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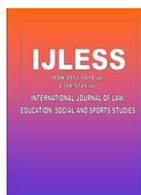
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## **ON WHETHER THE PRESUMPTION OF FAULT CONSTITUTES A REVERSAL OF THE BURDEN OF PROOF**

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### **ABSTRACT**

The term "reversal of the burden of proof" is frequently mentioned in both substantive and procedural law, but it seems to have different connotations in these two distinct fields. This paper takes the fault element in the presumption of fault liability as a starting point to explore the essence and true meaning of the presumption of fault liability. It also discusses the issue of the reversal of the burden of proof from the perspectives of subjective proof responsibility and objective proof responsibility. Through an analysis and comparison of these two perspectives, the paper ultimately reaches a conclusion regarding whether the fault element in the presumption of fault liability constitutes a reversal of the burden of proof. By clarifying the differences in understanding the reversal of the burden of proof between the substantive law field and the procedural law field, it aims to establish a clear relationship between the presumption of fault liability and the burden of proof in litigation, thereby better utilizing the role of the presumption of fault liability.

**Keywords:** presumption of fault liability, subjective proof responsibility, objective proof responsibility, reversal of the burden of proof

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### **INTRODUCTION**

When we mention interdisciplinary legal studies, we often hear about the integration of law with disciplines such as sociology, political science, and economics. We also come across intersections between criminal and civil law or administrative and civil law. However, the intersection between substantive and procedural aspects is often overlooked and not given sufficient attention. Due to the current classification of disciplines and the background knowledge of legal studies in our country, the integration of substantive and procedural law is not smooth in legal research. The same legal concept may have different interpretations between substantive and procedural law, which poses significant challenges to interdisciplinary integration. Therefore, it is necessary to analyze and distinguish concepts related to substantive and procedural law that are approximate or interconnected.

#### **I. Problem Statement and Research Significance**

**A. Problem Statement:** The purpose of civil procedural law is to resolve civil disputes fairly, promptly, and economically.<sup>1</sup> To resolve disputes, it is essential to first determine responsibilities and allocate

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<sup>1</sup> Zhang Weiping: Civil Procedure Law (Fifth Edition), Beijing: Law Publishing House, 2019 edition, page 10.

them accordingly. As a result, various principles of responsibility attribution in substantive law have emerged. Therefore, in undergraduate legal education, identifying various principles of responsibility attribution and the specific principle of fault attribution in tort law is of utmost importance. Similarly, in the study of civil procedural law, the concept of burden of proof is often referred to as the "backbone of civil litigation."<sup>2</sup>Therefore, determining whether a particular method of attribution constitutes a reversal of the burden of proof is considered a fundamental aspect of studying this subject.

However, in my civil procedural law classes, the teachers believe that the existing situation of reversed burden of proof in China only applies to patent infringement litigation caused by the invention of new product manufacturing methods, where the burden of proof lies with the unit or individual manufacturing the same product using a method different from the patented method. Additionally, in cases of compensation for damages caused by environmental pollution, the burden of proof lies with the tortfeasor to prove the absence of a causal relationship between their actions and the resulting damages, based on legal exemptions. When discussing the presumption of fault in medical institutions defined by law, it is considered merely a principle of fault presumption in substantive law and not a reversal of the burden of proof in civil procedural law. However, they did not elaborate on the specific differences between the two, which left me puzzled. Therefore, I decided to conduct research on this issue.

In comparison, I found that scholars in substantive law and legal practice generally consider the principle of presumed fault in tort liability law as essentially a reversal of the burden of proof for the element of fault. Some researchers still advocate that presumed fault attribution is one of the ways to attribute fault, which means that the element of fault is still required as a constitutive element of the principle of attribution. The wrongdoer can still prove their innocence to avoid liability, effectively shifting the burden of proving the fault from the victim to the wrongdoer. In this sense, presumed fault is also referred to as a reversal of the burden of proof.<sup>3</sup>

Regarding whether the element of fault in presumed fault attribution actually reverses the burden of proof, I received two completely different answers from scholars in civil procedural law and substantive law. What is the answer to this question? Why do scholars from different fields have such contrasting views on this issue? What is the relationship between presumed fault attribution and the reversal of the burden of proof?

