中国校园学生伤害的法律研究

A Study on the Law Relating to Student Injuries on Campuses in China

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目　　录

摘　　要

学生伤害事故作为一种客观现象，所涉法律关系非常复杂。如何协调学校与受害学生的利害冲突是本文研究的核心问题。学生伤害的准确定义应为“校园学生伤害事故”。在这样的定义下展开认识和研究并提出立法建议或作出实案处理，才是正确的。而学生伤害特点的总结与类型的划分则更进一步界定了应特别立法规制的学生伤害的内涵和外延。

学校与学生的法律关系应澄清各种认识观点，分析学校法律地位与职责及国外立法、研究观点。中国立法应确定教育管理保护法律关系。而教育管理法律关系属社会行政法律关系。监护关系说、特别权力关系说、契约关系说、两重关系说等不同观点不符中国实际。他国的法律是区分公、私立学校分别立法作出规定的。学者们提出的特别权力关系论、部分社会论和重要性论等观点和学说，或不适应中国国情，或在法理上存在疏漏，或有种种值得质疑的不严密之处。只有教育管理关系的说法才是最适应中国学校与学生的实际。故学校对学生不负监护义务，而仅有教育管理和保护的职责。无论是《民法通则》还是一系列教育法规都充分证明了这一点。

中国学生伤害事故的防范工作极为重要。防范不力者应依法承担过错赔偿的民事责任以及行政抑或刑事责任。防范主体包括学校的举办者——国家、集体、社会机构、公民个人等；学校及其工作人员或教师；政府相关各个部门（如公安、卫生、防疫、工商、司法、教育等等）；学生本人及其家长或其他监护人。以及社会机构和单位等。都分别负有防范职责。学校防范校内，政府和社会机构防范校外及设施建设等。家长与学生防范自身。各主体齐心协力，才能有效防范事故的发生。各主体在法律上有详细具体的防范职责和义务。

学生伤害的事故鉴定包括当事人对事故的委托鉴定、政府行政部门对事故的检验分析和评定、司法鉴定等三个方面。三个方面的鉴定各具不同的特点和法律效力。当事人举证鉴定应遵循一般证据学规则；行政鉴定受证据规则限制少、但法律责任不明确、监控机制缺乏。而学生伤害的处理方式，则包括：（1）学校的应急处置——包括救助、告知家长和报告政府等各种法定的处置职责；政府的调查和追究原因等。（2）协商处理的规则；（3）调解处理的类别、依据与规则；（4）法院诉讼的注意事项；（5）行政部门处理的方式方法等内容。中国学生伤害的鉴定和处理是一个

多方面、多途径、多手段的纠纷解决模式。

学生伤害的责任追究中应以什么为责任确定的依据。不同的侵权法归责体系导致不同的学生伤害事故归责原则。大量国外学生伤害事故归责原则集中在过错归责原则和过错推定归责原则的立法区别上。本文从抽象的民事责任归责理论导入学生伤害法律责任的归责原则。反对按无过错责任原则和公平责任原则作为学生伤害的归责原则。也不完全主张按过错责任原则归责。主张以“过错推定原则”作为学生伤害中确定学校责任的归责原则。即校方如不能自证对学生受伤害无教育管理和保护上的过错，就应对受害学生承担民事赔偿责任。监护人责任不由“过错推定原则”归责，而由“ 无过错责任原则”归责。其他国家关于学生伤害归责原则的不同立法，侵权归责原则的学术争论，证明按过错责任原则和无过错责任原则归责均不能客观地确定校方责任。而公平责任原则在法理上不应成立，它既不是学生伤害事故的归责原则，也不是侵权行为的归责原则，而是一种司法实践中损失的实际分担原则。它不应成为学生伤害对校方责任认定的归责原则。否则会造成校方与学生的权利义务不对称和不平衡。而针对校方责任的过错推定原则，则符合法理要求和客观上校方更近而家长更远地接触证据的情况，更符合立法的精神和对校方“教育保护义务”的督促意义，也有充分的立法依据。在校方责任的构成要件上，校方有过错、学生有伤害及二者之间具因果联系时，校方便应承担民事赔偿责任。不必苛求校方有无违法行为。因果关系的确定应采用原因力理论及采用一系列主客观标准。学校主观过失不仅要有事实上的因果，还应有法律上的因果时才能定责。在学生损害的认定上。校方过错的判断应采主观过错与客观过错的混合过错说。法律上应量化校方过错。贯彻这些原则，便能客观、公正、准确地断定具体案件中校方有无民事赔偿责任问题。

