Theoretical Basis and Legal Analysis of Proportionate Joint Liability of Security False representation Disputes

Ruidan Wu*

China University of Political Science and Law, Beijing, China

*Corresponding author: 15020440304@xs.hnit.edu.cn

Abstract. The way that securities service institutions assume tort liability in securities false representation disputes is limited to joint liability by law. Considering the discretion principle of punishment according quantity of securities service institutions, proportionate joint liability appears in judicial practice. The proportionate joint liability, different from the proportionate liability regulated by other countries in comparative field of vision, is still joint liability in nature, which in China is mainly specified in the field of environmental tort disputes. It is especially expressed as the bearing joint liability in the cause force overlap section of the respective tort of semi-superimposed majority of people. According to the principle of analogy, environmental tort disputes and securities false representation disputes share some similarities in certain circumstances, which conforms to the requirements of the analogy, and enables to apply environmental tort proportionate joint liability to securities false representation disputes in an analogy manner. However, it is still necessary to keep alert of the deficiencies of proportionate joint liability. For the tortfeasor needed to bear the final responsibility, to define the scope and proportion still requires to further improve the legislation and judicial technology.

Keywords: False representation; proportionate joint liability; semi-superimposed tort; analogy explanation.

1. Introduction

Since the start of the second instance judgment of the China Security Co., Ltd case, the court creatively adopted proportionate joint liability to ordered China Merchants Securities to bear civil liability and joint liability for compensation within the scope of 25% of the security's false representation to China Security, and Ruihua Certified Public Account within the scope of 15% of the security's false representation civil liability of joint liability for compensation. Since then, in the cases of Wuyang Debt and Kangmei Pharmaceutical, the proportionate joint liability has been recognized and photo applied by other courts.

In the securities false representation dispute, in most cases, the securities service agency and the issuer constitute the tort committed by several persons without meaning connection. According to the regulations of Civil Code of the People's Republic of China on the tort committed by several persons without meaning connection, if each person's tort is sufficient to case overall damage, the tortfeasor shall be jointly and severally liable. If each person's tort is insufficient to cause overall damage, and the proportion of the liability can be determined, then each of them shall be held equally liable. However, in the above provisions, it is difficult to peep into the legal origin of proportionate joint liability, and its theoretical basis and legal sources are very worth discussing. This paper tries to arrange and analyze the above from the perspectives of the concept source, component, and filling the legal loopholes by analogy of proportionate joint liability.

2. Evolution of the Liability Rules of Securities Service Institutions in Securities False Representation Disputes

In the securities market, security service institution is often known as the "gatekeeper" [1] and in the tort liability system, it is known as the "expert" whose work is based on specific professional knowledge or skills, and services for the clients are provided through inspection, testing, opinions and other methods. As a result, the identification of negligence also needs the use of legal provisions, expert witnesses, identification and other professional identification methods [2]. According to the objective criteria adopted by the Civil Law of China, the experts' practice behavior and practice standards have the corresponding industry specifications, and their responsibility is also limited to the scope of work and professional field of their major. The duty of verification and the level of care within its field of expertise is a "duty of special care". In the case of violation of the "duty of special care", the securities service institution will be identified as at fault and bear the corresponding tort liability.

2.1 Evolution and Application Conflict of the Legal Rules of Securities Service Institutions' Tort Liability

In the case of securities misrepresentation, there are repeated rules and conflicts in the rules of securities service institutions in the Chinese law. From 1998 to 2005, the Securities Law of the People's Republic of China changed the liability of securities service institutions in false representations from "joint and several liability for the responsible part" to full joint and several liability and the form of liability in the face of false representations made by securities service institutions is determined as the "all-or-nothing" [3] model at the law effectiveness level. The Provisions of the Supreme People's Court on the Trial of Civil Compensation Cases for the Tort of False Representations in the Securities Market (Law No.2,2022) revised in 2022, it also makes merely clear that the responsibilities of securities services are limited to their scope and areas of expertise, failing to clearly stipulate the liability form of securities service institutions to bear tort liability.

The securities services "all-or-nothing" attribution system has triggered discussions on the unfairness and excessive accountability that may cause inappropriate incentive of judicial practice for securities service institution [4]. Meanwhile, in the judicial practice case also appeared the case in the consideration of securities service fault degree on the basis of joint and several liability corrections, creation of securities service proportion of joint liability.

2.2 Judicial Practice

Combined with the current judicial cases, in practice, there are not only cases ordering securities service institutions to assume full joint liability, but also cases ordering securities service institutions to assume joint liability within the scope of some proportion.