### *B. Research Significance*

The essence of legal studies is to explore the answers to legal questions using a specific knowledge system that examines legal phenomena through concepts and principles. It is a practical discipline characterized by a professional knowledge system and a language that is calm, rigorous, concise, and logical. Its purpose is to facilitate communication within the legal profession.

However, the concepts of presumed fault attribution and the reversal of the burden of proof, which are important in both the fields of substantive law and procedural law, suffer from a lack of unified understanding due to certain reasons. This inevitably hinders legal research, especially in the intersection of substantive and procedural law.

In recent years, the fusion of procedural law and substantive law seems less novel and is considered a matter of course by scholars. However, in the current legal system and the field of legal studies, the fusion of civil substantive law and civil procedural law is currently limited to the qualifications of parties, judgments on repeated lawsuits, and the relationship between burden of proof and tort liability law, without attracting sufficient interest from relevant scholars. Moreover, due to

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<sup>2</sup> [De] Leo Rosenbeck. *Burden of Proof*, Translated by Zhuang Jinghua. Beijing: China Legal Press, 2002, page 52.

<sup>3</sup> Wei Zhenying (Ed.). *Civil Law (7th Edition)*, Beijing: Peking University Press, 2017 edition, page 69.

factors such as disciplinary divisions and knowledge backgrounds, it is doubtful to what extent scholars in the fields of substantive law and procedural law in our country have effectively communicated. Through research on this issue, it is helpful to break down disciplinary barriers, demonstrate the achievements of interdisciplinary research, and enable the theoretical and practical circles in our country to truly recognize the inherent relationship between substantive law and procedural law.<sup>4</sup>

From a practical perspective, the burden of proof directly affects the success or failure of litigants. The system of burden of proof reversal is a special case compared to general rules of liability allocation. Properly applying this system has significant implications in civil litigation. Although the reversal of the burden of proof is frequently applied in civil litigation, the relevant legal provisions are extremely vague, with only a few articles in the "Rules of Evidence" and the "Tort Liability Law" serving as references, causing misunderstandings and confusion among many people who feel lost in their application. In actual judicial cases, judges either change the burden of proof in cases that do not fall under the reversal of the burden of proof, or they require the defendant to bear the burden of proof for only one of the legal elements. The lack of uniformity in legal provisions and changes in laws and regulations create inconveniences in the practical application process.

Moreover, applying the theoretical system of burden of proof reversal is challenging and many litigants are unaware of its existence, especially those without legal representation. Therefore, if the circumstances in which the burden of proof reversal applies are not clear, it will deviate from the original intention of this system. The purpose of the burden of proof reversal system is to protect the party in a weak position in litigation and strive to achieve substantive justice to the maximum extent.

Therefore, clarifying whether the rules of presumed fault attribution constitute a reversal of the burden of proof is directly related to the success or failure of the litigants and whether the system of burden of proof reversal can be correctly and appropriately applied.

## **II. Interpretation of the Burden of Proof**

In the description of the systems related to the burden of proof, a wide range of concepts are used. In the past, it was often referred to as "burden of proof" or "evidential burden," but in countries like Japan, the term "burden of proof" has become popular and widely accepted.<sup>5</sup> In the judicial interpretations of China's Civil Procedure Law, the term "burden of proof" is also used.

Generally, the term "burden of proof" is believed to have two meanings: one is a subjective burden of proof, which refers to the responsibility of the parties to present evidence and prove their claims in order to prevent the judge's bias from leaning against them during the litigation process; the other is an objective burden of proof, which refers to the responsibility of the party who bears the burden of proving the disputed essential facts when the case reaches the stage of argument and the essential facts are still uncertain. This objective burden of proof is essentially a risk of losing the case.

