侵权法因果关系理论之研究

QIN QUAN FA YIN GUO GUAN XI LI LUN ZHI YAN JIU

刘信平 著

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序一 / 张新宝*

本书作者刘信平博士是一位学者型的律师。1985年在西南政法大学攻读法学硕士学位，1988年毕业后从事律师工作，15年后又继续在武汉大学攻读民商法博士学位，可见其对学习孜孜不倦、锲而不舍。

因果关系在自然学科、哲学、法学上都是颇具争议的重大理论问题。侵权法上的因果关系也是理论难题。从事侵权法因果关系研究既有理论意义又有实践意义。我国对此缺乏系统的专题研究，作者将其作为博士论文，显示了作者的勇气和气魄。

在本书中，作者在详细分析了普通法的近因理论和大陆法系的相当因果关系理论的基础上，认为近因说植根于美国的实用主义哲学基础，相当因果关系说源于科学的概率理论。前者的核心为可预见性规则，后者的核心为可能性规则，两种理论及相关规则均符合唯物辩证法的基本原理。作者认为应对两种理论兼收并蓄，尤其应以近因说中的可预见性规则为主，以相当因果关系中的可能性（盖然性）规则为辅认定因果关系。将因果关系认定分为事实因果关系和法律因果关系，对前者的认定适用认识论（逻辑判断），对后者的认定适用价值论（价值判断）。侵权法因果关系的特点是主观与客观的统一，逻辑推理与价值判断的统一，意志因素与因果态样的统一。上述观点是较为新颖的。

作者还对我国侵权法在责任构成要件方面进行了研究。认为除了要引进“注意义务”之外，还应引进可预见性规则，这样因果关系认定与过失（违反注意义务）认定才能互相协调。我国过失侵权构成要件应为：注意义务、注意义务的违反、因果关系和损害。对于介入原因，作者认为应该

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借鉴美国侵权法中的替代原因理论。在介入原因中判断是否构成替代原因,可预见性规则是主要判断依据。作者针对替代原因,提出了立法建议。另外,作者在对不作为侵权中基于特殊关系产生的义务作了研究,并对除了安全保障义务之外的特殊关系提出了立法建议。对于侵权法中的"原因力"理论,作者提出质疑,主张以"行为与损害的因果联系强度"取代"原因力"。紧接着作者对特殊侵权诉讼中的因果关系及证明也作了深入研究,特别是医疗侵权、证券侵权(虚假陈述、内部交易)、会计师事务所不实陈述诉讼中的因果关系及举证责任,提出自己的观点,有一定的参考价值。此外,作者对侵权法因果关系经济分析作了介绍和述评,认为侵权法经济分析不能完全取代因果关系理论。最后,作者在结论中提出构建我国侵权法关系理论体系的框架的设想。上述研究成果表明作者具有较强的理论功底和研究能力。

本书语言洗练,行文流畅,条理清晰,论据充分。

本书可商榷的地方在于:关于原因力的否定论、抛掷物致人损害的属性有待进一步论证,以供立法者参考。我国侵权法体系采用大陆法系体系的情况下,侵权法责任构成要件完全采用普通法的理论来构建是否与原有体系有逻辑上的冲突,也有待更深入地进行探讨和论证。

是为序。

2008 年 1 月 21 日

于中国人民大学明德楼

序二 / 张里安*

因果关系所表征的，是现象与现象之间的“引起与被引起”的关系。由于其存在的普遍性，自古以来，它就一直是哲学的重要范畴之一。除此之外，其他的学科，甚至于在日常生活中，人们也同样的提及这种关系。

