Presumption of Fault or Liability without Fault

—Discussion on the Responsibility of Damage Caused by Domesticated Animals in Chinese Zoos

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Abstract: Article 81 of Torts of China stipulates that animals in zoos who cause injury to people are liable for a presumption of fault. The zoo can prove “no fault” and the liability of compensation can be exempted. Compared with the no-fault liability of other subjects responsible for animal breeding, the liability is lighter and the legislative classification is not uniform. This paper makes an in-depth analysis on the shortcomings of article 81. And analyzes the rationality of applying the principle of no-fault liability. On this basis, it is proposed that no-fault liability can better realize the balance of interests between the zoo and tourists and the unification of legislation. To make it more consistent with the legislative practices of major countries in the world.

1. Introduction

Chapter 10 of the Tort Law of the People's Republic of China, which came into effect in July 2010, stipulates the liability of damage caused by domesticated animals. There are seven clauses, which respectively stipulate the responsibility for injury caused by ordinary animals and violent animals kept by members of the society, the responsibility for injury caused by escaping animals and the injury caused by animals kept in zoos. Article 81 stipulates that “zoo animals that cause damage to others shall bear tort liability. But those who can prove they have fulfilled their management duties will not be held responsible.” It can be seen from this clause that at present, zoos in China assume the liability of the presumption of fault when their animals cause human damage. If the zoo can prove that it is doing its job, it can prove that it is not at fault. Compared with the no-fault liability (that is, article 78 of the Torts), the liability is obviously lighter. This is said to be due to the limited staffing of zoos and the large number of animals. However, I think it is not appropriate, which does not achieve an effective balance between the zoo and visitors.

2. Problems in the Presumption Application of Fault Liability for Injuries Caused by Animals Kept in Zoos

2.1 It Violates the Basic Principle That Raising Animals Causes Harm.

As a zoo operator, its risks and benefits always coexist. Given the profitability of charging high admission fee, the degree of responsibility should be commensurate with the benefits. The provision of Torts is obviously contrary to benefit compensation theory 1. That the principle of consistent benefit and risk. Zoo benefits from visitors paying to enter. The zoo is also required to ensure the safety of every visitor. “Torts” drafters explained that in the legislative process they inspected more than a dozen zoos, and conducted more than a dozen discussions, widely solicit opinions. [1] If the zoo can prove that its equipment and facilities are perfect, with obvious warning signs, the management has discouraged the unreasonable behavior of the visitors. That means that the zoo's management responsibilities are in place and that the zoo is not responsible. But there are two questions. First, the legislature focused on soliciting the opinions of the zoo side, which was biased. In the case of animal infringement in the zoo, tourists, as the injured party, should also ask for their opinions, so as to highlight the value of putting people first. Second, the current legislation clearly understands that a zoo's responsibility is an obligation to provide for its safety and security. But this

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ignores the other side, which is the fundamental source of animal responsibility for injury - “animal irrationality”. The main reason why animal owners bear tort liability is that even if they have done their duty of care, they may cause damage to others due to their irrationality. Therefore, it is reasonable to ask them to assume no-fault liability. Zoos, which keep lots of animals, but many of them are more dangerous, wilder and profitable, and should be held more strictly accountable. In addition, compared with tourists, the zoo has more professional and comprehensive safety protection capabilities, and tourists are on the weak side. The legislation should give priority to tourists as vulnerable groups when balancing their interests. It is necessary to protect the rights of the vulnerable party so as to achieve substantial equity. [2]

2.2 Violating the Principles of Legal Interpretation.

According to the provisions of article 78 of the Torts, ordinary members of the society who raise ordinary animals and cause injury bear no-fault liability. However, a large number of animals raised in zoos belong to wild animals, which are more aggressive and dangerous than ordinary animals, but assume the liability of presumption of fault, which is obviously contrary to the legal logic principle of “Even a serious act is not considered a crime, so a light act is certainly not a crime “. Article 78 of Torts is a general provision, which stipulates that the breeders or managers of animals shall assume no-fault liability. Articles 79 and 80 make special provision for animals that have not taken safety measures and animals that are forbidden to be kept. The same applies to no-fault liability. The law clearly classifies animals as dangerous. Article 81, however, dispenses with the distinction between animals in favor of a breeder and owner. This has led to confusion over legislative classification criteria. The liability type is reduced from no fault to the presumption of fault liability.

2.3 It is Inconsistent with the Legislative Orientation of Major Countries in the World.

Article 1385 of the Code Civil des Francais: “the owner or user of an animal or animal shall, during the period of use, be liable for causing damage to others, regardless of the animal or animal's state.” It stipulates that the breeder or manager shall assume no-fault liability when the animal causes human damage. Section 504-518 of chapter 20 of the second restatement of American Tort Law provides relevant provision on the issue of animal tort. Among them, section 504 states: “the owner of an animal who trespasses on the land of another shall be liable for such trespass, notwithstanding the great care he has exercised to prevent such trespass from taking place.” Section 507 states: “the owner of a wild animal shall be liable to any person or property damage caused by that animal, notwithstanding the great care which has been exercised to limit or prevent the injury caused by that animal.” It can be seen from this that the animals involved in injury incidents in the United States are divided into livestock, namely domestic animals and wild animals. In fact, they are divided according to the nature and species of animals, and different laws are applied according to the different ownership of animals. [3] The United States does not make a clear distinction between the liability principle and compensation for damage caused by zoo animals and other animals, but both assume no-fault liability. Britain's Animal Act 1971 divides animals into livestock, dangerous animals and non-dangerous animals, so as to apply different imputation principles. For damage caused by dangerous animals, the owner or possessor shall bear strict liability, that is, no-fault liability. For the damage caused by non-dangerous animals, the owner or possessor shall be liable for negligence. That is, the responsibility of the basis is that the owner or possessor has not done its duty to guard. [4] German civil law scholars are not shy to directly point out that article 81 is a “privilege” granted to zoos by Chinese legislation. Professor Yang Lixin also believes that the principle application of presumption fault to zoos is an “extra linguistic favor”. [5]