在前述理论指导下学校学生伤害中责任范围应量化和法定化。学校承担民事责任的法定范围含设施不当、保护不力、第三人过错等方面造成伤害的责任等。至于第三人致害中的校方责任则属“不真正连带责任”的性质。校方有四种法定情形不承担责任：在学生自行上学、放学、返校、离校途中发生的。在学生自行外出或者擅自离校期间发生的。在放学后、节假日或者假期等学校工作时间以外自行滞留学校或者自行到校时发生的。其他在学校管理保护职责范围外发生的事故等；校方有五种法定免责情形：学生或未成年学生监护人的过错所造成的事故。其他当事人的

过错所造成的。不可抗力、意外因素等引起的。教师及学校其他工作人员的非职务行为造成的。学生、教师及其他个人的故意犯罪行为造成。分门别类地对校方责任的具体案例作出实证分析，可指导实践中纠纷的处理。另外，校方法律责任含民事、行政和刑事等三种责任形式。

校园学生的精神伤害赔偿，是指发生于学校的对学生生命健康权、身体权、名誉权和隐权利益的侵害及精神健康的损害。这些损害有的来自教师、有的来自学生之间、也有的来自第三方。都应给予赔偿。其赔偿依据在于《民法通则》和《教育法》等。教育行政主管部门的相关规定还需与上述法律保持一致。对学生精神伤害的赔偿，在学校及管理者时应适用过错推定的过错责任原则归责；在学生之间时则适用过错责任原则归责。学校对教师的职务侵权、家长对被监护人对他人造成的精神伤害，均应承担赔偿责任。精神损害的赔偿方式既包括残疾赔偿金、死亡赔偿金和精神抚慰金，也包括恢复名誉、停止侵害、赔礼道歉等精神性赔偿。

学生伤害的保险投保旨在保障学生伤害责任的社会化分担、学校赔款筹措的商业化解决等问题。目的是减轻校方与学生家长的责任和损失。学生伤害保险制度必要性很大。学校责任险的推行和投保费用应由学校开办者承担（学校有条件的应自行承担、无条件的应由政府认证后由国家承担或社会单位承担）。学生伤害的赔偿应纳入到社会保障范围。学生意外伤害险则应由学生及其家长投保，但学校应以动员、协助、牵线搭桥的方式对待。不能强制学生投保。否则容易走向良好愿望的反面。但中国政府目前一味禁止校方介入学生平安险的武断作法阻碍了学生伤害的处置。故应正确地建立和对待学生伤害的保险，才能最彻底地治愈学生伤害纠纷的顽疾。

在综合分析、讨论上述现象、问题的基础上，采用实证分析与法理论证相结合的方法，对中国学生伤害事故的法律界定、法律关系、防范责任、归责原则、处置体系、保险推广等问题进行了全面分析与思考。提出了以下八个方面的新观点：①校园伤害应界定为学生伤害事故；②学校和学生的法律关系为教育管理的社会行政法律关系，学校对学生负有教育、管理、保护职责；③应建立学生伤害事故的防范体系，形成以学校防范、家长防范为主导，学生防范、政府各部门防范为重要组成部分的综合性的防范模式；④学生伤害事故归责原则应采用过错推定责任原则，实行举证责任倒置；⑤致害人应对学生物质性人格权损害给予精神损害赔偿；⑥应提倡协调处理并鼓励当事人自行协商解决的多途径、多手段并以司法处理为最终保障

的纠纷处理模式；⑦因学校的过错使第三人造成学生人身损害时，学校与第三人所负侵权责任性质上是不真正连带债务；国家应逐步将学校责任险纳入社会保障体系；⑧学校责任险应采用强制性的推行方式，保费由举办者负担；学生伤害险则应采用自愿投保、学校发动投保、保费由学生及家长负担的方式推行等。

Abstract

Accidents of student injuries is an objective phenomena involving rather complex legal relationships in practice. This paper focuses on how to coordinate the conflict of interests between school authority and injured students. By student injuries, we mean the injuries which students suffer from in campus. Without such definition, any relevant understanding, research, legislative suggestion and practice could not walk towards right path. In other words, a summery and classification of student injuries' characteristics will further distinguish the connotation and extension for the said injuries in accordance with special legislations.

To understand the legal relationship between school and students, we should clarify and analyze different viewpoints and comments on the legal status and duties of school, as well as legislation and the outcome of researches abroad. When it comes to China, the legislative is suggested to regulate the legal relationship of educational administrative protection. Unlike China's situation, in other countries this is a kind of social administrative legal relationship. The legislatures in other countries formulate laws and regulations for public and private schools separately. Thus, those various research achievements, for example, the Doctrine of Guardianship Relationship, the Special Authority Relationship Theory, the Contractual Relationship Theory, the Doctrine of Twofold Relationship, are not suitable to the actual situation in China. Other theories like Special Authority Relationship, Partial Social Theory and Doctrine of Importance are not acceptable in China either. In addition, some theories have theoretical omission or may be questionable. In this case, only the definition of educational administrative protection

relationship fits the status of Chinese school and students. It means that the school does not burden the guardianship duty to students, but a liability for the educational administration and protection. This point is also fully indicated in *The General Provisions of the Civil Law of the People's Republic of China* and other education laws and regulations.