Initially, all these concepts could be used interchangeably, but over time, a certain conventional and specific meaning gradually formed. The burden of proof now refers to the substantive burden of proof, which is essentially a result-oriented responsibility. The widely accepted concept of burden of proof in civil procedural law refers to the situation where, if the litigation proceeds to its conclusion and the essential facts of the case are still uncertain, the party presenting the essential factual claims

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<sup>4</sup> Column on the Intersection of Substantive Law and Procedural Law: Focusing on Guiding Case No. 33, *Contemporary Law*, Vol. 32, No. 2, March 1, 2018.

<sup>5</sup> Zhang Weiping: *Civil Procedure Law (Fifth Edition)*, Beijing: Law Publishing House, 2019 edition, page 246.

must bear the corresponding risk of losing the case as allocated by the law. <sup>6</sup>This is the usual description of the objective burden of proof.

The key issue is whether our usual expression of the burden of proof refers to the objective burden of proof, the subjective burden of proof, or a combination of both. Therefore, it is necessary to examine the understanding of the substantive law, procedural law, and practice in different contexts regarding the meaning of "burden of proof."

#### *A. Understanding of the Burden of Proof in Civil Practice and Substantive Law*

Chinese law provides two different expressions for the burden of proof: "burden of producing evidence" and "burden of proof," or "who asserts, who proves." For example, Article 1230 of the Civil Code of the People's Republic of China states that in disputes arising from environmental pollution and ecological damage, the person responsible should bear the burden of proving the circumstances where they are not liable under the law or the absence of causality between their actions and the resulting harm. Article 90, Paragraph 2 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China states that if a party fails to provide evidence or the evidence is insufficient to prove its factual claims before making a judgment, the party bearing the burden of proof shall bear the adverse consequences. Additionally, Article 64, Paragraph 1 of the Civil Procedure Law of the People's Republic of China stipulates that the parties have the responsibility to provide evidence for their claims. This is what we usually refer to as "who asserts, who proves." In particular, the principle of "who asserts, who proves" seems to have become the direct expression of the burden of proof for most people in China.

The Civil Code of China and the existing laws on civil and commercial matters contain provisions regarding the allocation of burden of proof. Substantive law stipulates four ways of allocating the burden of proof: one is directly imposing the burden of proof on a party regarding a certain factual element; the second is providing an exemption from liability after proving a certain factual element; the third is stipulating that if certain essential facts cannot be proven, the party must bear the responsibility; and the fourth is implicitly specifying the burden of proof through indirect means, even if not directly using the term "burden of proof" or whether it can be proven or not. From the direct provisions of the substantive law on the burden of proof, it can be observed that either the parties are assigned the burden of proof or more commonly, they are required to provide evidence and face consequences if they fail to prove. This indicates that in China's substantive civil law, provisions regarding the burden of proof are made from a subjective perspective, and it is difficult to find any objective rules for burden of proof as emphasized in objective proof responsibility theories, particularly in handling cases with uncertain factual elements.

However, despite the various expressions in Chinese law, and even the creation of the term "burden of proof" by legislators in response to academic calls for an objective burden of proof system, the author believes that these expressions still refer to subjective burden of proof and do not truly establish an objective burden of proof system, lacking systematic construction.

This is because the crucial premise for the application of objective burden of proof is that the main facts of the case are in a state of uncertainty. If the facts of the case are determined, there is no room for the application of objective burden of proof. The provisions in Chinese law regarding burden of proof do not presuppose this premise; they only place requirements on the party making factual claims. If both parties provide evidence for their respective claims, it facilitates the court in determining factual issues.

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<sup>6</sup> Bi Yuqian (Ed.). *Law of Civil Procedure*, Beijing: China University of Political Science and Law Press, 2019 edition, page 220.