然而哲学上所谓的因果关系同其他情况下人们所提及的因果关系，例如本书所研究的侵权法上的因果关系，究竟在多大程度上有着同一性，却不无问题。简而言之，哲学上的因果关系有着“终极的”或“根本的”意义，体现的是一种现象合乎规律、合乎逻辑地向另一种现象的“展开”的必然性；而侵权法上的因果关系则无非是探讨原告所遭受的损失是否，以及在多大程度上可归咎于被告（或应由被告为之负责的某个其他人）的行为，它不仅有异常明确的目标指向，而且必然蕴涵着法律本身的价值判断。

也正是由于侵权法上的因果关系判断受到侵权法本身的上述影响，而与单纯的哲学因果关系探讨有不同的侧重点，总结归纳某些既符合侵权法本质又符合哲学逻辑的因果关系判定方法和标准并在实践中合理地加以运用，便成为长期困扰着古今中外的法官和学者们的一道必须解决的难题。尤其是在中国，如何从哲学和法学理论出发，高屋建瓴，兼收并蓄两大法系的有益精华，构建符合中国国情的逻辑推理和价值判断的方法和标准，用于指导侵权法司法审判实践，已是当务之急。《侵权法因果关系理论之研究》这部著作即从这里切入主题。

作者刘信平先生是我的学生，作为一名资深律师，他在长期的执业生涯中，深感侵权行为民事责任的认定中对因果关系的认定有欠条理明晰的、贯彻始终的判断标准，遂下决心以之为题，进行博士课题研究。本书

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就是在他的博士论文基础上充实完成的。

作者首先对哲学上因果关系研究的新近发展作了简要论述，接着对普通法系和大陆法系的因果关系认定理论进行了比较深入细致的分析，结合我国民法理论和司法实践中的相关传统做法和新的学说，提出了自己独特的见解。

作者认为，有必要区别事实上的因果关系和法律上的因果关系，前者表现事物之间客观联系性，而后者则是于事实上的因果关系存在的基础上，对行为人的行为进行的价值判断。因为认定侵权行为的目的最终是为了追究侵权人的民事责任，仅仅具有客观的、事实上的因果关系的行为未必都具有这种可归责性。

出于同样的考虑，作者认为大陆法系关于相当因果关系的学说，虽然也能在一定程度上限缩依据纯条件说认定的事实上的因果关系的范围，但其价值判断标准较英美普通法的价值判断标准相对来说较为模糊，不如后者更具实用性和可操作性。

综观全书，作者对因果关系的各种理论的阐述是全面的，分析也较细致。其主要思想能否很好地融入大陆法系的抽象框架虽尚待考察，但仅就侵权行为民事责任而言，是言之有据且言之有理的。作者敢于挑战这一长期困扰法学界的理论难题，本身就勇气可嘉。值此本书付梓之际，期望他在今后的学术研究中取得更大的成就。

2007 年 12 月于珞珈山

中文摘要

侵权法因果关系是一个重大的理论难题。它不仅涉及哲学，也涉及法学；不仅具有深邃的理论性，而且具有极强的实践性。因此，英国著名学者弗莱明说："侵权法中再也没有其他问题像因果关系这样困扰着法院和学者。"

本书共分为十一章。第一章为因果关系的概述。在很早的古代哲学中就出现了原因和结果的概念。对因果关系的研究在哲学史上一直被作为一个重要的内容而绵延不断。古代的印度哲学、中国哲学和希腊哲学都对人类因果关系的研究作出了贡献。到了近代，人类对因果关系的研究的重心转入西方近代哲学之中，这期间涌现了众多的名家，他们研究成果丰硕。时至当代，由于科学技术的发展，传统的因果关系观念面临新的挑战，从而使过去曾被大多数哲学家和科学家信奉的严格因果关系（因果关系必然性）理论受到质疑，这方面的争论迄今还未有定论。

侵权法上的因果关系是指侵害行为（或侵害行为与其他因素结合）与损害事实之间的联系。侵害行为与其他因素（包括第三人行为、受害人自身因素或自然因素）结合是原因，人身和财产的损失和损害事实是结果。侵权法因果关系与哲学因果关系在目的、范围、确定性和判断依据方面各有区别，而侵权法因果关系与刑法因果关系在保护范围、举证责任、证明程度方面亦不相同。