The safeguard against student injury in China is extremely important. Those who fail to perform this obligation may undertake any civil liability on damages, as well as administrative or criminal liabilities when necessary. The parties concerned include the builders of schools, such as the country, community, the social organization or individuals; the school itself and it's staff or teachers, the related governmental agencies: public security, sanitation bureau, epidemic prevention agency, business administration, judicature system, education division etc, the students and their parents or other guardians, as well as other social organizations and units. All of them should assume their respective responsibilities. Under the aforesaid framework, each party has its detailed obligations and duties. For example, the school is responsible for any in-campus factors and the government and social organizations are responsible for any out-campus factors, while the parents and students for themselves. Only in this way can the prevention mechanism of student injury be carried out effectively.

The identification of student injuries includes identifications on commission from the involved parties, inspection and analysis by governmental administrative departments, and the judicial identification. Each of them has its characteristics and legal effect. Take the rule of proofing for example, if the parties concerned request an identification of student injury, they have to follow the general rules; while an administrative identification has lower limitations on proofing. However, an administrative identification also has its inherent disadvantages, as the legal liability is not clear and it seems lack of the monitoring mechanism. For the remedies of student injury, it usually includes: (1) school emergency measures including rescuing; informing the guardian, reporting to government or other legal responsibilities; governmental investigation, causation investigation and so on. (2) Rules for negotiation measures. (3) Regulations for intercession measures--its categories, basis and the rules. (4) Notes and tips for litigations. (5) Regulations for

administrative measures and so on. To this extent, the identification and remedies of student injury in China need a remedy mechanism with multi-aspect, multi-approach and multi- technique measures.

The rule of liability in student injury cases is another controversial issue. There are several rules of liability under tort law theories, which makes the problem in student injury rather complex. Many researches on the rule of liability in student injury discuss the rule of Intentional Torts, the rule of Negligent Torts and their legislative differences. While in this paper, a systematic survey and analysis on the traditional framework of civil rule of liability has been introduced to conduct this particular work in Student injury. According to the research, neither the rule of Strict Liability nor the rule of Fair Liability could be suitable for student injury cases. Moreover, the rule of Intentional Torts demonstrates some shortages in the prevention of student injury as well. As a result, it is better to judging the parties' responsibilities by the rule of Negligent Torts. In such situation, the school authority is not liable for any civil damage obligations to injured students, unless the school can self-proof its innocent in this injury accident. However, the responsibilities of guardians are much heavier than that of school authority due to an implementation of the rule of Strict Liability. As mentioned above, surveys on the various legislations and academic researches on the rule of liability in student injury in other countries have provided enough evidences that both the rule of Strict Liability and the rule of Intentional Torts failed to assess the legal liability of the school authority in a student injury case appropriately. For the rule of fair liability, the author regards it as a remedy of actual damage allocation measure in juridical practice only, which has little reasonability in legal theory. In other words, the rule is neither a rule of liability in student injury accidents, nor a reasonable rule of liability in the torts law theory. The implementation of such a rule in judging the legal liability of the school authority in a student injury case would undoubtedly leads to the asymmetry or imbalance on the rights and duties of two parties, namely, the school authority and the students. Adopting the rule of Negligent Torts to assess the legal liability of the school authority in a student injury case seems to be acceptable both in practice and in legislation. First, the implementation of rule is in accord with the fact that in a student injury accident, the school authority usually has more access

to find out any evidence than that of the parents. It also helps to improve the performance of school in education administration and other legal obligations. Second, when taking the legal requirements of the school authority liability into account, the school authority should assume responsibilities if the three requirements are satisfied. Whether the school authority conducts illegally or not, it is not necessarily required to test his liability. In this situation, the determination of causation should adopt the principle of causation power and a series of both objective and subjective standards. And the subjective negligence of school is not criminated with both causation in fact and legislation. In addition, for the remedy of mental damage of injured students, provision on the school authority's liability on the particular damage should be applied with a restrictive explanation, where it is liable for the mental damages only if the school creates an unreasonable and direct mental harm to students and caused serious consequences (the degrees of serious injury, disability or death etc). Therefore, the judgment of the liability of school authority should be realized as a mixture of both subjective and objective faults. This judgment can be measured quantitatively too. Problem of judging school authority's damage liabilities could be resolved under a fair, equal and true principle, with the benefit of applying those rules.