In judicial practice, it is rare to see explicit judgments based on the allocation of burden of proof. From the perspective of civil litigation in China, the courts frequently rely on subjective burden of proof as the basis for their judgments, while the use of objective burden of proof as a basis for judgment is extremely rare. The main reason for this is that although the state of uncertainty regarding objective facts does exist in practice, judges are reluctant to acknowledge this state of uncertainty. It seems that uncertainty represents a lack of judicial competence, so judges prefer to maintain an appearance of certainty and avoid acknowledging the state of uncertainty. Therefore, judges tend to emphasize the principle of "who asserts, who proves," and they only need to verify the claims made by the parties based on the corresponding facts. The root of this approach lies in the authoritarian nature of China's civil litigation model, which expects judges to determine right from wrong and assign responsibility. However, this positioning of judges undermines their neutrality. The author is more inclined to believe that in civil litigation, judges should examine and adjudicate based on the evidence provided by the parties, fulfill their duty to clarify and ensure the impartiality of judges.

In fact, the principle of "who asserts, who proves" contains a logical fallacy in that it incorrectly assumes that one party needs to bear the burden of proof for a specific factual element while the other party is exempt from that burden if the element is not present.<sup>7</sup> It is precisely because of this logical error that most scholars in substantive law believe that the principle of presumption of fault leads to a reversal of the burden of proof.

Furthermore, an essential aspect of objective burden of proof is that its allocation can only be predetermined by law and cannot be transferred. In contrast, subjective burden of proof can shift between the parties as the case progresses and as influenced by the judge's subjective opinion. In practice, judges often employ the reasoning of "shifting the burden of proof from the plaintiff to the defendant." For example, in the 2020 Annual Report of Chinese Courts, there is a case analysis titled "Determination of the Standard of Proof and the Transfer of Burden of Proof in Safety Obligations." In the section on violations of safety obligations, it cites the case of Guan v. Wuxi Green and Nourishing Hot Spring Farm Co., Ltd., stating: "The defendant, the party with safety obligations, failed to deny the occurrence of the accident in a timely manner and did not provide surveillance footage. Therefore, in the situation where the victim had already provided other sufficient indirect evidence, the burden of proof is shifted to the party with safety obligations, and they bear the burden of proving that the accident did not occur on their premises."<sup>8</sup>

From this, it can be seen that in practical application, judges do not consider the state of uncertainty as a prerequisite for applying the burden of proof. They consider it applicable to both indirect facts and essential facts, which are essentially issues of liability. Although the law makes predetermined allocations, the burden of proof can shift between the parties as the case progresses. Therefore, both the field of civil litigation and substantive law tend to interpret burden of proof as subjective burden of proof.

### ***B. Deepening the Understanding of Burden of Proof in Civil Procedural Law***

Early burden of proof, also known as the burden of adducing evidence, refers to the responsibility of the parties in specific litigation to present evidence to the court in order to avoid the risk of losing the case. <sup>9</sup>Since the birth of the theory of objective burden of proof in civil law countries, burden of

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<sup>7</sup> Wang Qian, Hermeneutic Analysis of "Who claims, Who Proves", *Journal of Zhejiang Shuren University*, Vol. 20, No. 4, July 2020.

<sup>8</sup> National Judges Academy, Judicial Case Research Institute of Supreme People's Court, edited: *Cases of Tort Compensation Disputes in Chinese Courts in 2020*, Beijing: China Legal Press, 2020 edition, page 71.

<sup>9</sup> Zhang Weiping: *Analysis of the Concept of Burden of Proof*, *Journal of Zhengzhou University (Social Science Edition)*, Vol. 6, No. 6, January 2000.

proof has been considered to have "dual meanings".<sup>10</sup> Therefore, it can be seen that objective burden of proof is a deepening of the theory of subjective burden of proof.

It is well known that judges cannot refuse to render judgments in civil cases. However, there may be two situations in civil cases: uncertain facts or uncertain laws. In the case of uncertain laws, judges can apply the law through various interpretive methods to make judgments. However, when the essential factual elements of a case remain in a state of uncertainty, judges face a dilemma, and that is when objective burden of proof comes into play. As German civil procedural law scholar Hans Puttfarcken stated, "The essence of objective burden of proof lies in its creation by legislation, thereby expanding the application of substantive law to the realm of uncertainty."<sup>11</sup>