本书第二章为普通法中侵权法因果关系理论之研究。普通法对侵权法因果关系的认定，采用两分法的认定程序，即分为事实原因和法律原因。事实原因认定分为必要条件和重要因素规则，必要条件（即"若无则不"规则）适用于单一因果关系，重要因素规则适用于复合因果关系。错失机会理论是重要因素规则的一个分支，主要适用于医疗纠纷案件。

在事实因果关系的证明方面，美国侵权法创造了企业责任、市场份额、选择责任、一致行动、不确定的原告、欺诈市场诸理论，并在司法实践中发挥了重要作用。

法律原因认定适用直接结果规则和可预见性规则。前者主要适用于故意侵权行为，后者适用于过失侵权行为。可预见性规则是侵权法归责理论中的重要规则，是因果关系的权威理论。可预见性规则的哲学基础植根于美国的实用主义，它兼具统一性、简洁性和公平性特点。可预见性规则在判断介入原因是否中断因果关系中发挥了重要的作用。

本书第三章对大陆法中侵权法因果关系理论进行了研究。大陆法因果关系理论有两种不同指导观点，一为个别性观点，一为一般性观点。大陆法因果关系理论中的“条件说”和“相当因果关系说”，就是以这两种不同的认识论为基础构建的。

德国的条件说分为必然原因理论和有效原因理论。德国的相当因果关系说之所以经久不衰，主要在于：该学说有利于减轻受害人的举证责任；有利于坚持因果关系的客观性；有利于限定赔偿责任。但其不足之处在于：该学说的抽象性造成适用的差异性，而且判断标准过于宽泛。

德国的法规目的说提出了一个新的思考方向，并对损害赔偿进行了合理限定。但德国民法典将侵权法保护的范围进行了明确限定，是典型的限定性侵权构成，而且是一种封闭的严密的逻辑体系。由于许多法规并没有明确规定法规目的和保护范围，法官被赋予更广泛的裁量权，可以通过判例创制新的规则，对法规未规定的利益进行保护，这样，法官无形中扮演了立法者的角色。

日本侵权法因果关系理论博采众长，尤其是因果关系证明理论（包括盖然性说、间接反证、经验法则、疫学因果关系、比例认定说）独树一帜，取得丰硕的成果，值得借鉴。

我国台湾地区的相当因果关系说源于德国法，吸收了普通法的部分精华，但未能解决理论内部的逻辑冲突问题，同时在价值判断的归责问题上无客观评价标准。

第四章为两大法系侵权法因果关系理论之比较。两大法系在政治思想和制度、方法论、司法理念、法律渊源上都不同，但第二次世界大战以后有互相靠拢的趋势。两大法系在侵权法因果关系理论上有差异性，但也

有同一性。普通法系重实用性和灵活性，但稍逊周延；大陆法系重思辨性和严密性，但不免流于呆板。两者的同一性表现在：价值判断的同一性、预见主体的同类性、预见标准的相似性、预见结果的通常性。

第五章为我国侵权法因果关系理论现状之反思。我国建国以来到20世纪80年代末，民法理论一直受前苏联民法理论的影响。目前侵权法因果关系研究正在冲破传统理论的藩篱，朝着两大法系主流因果关系理论（包括近因说和相当因果关系说）进逼。立法上和学说上对外国法的继受成了我国多数侵权法研究学者的一致呼声，其争论的只不过是向普通法系倾斜还是向大陆法系倾斜。

但我国侵权法因果关系理论仍存在一些尚待解决的问题，如认识论方面的问题（包括如何看待必然说、必然偶然区分说，如何看待近因说、相当因果关系说），以及价值论（在因果关系认定中越来越强调价值判断）和因果关系理论内容理解方面的问题。

