng. *On the Liability of Guardians: The Interpretation of Article 32 of the Tort Liability Law [J]*. *Chinese and Foreign Law*, 2011, 23(01): 96-110.
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- [9] Wang Zegian. *Tortious Acts [M]*. Beijing: Peking University Press, 2016: 13.
- [10] Article 1384, paragraph 7 of the French Civil Code stipulates: "The father or mother as guardian is exempt from liability if he/she proves that he/she could not prevent the act which caused the liability."