Regardless of the party-oriented or authority-oriented models, situations where the truth or falsity of key facts is uncertain are always difficult to avoid, although they may be less apparent in the authority-oriented model. With the continuous advancement of trial reform, the scope of judges' authority to investigate evidence has gradually narrowed, and the occurrence of situations where the truth or falsity of key facts is uncertain will become more frequent. How to make judgments in such situations is a challenge that cannot be avoided but must be addressed in judicial practice. If the concept of objective burden of proof is not correctly established, attempts to establish the truth of the entire case in order to eliminate uncertainty will inevitably increase the burden of litigation, leading to delays in the proceedings. Conversely, if the issue of "uncertain facts" is ignored, it will be impossible to handle the case correctly. Therefore, it is of great theoretical significance and practical value to properly differentiate between the two types of burden of proof.

Today, in the field of civil procedural theory, objective burden of proof has become the widely accepted viewpoint. In any influential textbook on civil procedural law, when discussing burden of proof, it is universally assumed that the premise is the uncertainty of the truth or falsity of facts. In related research papers, the viewpoint of objective burden of proof is dominant.<sup>12</sup> Therefore, there is almost no dispute or controversy in the expression of burden of proof in the field of civil procedural law.

When explaining objective burden of proof, there is one premise that must be emphasized, which is that the essence of burden of proof is a disadvantageous consequence of losing a case, and this consequence only applies when the essential factual elements of the case remain uncertain. The allocation of burden of proof is predetermined by relevant laws. Therefore, there is no situation where burden of proof shifts back and forth between the parties during the litigation process.

Therefore, looking at the expressions of burden of proof in substantive law and civil procedural law, it can be seen that the two have completely different understandings of the term "burden of proof." This also constitutes one of the reasons why they have different answers to the question of whether the fault element of the principle of presumption of fault is reversed burden of proof. Why do the practical field and the field of substantive law persist in using subjective burden of proof, even though there is already a high consensus in the theoretical field that the essence of burden of proof is objective burden of proof? In the author's view, the reason lies in the fact that subjective burden of proof can provide clear and straightforward reasons for the court's judgment, which is something that objective burden of proof cannot match.

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<sup>10</sup> Wan Zhe, "New Differences in the Concept of Civil Burden of Proof", *Journal of Wuhan University of Technology (Social Science Edition)*, No.1, 2021.

<sup>11</sup> Hans Purweiting. *Modern Burden of Proof*. Translated by Wu Yue. Beijing: Law Publishing House, 2006.

<sup>12</sup> Li Hao, "The Concept of Burden of Proof -- the Departure of Practice and Theory", *Contemporary Law*, No.5, 2017.

The logic behind the court's use of subjective burden of proof is as follows: when a party requests the court to apply substantive law provisions that are favorable to them and asserts the favorable factual elements of the case, if the opposing party disputes these facts, the burden is on the party to present evidence to prove the truthfulness of these facts. If the party fails to provide evidence or if the evidence provided is insufficient, the judge cannot believe that the facts are true, and therefore cannot support the party's claims.

On the other hand, when it comes to objective burden of proof, explaining this theory to the parties is much more complex and difficult. The judge must first explain that burden of proof is a problem caused by the judge's application of the law and is not intended to regulate the behavior of the parties or their representatives in litigation. It is meant to guide the judge on how to make judgments when confronted with facts that are uncertain. Furthermore, the judge needs to explain what legal elements and essential facts are, and how the judge derives legal consequences based on the provisions of the law. Finally, the judge must explain what it means for facts to be uncertain, what situations fall under uncertainty, and why uncertainty arises in litigation.

The simpler and more straightforward a theory is, the more persuasive and convincing it is to people. Conversely, the more complex and convoluted a theory is, the more difficult it is for others to understand, even if that complex theory is far superior in terms of scientific and logical accuracy compared to a simple theory. Therefore, the practical field and the field of substantive law tend to favor simple subjective burden of proof rather than objective burden of proof.