第六章为我国侵权法因果关系认定一般原理研究。侵权法因果关系在责任构成要件中起着重要的作用，因果关系与过错及违法性密不可分。我国侵权法因果关系理论首先要引进两大法系共同认可的“违反注意义务”，以取代“过错”及“违法性”概念；其次要移植可预见性规则，该规则是因果关系认定的核心。因果关系认定与违反注意义务认定要达到相互协调。

第七章为我国侵权法事实因果关系之研究。事实因果关系的特点是：事实因果关系具有客观性、事实因果关系的必然性表现为可能性、事实因果关系具有复杂性、事实因果关系具有相互作用性。事实因果关系的认定规则包括目的性规则、客观性规则、全面性规则和推定性规则。

第八章为我国侵权法法律因果关系之研究。法律因果关系的特点为：主观和客观的统一、逻辑推理与价值判断的统一、意志因素与因果态样的统一。法律因果关系的认定规则为：直接结果规则、可预见性规则、可能性规则和衡平规则。相当因果关系说的可能性规则与近因说的可预见性规则有异曲同工之妙。

研究不作为侵权中的因果关系时，应注意基于特殊关系产生的义务，而这种不作为是导致损害的原因。介入原因中能使原有的因果关系中断，并能有效解脱责任的介入原因被称为“替代原因”。无意思联络的数

人所为的侵权行为中的因果关系，较难判断。应以主观意思的关联性或客观行为的关联性作为共同侵权的判断标准，共同侵权人承担连带责任。不符合该标准的为“多因一果”，即侵权人不承担连带责任。纯粹经济损失是人身伤害和财产损害之外的经济损失，判定纯粹经济损失是否应予赔偿，取决于存在的因果关系是否过于遥远。

第九章为我国侵权法原因力否定说研究。从哲学角度来看，洛克解释了“因果力”的概念；休谟认为“能力”是最高深、最富有争论的问题之一；恩格斯认为把“力”作为一切现象的原因这样一种观念，在力学领域之外是不适用的。因此，从侵权法角度来看，为了避免混淆和模糊性，应避免使用原因力的概念，而用“因果联系的强度”来取代。共同侵权人对外承担连带责任，其内部之间基本上是平均分担责任。“多因一果”中应将过错与侵权人行为与损害之间因果联系的强度结合起来考虑，确定侵权人承担的责任份额。比较过失中应优先考虑过失程度，再结合侵权人行为与损害之间因果联系的强度，最后确定侵权人应承担的责任份额。

第十章为特殊侵权诉讼中因果关系及证明之研究。特殊侵权（包括医疗侵权、环境污染、证券虚假陈述、内幕交易、会计师事务所不实陈述、缺陷产品致人损害、共同危险、抛掷物致人损害）诉讼中的因果关系采取推定的方式，但两大法系证明责任分配的理论各有不同特点。我国必须借鉴其有益经验，对现有法律、法规、司法解释中的一些因果关系条款进行修改，并增加一些新的因果关系条款。

第十一章为侵权法因果关系经济分析之研究。美国侵权法经济分析的理论（包括汉德公式）并非无懈可击，该理论重效率、轻正义，为人所诟病。侵权法经济分析不能完全取代侵权法因果关系理论，而只能对后者起着拾遗补阙的作用。

本书在结论中提出了构建我国侵权法因果关系理论体系框架的建议。

Abstract

Causation in torts is a major and difficult theme of theory involving philosophy and jurisprudence, with the characteristic of profound theory as well as specificity of the emphasizing practice. So the famous England scholar John G. Fleming said: "Causation has plagued courts and scholars more than any other topic in the law of tort."