In terms of full joint liability, the Huaze Cobalt and Nickel case (second instance) is taken as an example. The court thought that the key to judge whether the securities service institution shall be jointly and severally liable for all the losses caused to the investors by the false representation of the listed company is whether the agency "knows or should know" of the listed company’s false representation. Public accounting firm, as a professional auditor, “should know” the false representations. If it fails to find a major fault, it shall bear 100% joint liability for compensation.

For the proportionate joint liability, the case of China Securities second instance) is taken as an example. The court distinguished between the degree of subjective fault of accounting firms and the impact on investors' decisions, considering that the accounting firm did not jointly intentionally or knew that the relevant materials were false. However, the falsely recorded operating income accounted for 19.4% of the parent company in the financial report of the company in 2013. Plus the 3.7% caliber of the consolidated representations, the revenue recognition of the "Smart Stone Turn" project had a certain impact on the profit forecast, evaluation and transaction pricing, so the accounting firm shall bear joint liability within the scope of 15%.

As can be seen from the above two cases, on the one hand, the court is deeply affected by the joint liability concept under the system of the Securities Law of the People's Republic of China. On the other hand, there also appeared in the judicial practice the creative act of distinguishing the securities service fault degree and cause proportion division of responsibility to order the securities service agency proportion of joint and several liability innovations. But what is the source and legal basis of the ruling of proportionate joint and several liability? Is there the necessity of creating this type of responsibility? And how should the proportionate joint and several liability apply? No answer was given in the verdict.

3. Proportionate Liability and Proportionate Joint Liability

3.1 Appearance and General View of Proportionate Liability

Proportionate liability takes root in the theory of proportionate causality, which belongs to the concept of tort liability sharing under the Anglo-American law system. It refers to the proportionate tort liability based on the tortfeasor's tort behavior that may cause damage or partial damage or has the possibility of future damage [5]. The theory is to make up for the deficiency of the "all-or-nothing" compensation system established by the German Civil Code.

For the application of proportionate liability, courts in various countries mainly consider the following three bases to determine the proportionate liability. The first comes to the participation degree. For instance, in most human cases of environmental pollution, emissions of pollutants, the types of pollutants and the degree of pollution caused by them decides the proportion of the liability of each tort subject. Second, it is the degree of opportunity loss, that is, the "loss of survival opportunity" theory [6]. For example, in disputes over medical damages compensation, if the patient loses treatment or the chance to gain benefit due to medical negligence, the proportion of the lost opportunity is used as the basis for the calculation of the damage compensation for the patients. Third, it is the market share liability. The basis was first set by the case of Sindell v. Abbott Labs heard by California Supreme Court [7]. Because the available evidence failed to prove which of the company produced the product used by the plaintiff and caused harm, the court determined that all the companies were liable for damages in proportion to their market share.

In comparative field of vision, to define the concept of proportionate liability, non-domain laws tend to several liability. The difference lies in that the several liability only applies to common tort, and proportionate liability, in addition to apply to the majority tort, is also suitable for the liability allocation between the infringed and the tort. Thus, the applicable scope of proportionate liability is greater than the several liability, which is a type of proportionate liability in common tort [8].

3.2 Proportionate Joint Liability

Through the above analysis of proportionate liability, it can be seen that proportionate liability and proportionate joint liability do not belong to the same type of liability, and the essence of proportionate joint liability is still joint liability. China's judicial practice proportion of joint liability is mainly reflected in the Paragraph 3, Article for of The Supreme People's Court on the Interpretation of Several Issues of Applicable Law. Professor Lixin Yang called this provision of tort type Half-superimposed separate tort [9], specifically referring to that when in the number of separate torts, part of the tortfeasors' behavior is enough to cause all damage, and the behaviors of others are not, they should share the joint liability of separate tort on the cause of the force overlap part [10].

The semi-superimposed tort theory is an extension and supplement to the superimposed separate tort and separate tort. For example, in the case of pond discharge, A and B discharged pollutants into the pond respectively, and the discharge amount of A was enough to cause the death of all of the aquatic products of farmer C, while the sewage discharged by B would only lead to the death of some of the fish fry of C. How to determine the liability mode of A and B? Under the existing legal framework, the pond discharge case does not conform to the stipulation of the Article 1171, Civil Code of China, that is the situation that each cause force can cause 100% damage, nor conform to each cause force of Article 1172, but with a special performance of "100 + 50=100 cause force separate tort" [9]. Therefore, the semi-superimposed separate tort theory is to make up for the above pond discharge case in the application of law. When a tort has 100% of the cause of the damage, and another tort for the occurrence of the damage is only part of the cause force, at this time, the tortfeasors are responsible for the occurrence of the damage results. It shall be in the cause force overlap part of the joint liability. For the part not overlapped, the tortfeasor is liable [9]. The theory actually integrates

Articles 1171 and 1172 of the Civil Code of the People's Republic of China. "Taking joint liability in the part where the causes overlap" is the theoretical basis of proportionate joint liability.