### **III. Interpretation of the Principle of Presumption of Fault and Liability**

The principle of presumption of fault and liability means that within the scope of tort liability established by the Tort Law, the law presumes that the actor has acted negligently when committing the act.<sup>13</sup> Article 1165, Paragraph 2 of the Tort Liability section of China's Civil Code stipulates that when it is presumed by law that the actor is at fault and the actor fails to prove their innocence, they shall bear tort liability. Therefore, it is clear that clear legal provisions are necessary when applying the principle of presumption of fault.

#### *A. Meaning of Presumption*

Presumption refers to the process of inferring and determining another essential fact based on an existing fact. The fact used for inference is called the basic fact, and the fact derived through reasoning and judgment is called the presumed fact. Presumption includes both legal presumption and factual presumption.<sup>14</sup> Legal presumption is based on relevant legal provisions, and when a basic fact is established, it must be concluded that the presumed fact exists, regardless of whether the presumed fact objectively exists or is logically sound. On the other hand, factual presumption is based on the judge's experience and logic. It is a logical inference of presumed facts based on a basic fact, focusing only on logical consistency and not on objective existence. The presumption of fault liability described in the Tort Liability section of China's Civil Code belongs to the category of presuming the existence of fault based on the basic fact that the actor has not proved the absence of fault.

Currently, Chinese courts have many cases where facts are directly determined through presumption. The widely known "Peng Yu Case" is a typical example where factual presumption was applied in the first instance judgment. The focus of the case was whether Peng Yu had knocked down Xu, with both parties giving conflicting statements but no evidence to prove their claims. In this situation, the judge made a factual presumption based on an empirical rule to determine whether a

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<sup>13</sup> Wei Zhenying (ed.): "Civil Law (7th Edition)," Beijing: Peking University Press, 2017, p. 668.

<sup>14</sup> Wang Limin, Guo Minglong: "A New Discussion on the Principle of Liability Attribution in Civil Responsibility - The Evolution of the Fault Presumption Rule: Development of Modern Attribution Principles," "Law Forum" 2006, No. 1.

collision occurred between the plaintiff and the defendant. The judge reasoned, "According to common sense, the defendant was the first person to get off the bus, and he was most likely to collide with the plaintiff. If the defendant did not hit the plaintiff, there would be no need to help him. Moreover, after the plaintiff's family arrived, the defendant could have explained the facts and left, but instead, the defendant not only stayed but also accompanied the plaintiff and his family to the hospital, paying 200 yuan in medical expenses in advance. Based on everyday life experience, it is highly likely that this 200 yuan was paid as an advance for medical expenses. Taking all factors into consideration, it can be concluded that the plaintiff was injured after being knocked down by the defendant."

In cases of factual presumption, since there are no explicit legal provisions, the presumption becomes an exercise of judicial discretion. Due to differences in judges' knowledge background and value orientation, different judges may make completely different factual determinations and judgments. This not only raises concerns about incorrect factual determinations but also the potential damage to the principles of legal uniformity.

Judicial regulation of legal presumptions primarily involves governing how judges apply the rules of legal presumptions. Judges need to accurately analyze the facts of the case and determine whether the conditions for applying legal presumptions are met. If the conditions are satisfied, judges must ascertain the existence of presumed facts according to the rules of legal presumption. On the other hand, if the conditions are not met, judges cannot apply presumptions based on their own discretion.

Presumptions operate where the burden of proof ends. The main method of establishing facts in a case is through the presentation of evidence. However, when evidence is lacking, it leads to ambiguity in the determination of facts. In such cases, objective allocation of responsibility through evidence-proof is generally used to resolve the issue. This means that the burden of proving the facts that cannot be proven lies with the party who bears the burden of proof. However, there is a limitation to objective allocation of responsibility: it may result in a discrepancy between the judgment and the objective facts of the case. The unproven facts may indeed exist or be clearly discernible, but there may be a lack of effective evidence to prove them. Alternatively, the party with the burden of proof may be unable to prove the facts due to their status or limited access to resources. In such situations, relying solely on objective allocation of responsibility would result in obvious unfairness and contradict the principle of fact-based adjudication. Presumption is an attempt and effort to enable the case to be judged according to the objective facts in situations where evidence is insufficient, avoiding the predicament of relying solely on objective allocation of responsibility to establish facts.