There are eleven chapters in this dissertation. Chapter One has a brief introduction to causation. There were the concepts of cause and effect in philosophy of early ancient time. The research of causation had been continuing as an important matter in the history of philosophy. The philosophy of ancient India, China and Greece had made a contribution to the study of causation. In modern time the key to the study of causation of human was transferred to western philosophy. Many famous scholars who achieved a great deal of results emerged during the time. In the contemporary era, the traditional concepts of causation are facing new challenges due to the development of science and technology. The theory of strict causation or necessary of causation which most philosophers and scientists used to firmly believe in was doubted. So far the answer to the debate about the topic remains uncertain.

Causation in tort means the relations between the tortious conduct (or the tortious conduct combining other elements) and damage. The tortious conduct or tortious conduct combining other factors (including the conduct of the third party, the elements of the victim or nature force) is the cause. The damage of physical harm or property is the effect. There are some differences

between the causation of torts and philosophy in their aims, extents, determination and judgment basis. So are there between the causation of torts and crime in protecting scope, burden of proof and degree of proof.

Chapter Two focuses the study of causation theory in common law. The determination of causation of tort adopts bifurcated approaches i. e. cause-in-fact and proximate cause (or legal cause). Cause-in-fact bases on the conditio sin qua non and substantial factor. Conditio sin qua non (or "but-for-test") is applicable in single causation and substantial factor is applicable in multiple causations. The last of chance of doctrine belongs to substantial factor, which is mainly applicable in medical malpractice cases.

In the determination of cause-in-fact, American torts created many theories such as those of enterprise liability, market share, alternative liability, concerted action, indeterminate plaintiff, fraud on the market and so on. They play important parts in judicial practice.

Direct consequence test and foreseeability rule (or foreseeability test, foresight rule) are applicable in judgment of proximate cause. The former is mainly used in intent torts and the latter in negligent torts. Foreseeability is a key rule in liability theory in torts and an authoritative theory in causation. Its basis of philosophy originates American pragmatism. It possesses attractions of consistency, simplicity and fairness and plays an important role in judgment on whether the intervening cause interrupts the causation chain.

Chapter Three focuses the study of causation theory in civil law. There are two different points of views on causation theory: one is individualizing theory and the other is generalizing theory. Condition theory (aquivalenz-theorie) and the adequate cause theory (or adequacy theory) were created on the different epistemologies.

Condition theory consists of necessary cause theory and efficient cause theory. The reason why the adequate cause theory is applicable for such a long time is that it reduces the burden of proof, insists on the objectivity and restricts the liability of compensation. But it has some defects. The abstraction of the theory makes a difference in application. And the standards

of judgment are too extensive.

Normzweck Theory (Theory of Regulation Aim) is a new approach which restricts the compensation of damage reasonably. But German Civil Code which defines the range of protection by torts is a typical restricted tortious composing and closed logical system. Because many laws do not regulate the aims and protecting range, the judges have more rights of adjudication. They can create new rules by the cases to protect the interests which the laws do not regulate to protect. So the judges virtually play the role of law-makers.

The theories of causation in torts of Japan select essence from continental law and Anglo-American law and create the new theories of proof including probability theory, experience rule, epidemiology cause theory and proportion determination theory. These theories fly their own colours and achieve fruitful results which are worth notice.

Adequate cause theory in Taiwan district originates in German torts and selects the essence from common law. But there are some logical conflicts that are not solved. Meanwhile there are no objective standards for valuing judgment of liability.

Chapter Four makes a comparison between the theories of causation of common law and civil law. There are many differences in political ideologies and systems, methodologies, judicial thoughts and sources of law between the two law systems. But the trend seems that the two law systems have become closer since the World War Two. The causation theory of genealogy of common law emphasizes practice and flexibility, but it seems rigorous. That of genealogy of civil law emphasizes logic and strict, but it seems rigid. However, they have identical characteristics on the value judgments and criteria. In addition, the kinds of the party who foresee and the results of foresight are alike.