3.3 The Conditions of Proportionate Joint Liability Shall Apply

According to the analysis of the half-superposition separate tort behavior, the applicable situation of the proportionate joint and several liability for the damage results is a half-superposition separate tort behavior, which specifically needs to meet the following requirements:

This tort belongs to the majority of the separate tort acts, that is, the number of the tortfeasors is more than 2. It is not applicable to a single tortfeasor situation.

It requires that several tortfeasors cause the same damage consequences The damage consequences are inseparable is one of the main differences between the semi-superimposed tort and Article 1172 of the Civil Code of the People's Republic of China.

The cause force is different. For the half-superimposed tort respectively, the cause force of partial competition and cooperation is the main factor between the superimposed tort and the tort respectively, that is, the cause force of one act is 100%, and the cause force of other acts is less than 100%.

The subjective fault form of the tortfeasor is intentional or negligence. It should be noted here that there should be no common intention between the tortfeasor, nor should there be no such subjective form of fault.

4. The Legality of Joint Liability of Securities Service Institutions

Whether half-superimposed tort, or proportionate joint liability, they are applicable to securities false representations under the framework of Chinese law which are lack of clear legal basis. In the cases where securities service institutions were ordered to bear proportional joint and several liability, the court avoided the reasoning and explanation of the applicable law, which in fact also reflected the embarrassing situation that proportional joint and several liability cannot be relied on in the application of the law. Due to the fact that at present, only paragraph 3 of Article 3 of the Supreme People's Court on the Interpretation of Several Issues Concerning the Application of the Law in Hearing Environmental Tort Liability Dispute Cases makes clear provisions on proportional joint and several liability, whether we can use the method of analogy, the Supreme People's Court on environmental tort liability dispute cases interpretation of applicable legal issues applicable to securities false representation disputes, set up the applicable proportion of legal path of joint liability is an attempt in the following analysis.

4.1 The Legal Basis of the Analogy to Application

The Securities Law of the People's Republic of China, and the Provisions of the Supreme People's Court on the Trial of Civil Compensation Cases for infringement of False Statements in the Securities Market (Law No.2,2022) only generally stipulate that the liability mode of securities service institutions is "joint liability", and the subjective form of intermediary institutions is intentional or negligence, the degree of fault and the cause force, etc. while the situation where the false statement of the issuer and the controlling shareholder is the main cause force, and the negligence of the intermediary agency is the secondary cause force is not clearly stipulated, which can be said to be that the current law has "open" loopholes. The "open" loophole occurs when the enactment law has no applicable rules for specific types of cases, although such rules should have been included for the purpose of the enactment itself [12]. According to the open vulnerability filling rules, can adopt analogy interpretation methods, and apply the existing legal provisions to cases with legal loopholes in the way of "similar problems and similar handling" [13]. Professor Xingye Yingyi thinks that analogy is applicable when "if accord with the fact of A, will produce the effect of X" is the premise. If the fact of A1 is generated, analogy will think that "although A and A1 are different, but they contain the common element A2. Because of A2, we should admit the effect of X, so the same effect will be produced on A1 too" [14].

4.2 Analysis of the Legality of the Analogy Application

4.2.1 Whether There Are Legal Loopholes

Securities false representation disputes exist in a kind of situation, that is: the issuer intentionally provide false financial information, exaggerated business performance and earnings, and securities companies, accounting firms and other intermediary agencies, after the verification of false financial information, for negligence, not diligently responsible, failed to verify the existence of financial fraud, lead to major omissions or errors. For such cases, if the subjective fault degree and cause force between the issuer and the securities service institution are not distinguished, and the securities service institution and the issuer are directly ordered to assume 100% joint and several liability, which indeed violates the judicial spirit of excessive punishment. The author believes that in such cases, there are legal loopholes.

4.2.2 Whether There Is a Similarity

First, the tort of securities false representation and environmental tort cases discussed in this paper undoubtedly belong to the legal relationship of most people's tort respectively. Both types of cases are at the same level in the legal relationship. For the legislative purposes, the legislation is designed to protect the victims and share the losses fairly and reasonably according to the size of the cause; once more. The tort characteristics of the securities false representation discussed in this paper are that the issuer intentionally performs the false representation behavior, and the securities service agency fails to find the false representation behavior due to negligence, which ultimately leads to the damage result, This kind of cases and the combination of environmental tort. The cause force of one behavior is 100%, the other behavior is less than 100%, and leads to the elements of the same damage result.