As a result of aboved analysis and discussion, it is possible to get a more quantitative and statutory definition on the liabilities of the student injury cases. Generally speaking, the statutory responsibilities of school may contain these responsibilities for damage caused by improper measures, deficient prevention or third person's mistake and so on. Nevertheless, the liability caused by a third party's fault is regarded as "presentational referred duty".Thus, there are four legal conditions in which the school authority has no responsibilities on injury accidents. The first type is the accident that happens on student's own way to school or home, the second is the accident that takes place when student are out of class during holiday, after-school time, or other spare times beyond school operation schedule. The third type is the accident when the injured student is asked to stay in campus but he escapes due to his own fault. And the four type is the accidents that occurs beyond the legal duties of school authority in their administration and prevention job. Furthermore, the school authorities may be exempted from undertaking any

responsibility in the following five situations: (1) It is the student himself or the underage student guardian's fault that leads to the accident. (2) It is other litigants' fault that leads to the accident. (3)The accident caused by force majeure, or other accidental factors. (4) The accident results from any teacher or other staff's non-duty behaviors. And (5) The accident is caused by intentional offence of either the student, the teacher or other individuals. An analysis on plenty of student injury cases and practices, according to such categorized statutory provisions respectively, will greatly contribute to the juridical practice. Moreover, another way to classify the legal liabilities of the school authority could be used to divide those liabilities into three forms, the civil, administrative and criminal liabilities.

Damages for mental injuries of students in campus refers to the compensation for the torts students suffer from in campus, such as health right, physical right, reputation right and privacy right and mental health. All these injuries caused by teachers, other students and the third party should be compensated pursuant to *General Principles of the Civil Laws of the People's Republic of China* and *Education Law*. The relevant regulations of education authority must be in accordance with the foregoing laws. Where school and its managers are responsible for the compensation for mental injuries of students, fault responsibility principle for fault assumption should apply; when such cases occurs among students, the liability should be determined by fault responsibility principle. The school should assume compenstation responsibility on the mental injuries caused by teachers' duty infringement and the injuries on other students by guardians. The compensation modes for mental injuries include disability damages, decease damages and mental condolence compensation and mental remedy for reputation recovery, request for stopping tort and apologies, etc.

As a part of the remedy research, this paper discsuses the insurance system of student injury as well. This insurance system is designed for the purpose of safeguarding the social reallocation of damage liabilities in student injury cases, and improving current finance problems caused by the refunding of damage remedies. Thus, the goal of this

system is to mitigate the school authority and the student guardian's responsibility and losses. To this extent, it is crucial to establish such a student injury insurance system. Not only the school, but also the students and their parents should participate in the process of insurance project. The school is asked to take the task of providing and extending the school liability insurance and assuming the insurance premium (If necessary, such premium could be assumed by governments or other social organizations). The compensation or damages could be funded under the social security mechanism. While the student accident insurance could be covered by the students and their guardians. But it does not mean that the school cannot forces students to cover insurance. Instead, schools are responsible for promotion, assistance and communication duties. Otherwise, this system would easily bring about unexpected results. However, the Chinese government currently inhibits school to join the personal accident insurance, which actually impedes the handling of student injuiry cases. Therefore, many schools are prevented from participating in students' life insurance. As one of the research conclusions, this paper highlights the function of insurance system in student injury. To improve the serious situation in China, it is urgent to establish an effective in-campus insurance mechanism and assure its sound operation.

This paper seeks to examine related issues of China's in-campus injury in both academic and practical research methods. Through a study on the above issues related to in-campus injury, the article analyzes the specific situation in China and comes to several advices, its legal relationships, the duty of prevention, the rule of liability, the system of treatment, and the promotion of insurance, etc. We hereby put forward the following eight suggestions: First, the term of injury should be clarified as the accidents of student injury. Second, the relationship of school and students is regarded as a kind of social administrative legal relationship of educational management, which means the school is liable to educate, manage and protect students. Third, an integrated safeguard system is crucial for prevention, which is organized in a way that the school and parents should take primary liabilities, while the students themselves and the government has their own responsibility as well. Forth, it is suggested that we should use the rule of Negligent Torts

as the rule of liability in such cases, when the onus probandi is converted. Fifth, the school is liable to any mental damages of the student's physical human right. Sixth, the model of remedy in those cases is supported by promoting a multi-aspect, multi-approach voluntary negotiation between parties where the power of judicature is the latest safeguard. Seventh, if the school is liable for a student's damage made by a third person's action, the tort responsibility of school and the person is a kind of presentational referred duty; and it is necessary to have the school liability insurance covered under social security mechanism step by steps. Finally, the school should adopt compellent methods to promote insurance system, and the schools' supporters are responsible for paying insurance premium. While the insurance against student' accident is a kind of voluntary one that should be covered by the students and their parents on the bassis of willingness. And such insurance should be promoted by the schools.