### ***B. Is the Presumption of Fault an Independent Principle of Liability?***

Regarding the principle of liability in China's tort law, the academic community holds at least four theories: the single principle theory (which holds that only fault-based liability exists), the dual principle theory (which includes fault-based liability and non-fault-based liability), the tripartite principle theory (which includes fault-based liability, non-fault-based liability, and fairness-based liability), and the quadruple principle theory (which includes fault-based liability, presumption of fault liability, non-fault-based liability, and fairness-based liability). The core debate concerning the inversion of the burden of proof in the presumption of fault revolves around whether the presumption of fault is an independent principle of liability. If the presumption of fault is regarded as an independent principle of liability, then the essential facts of this principle would be the legal facts, actions, results, and causal relationships that can be presumed as faults. On the other hand, if the presumption of fault is not an independent principle of liability, then the essential facts of this principle would be the same as normal fault-based liability, i.e., the existence of fault, actions, results, and causal relationships. To address this core issue, it is necessary to comprehensively consider the basic principles of China's civil law, the functions of the Tort Liability section, and the latest legislative policy tendencies.

Firstly, from the perspective of legislative policy, China's latest Civil Code in the Tort Liability section inherits the consistent provisions of the previous Tort Liability Law. Article 1165 separately defines fault-based liability attribution and the presumption of fault attribution, without providing a separate provision for the presumption of fault. Therefore, the current legislative policy in China tends to view the presumption of fault attribution as a special circumstance of fault-based liability, rather than an independent principle of liability. Secondly, from the perspective of traditional tort theory, although various principles of liability attribution have emerged in modern times, it does not mean that fault-based and non-fault-based theories of tort liability are being undermined or moving towards diversification. The binary system of liability attribution principles has already taken shape in today's world, which is an undeniable fact.<sup>15</sup>

Therefore, considering China's legislative policy and the system of liability attribution worldwide, it can be concluded that the presumption of fault liability is not an independent principle of liability but rather a more specific circumstance within fault-based liability. Under this principle of liability, the essential facts of the relevant legal relationship remain the same as the four general elements.

#### **IV. Answers to the Questions**

Based on the previous discussion, the meaning of liability attribution and the presumption of fault have been clarified, and their respective points of contention have been determined.

Therefore, a comparison can be made with the previous interpretations to determine whether the fault element of the presumption of fault liability constitutes a reversal of the burden of proof.

##### ***A. Is the presumption of fault liability a reversal of the burden of subjective proof?***

Subjective proof is a form of liability based on behavior, which shifts during the course of the case based on the judge's subjective judgment. Its essence lies in the fact that parties present evidence to the court in order to avoid losing the case. In the presumption of fault liability, the wrongdoer bears the burden of proving that they are not at fault in order to avoid being presumed at fault and losing the case. This responsibility is also a form of behavioral responsibility to present evidence and can be understood as a form of subjective proof responsibility in procedural law.

However, it should be noted that the presumption in the rule of presumed fault is a legal presumption, and its greatest difference from factual presumption lies in whether the court is required to apply it forcibly. In factual presumption, the judge can rely on the principle of free evaluation to independently determine whether to apply the presumption based on their own logic and experience. In legal presumption, once the basic factual basis specified by the law exists, regardless of the judge's recognition, the presumption must be applied. This differs from the rule of transferring subjective proof responsibility. The transfer of subjective proof responsibility is a result of the court's temporary state of mind, which cannot be pre-allocated by the court. This creates a paradox. If the presumption of fault liability is considered as a transfer of subjective proof responsibility, it is equivalent to suggesting that the transfer of subjective proof responsibility is not determined by the judge's subjective judgment but rather by pre-determined legal provisions. This would substantially violate the principle of the judge's freedom of evaluation.