Chapter Five treats the present situation of causation theory in torts of China. The theories of civil law in China were influenced by those of Soviet Union. Today the research on causation theory in torts is thriving beyond the

extent of traditional theory and towards the main theories of two law systems. The most of scholars of China who study on torts assert the foreign legislation and theories of causation should be grafted in China. The different points of view focuses on which is priority, proximate cause theory or adequate cause theory.

However, the theories of causation in torts of China remain some unsolved problems including those of epistemology (such as how to look upon necessary theory and contingency theory, how to look upon proximate cause theory and adequate cause theory) and those of axiology (more attention paid to value judgment which is stressed in determination of causation than before) and understanding of content of causation theories.

Chapter Six discusses the general principles of determination of causation in torts of China. Causation plays an important part in constitutive requirement in liability in torts and causation, fault and illegality establish non-separated relationships. First of all we should introduce the concept "breach of duty of care" which the theories of two law systems adopt instead of fault and illegality. Secondary, we should introduce foreseeability rule since it is the core of determination of causation. And determination of causation and the "breach of duty of care" should be well coordinated.

Chapter Seven explores study of fact-in-cause in torts of China. The characteristics of causal connection are described as follows: First, The connection is objective. Second, The necessary of connection displays its probability. Third, The connection is complicated. Fourth, The connection has action and reaction. And the rules of determination of causation include the rules of goal, objectivity, overall and presume.

Chapter Eight treats the study of legal cause in torts of China. It has many characteristics namely unity of subject and object, unity of logic reasoning and value judgment, unity of will and form of causation. The rules of determination of proximate cause include the rules of direct consequence, foreseeability, probability and equity. The rule of foreseeability in proximate cause theory and the rule of probability in adequate cause theory are different

in approach but equally satisfactory in result.

In study of causation of nonfeasance, attention should be paid to the duty of special relationship and such kind of nonfeasance is the cause of the damage. The intervening cause which breaks the causation and gets rid of responsibility is the superseding cause. The causation in torts by several tortfeasors who do not communicate with each other is difficult to determinate. The judgment criterion of joint tortfeasors (action in concert) is the connection of subjective intention or objective conduct of tortfeasors. The joint tortfeasors are joint and several liable. Otherwise, each of tortfeasors in "multiple-cause-one-effect" is not joint and several liable for the harm. Pure economic loss is one which is unaccompanied by physical injury or property damage. Whether those who have suffered economic loss are compensated depend on remoteness of existing causation.

Chapter Nine deals with the study on negative theory of causal potency. From the point of view in philosophy, John Lock explained the concept of "causal power"; Hume considered "power" was one of the most profound and contentious issues; Friedrich Engels held the idea that "power" was deemed to the cause of all phenomena did not accepted in all domains except that of mechanics. So from the point of view in torts, the concept of "causal potency" should not be used due to the misuse and vague of the concept and it should be replaced with "the strength of the causal connection". The joint tortfeasors are joint and several liable to victim and basically each of them pay his pro rata share of damage among them. In "multiple-causes-one-effect", the apportionment of liability should be considered in accordance with "fault" and "the strength of the causal connection". In comparative fault, "negligence" should takes precedence over "the strength of the causal connection" and then the liability is identified.

Chapter Ten treats the study on the theory of causation and burden of proof in lawsuits of special torts. The causation in lawsuits of special torts (including medical malpractice, pollution of environment, securities misrepresentation, insider trading, misrepresentation of accounting firms,

physical damage caused by the defect product, indeterminate cause and personal injury caused by throwing objects) is adopted the approach of presume. But the theories of burden of proof of two law systems are different. We should make use of the theories for reference and make some amendment and supplement of the clauses of causation of legislation in effect.

Chapter Eleven focuses the study on economic analysis of causation in torts. American economic analysis including Hand Formula is not unassailable. It stresses efficiency but ignores justice for which it is criticized. Economic analysis should not completely replace the theory of causation and the former is only a supplement to the latter.

In conclusion, some suggestions on the frame of system of theory of causation in torts of China were made.