3. Whether Zoo Should Be Distinguished

As mentioned above, the liability for injury caused by the breeding of animals in China's Torts can be divided into the general public and zoos according to the different owners, and they shall assume different responsibilities. The question is: does this distinction make sense? Not only has

this kind of distinctive treatment not was recognized from the world scope, actually also does not accord with our country legislative tradition. In the General Principles of Civil Law issued by China in 1986, article 127 “civil liability for injury caused by animals” does not distinguish the subject of tort liability. Instead, it stipulates that if the animals raised cause damage to others, the animal breeders or managers shall assume no fault. A zoo is a place for raising wild animals and educating the public. It is a place for collecting and raising all kinds of animals, for off-site protection and scientific research, and at the same time for the public to enjoy and conduct some publicity, protection education and scientific popularization. Zoos are different from other places with two basic characteristics: first, the zoo is the breeding and management of wild animals, wild animals here are different from ordinary poultry and pets; second, it is open to the public. In a broad sense, zoos include special zoos, aquariums, etc. In a narrow sense, zoos include wildlife parks and city zoos.

Article 81 of Torts of China refers to the subject of liability as “zoo”. With the continuous development of economy and society, the number of zoos in China has reached nearly 800. These are mostly for-profit organizations, including a number of wildlife parks. From the practice in recent years, the number of serious casualties caused by animals raised in zoos, especially wild animals, has increased significantly. Different zoos have different requirements for visitors. For example, in the case of the tiger attack in Beijing Badaling Wildlife Park in 2016, tourists can freely get on and off the vehicle when driving in and out of the beast zone. This model is markedly different from that of captive animals in urban zoos, where visitors have little direct contact with them. Article 81 does not distinguish but use the same responsibility, which I find inappropriate. In the Badaling incident in Beijing, the wildlife park claimed no fault on the grounds that there was a “no getting off” warning notice outside the zoo gate and that it fulfilled its obligation to inform orally. Ningbo Zoo claims to be exempt from liability on the grounds of fare evasion, does it all mean that the reason is enough? In my opinion, it is not appropriate for all kinds of zoos to assume the same security obligation. Banks, hotels and other social organizations that assume the obligation of safety assurance do not have incidents of sudden animal bites. Because they only need in the construction, management in no fault can basically ensure that there will be no harm. But a zoo full of uncertainty is no guarantee.

4. Suggestions on the Revision of Tort Liability of Animals in Zoos in China

4.1 The Modification Suggestion of Imputation Principle.

The Civil Law of Torts is under revision. The author is sorry to see that the second revised draft still adhere to the provisions of article 81 of the current law without any amendment. Therefore, I try to put forward two ideas for reference:

1) Distinguishism.

The so-called separatism doctrine is that according to the different types of zoos, different treatment, apply different principles of attribution. The danger faced by visitors to safari parks is markedly different from those faced by zoos in general. Most city zoos keep animals in captivity, where visitors can move around freely and enjoy them safely. Wildlife parks, on the other hand, keep the animals in certain areas, and visitors stay in certain “cages” to watch the animals. They not allowe to move around freely. Badaling Wildlife Park, for example, allows visitors to drive into the park (the format contract stipulates that visitors cannot get off the car, the zoo also orally reminded). In this way, the animal can be released from its primitive wildness at a short distance, and the risk factor is also soaring. Based on this fact, the liability of general zoos can still apply to the presumption of fault liability, while based on the principle of risk, wild zoos are required to apply more strict no-fault liability.

2) No-fault liability applies to all.

Discrimination is still a special privilege for zoos. If we look at the basic principles of the consistency of liability for injury caused by raising animals, “animal irrationality” and so on, it seems more reasonable to require zoos to be equally blameless as the general public. The

advantages of no-fault liability can be applied as analyzed above: it conforms to the basic principle of liability for injury caused by raising animals; reflect the consistency and coordination of legislation; victims get better relief. As for the losses paid by the zoo, they can be spread out by raising the admission fee and actively insuring.

4.2 Suggestions on Other Related Issues.

In addition to the principle of liability, there are two specific issues that need to be paid attention to in the specific application of liability for injury caused by keeping animals in zoos. First, the victims should not be limited to legitimate tourists who buy tickets. There have been incidents where over the wall ticket evaders who broke into the zoo were bitten by tigers. In this case, the zoo should also pay compensation. Because whether it is based on the security obligation of the public field, or whether the tort liability is targeted at strangers, the tort liability is established for being violated by animals in the park. As for fare evasion, it is only a reason for the zoo to reduce its liability, not a factor of whether the liability is valid or not. Secondly, the format contract of the zoo is limited. Each zoo has a “notice for admission” and warning signs, which are unilateral format contracts. According to article 40 of the Contract Law of our country, the content that aggravates the responsibility of the other party, excludes the main rights of the other party, and exempts the liability of the party providing standard terms is invalid. A similar provision in article 24 of the Consumer Protection Law states that there is no legal basis for a zoo to use “instructions for admission” and warning labels to prove that it has fulfilled its management responsibilities and is exempt from liability. Even if the zoo provides an “admission notice” or sets up such warning or warning mark, the zoo shall not be relieved or exempted from its responsibilities if it fails to fulfill the corresponding management responsibilities and obligations. [6]

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