Moreover, this issue also falls into the logical fallacy caused by the "burden of proof on the party who asserts" in subjective proof responsibility. That is, one party bears the burden of proof for an affirmative claim, and the other party bears the burden of proof for a negative claim. In the context of the presumption of fault, it is manifested as follows: the wrongdoer needs to prove their lack of fault,

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<sup>15</sup> Wang Liming (ed.): "Civil Law (7th Edition)," Beijing: Renmin University of China Press, 2018, p. 604.

otherwise, they are presumed to be at fault; the victim needs to prove the wrongdoer's fault. This not only causes logical confusion but also confuses fundamental rules and principles.

Furthermore, factual presumption does not affect the objective burden of proof; it is merely the result of the judge's exercise of discretionary power. In other words, in the process of presumption, the judge requires the party with the burden of factual presumption to bear the objective burden of proof, while the opposing party plays the role of refutation or denial. This refutation clearly falls within the scope of subjective proof responsibility, thereby rendering the presumption of fact inapplicable. The purpose of factual presumption is to prompt the transfer of subjective proof responsibility, aiming to bring the facts back to an uncertain state through refutation. However, as mentioned above, the presumption of fault is a legal presumption, not a factual presumption.

In conclusion, due to the logical fallacy inherent in subjective proof responsibility and the different methods of transferring subjective proof responsibility compared to the presumption of fault liability, it is not appropriate to consider the fault element of the presumption of fault liability as a reversal of the burden of subjective proof.

### **B. Is the presumption of fault liability a reversal of the burden of objective proof?**

Objective proof responsibility is essentially a form of liability for the outcome, a risk of losing the case, and it is pre-allocated by law and does not shift. The party with the burden of proof presents evidence as the burden of proof, while the party without the burden of proof presents evidence as counterproof. When allocating the burden of proof, considerations of fairness, proximity of the parties to the evidence, and the degree of certainty may lead to the inversion of certain specific elements, such as the inversion of causality in environmental tort cases.

Some scholars argue that the fault element in the presumption of fault liability is the same as the inversion of causality in environmental tort cases, thus indicating a reversal of the burden of objective proof. However, due to the difference in timing between the two, they have different essential characteristics. In environmental tort cases, if causality remains uncertain after the conclusion of the case, the party responsible for proving the causal element, i.e., the wrongdoer, bears the risk of losing the case because of the legal provision for the inversion of the burden of proof. On the other hand, the timing of the presumption of fault is different. Taking the example of the presumption of fault for medical institutions as stipulated in Article 1222 of China's Civil Code, if the judge believes that the hospital meets the three conditions specified by law, fault can be directly presumed at the beginning or during the trial.

From the above examples, it is clear that the inversion of the fault element in the presumption of fault liability is fundamentally different from the inversion of causality. The presumption of fault occurs during the progress of the case, which is entirely different from the nature of objective proof responsibility as an outcome liability or the attribute of the risk of losing the case.

It should be reiterated that the presumption of fault is a legal presumption. From a comparative law perspective, even in U.S. law, it is believed that legal presumptions do not result in the transfer of the burden of objective proof. Rule 301 of the Federal Rules of Evidence (1975) states that in all civil proceedings, unless otherwise provided by Congress or the rules of evidence, a presumption imposes on the party against whom it is directed the burden of producing evidence to rebut or satisfy the presumption, but the risk of non-persuasion remains with the party who originally bore it in the trial process.

Therefore, it can be concluded that the presumption of fault liability does not involve a reversal of the burden of objective proof.

### **C. Conclusion**

Based on the above discussion, the presumption of fault liability is a pre-determined legal transfer, rather than a shifting of burden of proof between the parties based on the judge's subjective judgment. Furthermore, considering the logical fallacy inherent in subjective proof responsibility, it is not appropriate to consider the fault element of the presumption of fault liability as a form of subjective proof responsibility. Moreover, the presumption of fault occurs during the progress of the case, rather than being applicable only when the case ends with uncertainty. It is essentially a form of behavioral responsibility, namely, presenting evidence to prove one's lack of fault, and not a risk of losing the case. Therefore, the fault element in the presumption of fault liability should not be regarded as a form of objective proof responsibility.

In conclusion, the presumption of fault does not involve a reversal of the burden of proof.