A question that must be explored in similarity is that the principle of no-fault liability applies to environmental pollution tort liability, and the presumption of fault applies for securities service institutions in securities false representations. Does this difference lead to the obstacle of similarity between the two types of cases? But the author thinks not enough, the fundamental characteristics of the two kinds of tort is small, the cause of environmental pollution force for pollutant emissions more and less, the cause of securities false representation is subjective fault degree, due to failure to diligently failed to verify the cause of the damage force, so whether there is a fault is only one of the elements of cause, even excluding the identification of fault, environmental pollution tort liability force as an important standard of attribution, this is consistent with securities false representation disputes in attribution method.

4.3 Reflections on the Joint Liability Ratio of Securities Service Institutions

Although proportionate joint liability reduces the scope of liability of securities service institutions to some extent compared with full joint liability, there are still some points to be cautious about:

4.3.1 The Scope of Final Liability for Proportionate Joint and Several Liability Is Still Unclear

Whether environmental tort cases or securities false representation cases, for the first according to the verdict bear the proportion of joint and several liability of the tortfeasor, whether the subsequent enjoy the right to recover from other tortfeasor, can recover the proportion of scope, whether there is a final responsibility between the parties, currently in theory and practice, remains to be further improved in legislation.

4.3.2 The Identification Method of Proportion and Size Needs to Be Improved

Securities false representation case characteristic is the complexity of cause force, such as for systemic risk and other factors cause losses, there has been the "multi-factor quantitative model" calculation method, through the "yield curve synchronous comparison method" check the amount of loss cases, this for the scientific definition of the tort damage liability is of great significance. However, it is a pity that the reasons of securities service institutions in securities false representations have no more scientific reasoning and demonstration in the existing judicial practice, which is usually decided by the judge by exercising his discretion. It is suggested to further explore the scientific identification of the liability of intermediaries from the perspective of probability and reason force, so as to reasonably determine the scope of the proportionate joint liability.

5. Conclusion

In the case that the existing legal system cannot solve the problem, the emergence of proportionate joint liability is of practical significance. However, as an innovative liability sharing mechanism under the tort liability law, its theoretical basis and superior legal basis still need to be reached a consensus by the academic circle, and the legislation and amendment work needs to be further accelerated. In addition, as a new form of liability, after several tortfeasors without meaning connection bear the liability for compensation respectively, how to divide the internal liability and how to recover each other is still a more controversial link in practice, which is waited to be clear and guided by the legislation. Only when the right scope is distinctively divided can proportion of joint and several liability in practice truly realize the purpose of clarify the liability of the parties.

References

[1] Brogaard J, Hendershott T, Riordan R. High frequency trading and the 2008 shot-sale ban. Journal of Financial Economics, 2017, 124 (1): 22 - 42.

[2] Japanese] Nengjian Shanjiu. On the Civil Liability of Experts: The significance of its theoretical architecture. Liang Huixing: Research on Civil Law Jurisprudence and Legislation (II), National School of Administration Press, 1999: 295.

[3] Fucong Chen. Damages for Loss of survival, causation and damages. Peking University Press, 2007: 182.

[4] Chun Zhou. False representation on securities issuance: identification and reflection on the fault liability of intermediaries. Securities Market Herald, 2021, 7: 70.

[5] Christopher H. Schroeder. Corrective Justice and Liability for Increasing Risks. 37UCLA L. Rev. 439 (1990).

[6] JH King, Jr. Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequence. Yale Law Journal (Yale LJ)1981, 90: 1353.

[7] James A. Henderson, Jr. Product Liability-Problems and Process (2ndEdition). Little, Brown & Company Limited 1992: 199 - 200.

[8] Yan Jing. Research on proportionate Responsibility. Doctoral dissertation of Wuhan University, March 2019: 9 - 10.

[9] Lixin Yang. The Creative Play of the Judicial Interpretation of Environmental Tort on separate tort Rules: The Interpretation of the Article 3 of the Supreme People's Court on Several Issues concerning the Application of the Law in Hearing Environmental Tort Liability Dispute Cases. Journal of Law Application, 2015, 10: 31 - 34.

[10] Lixin Yang. The Tort Liability Law. Law Press, 2021: 110.

[11] Lixin Yang, Ying Tao. On separate torts. Academic Journal of Jinyang, 2014, 1.

[12] [German] Karl Larenz, Legal Methodology. Translated by Jiazhen Huang, the Commercial Press, 2020: 473.

[13] Liming Wang. Legal Methodology: From the Perspective of the Application of Civil Law. China Renmin University Press, 2021: 489.

[14] [Japanese] Jingshang Yingzhi. The General Provisions of the Civil Law. Facao Tongren, 1998: 174.