# 20 世纪法学系列教材

总主编 曾宪义



# 意外事故、赔偿及法律

Atiyah's Accidents, Compensation and the Law (Sixth Edition)

(导读本)

[澳] Peter Cane 著 袁雪石 朱呈义 张国宏 编注

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中国人民大学出版社

## Atiyah's

# Accidents, Compensation and the Law

**Sixth Edition** 

**Peter Cane** 

Research School of Social Sciences Australian National University



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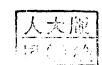
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## "21 世纪法学系列教材"总序

#### 曾宪义

斗转星移,人类社会纷纭复杂、充满变数的20世纪即将落幕,21世纪的黎 明已经来临。在这世纪更替、千年变迁之际,回顾人类社会不平凡也不平坦的发 展历程,我们为人类文明的辉煌成就而感到欣喜,也因社会进步的步履艰难而感 到沉重。自从摆脱动物生活、开始用双手去进行创造性的劳动、用人类特有的灵 性去思考以后,我们人类在不断改造客观世界、创造了辉煌的物质文明的同时, 也在不断地探索人类的主观世界,逐渐形成了哲学思想、伦理道德、宗教信仰、 风俗习惯等一系列维系道德人心、维持一定社会秩序的精神规范,更创造了博大 精深、义理精微的法律制度。应该说,在人类所创造的诸种精神文化成果中,法 律制度是一种极为奇特的社会现象。因为作为一项人类的精神成果,法律制度往 往集中而突出地反映了人类在认识自身、调节社会、谋求发展的各个重要进程中 的思想和行动。法律制度是现实社会的调整器,是通过国家的强制力来确认人的 不同社会地位的有力杠杆,它来源于现实生活,而且真实地反映现实的要求。因 而透过一个国家、一个民族、一个时代的法律制度,我们可以清楚地观察到当时 人们关于人、社会、人与人的关系、社会组织以及有关哲学、宗教等诸多方面的 思想与观点。同时,法律制度是一种具有国家强制力、约束力的社会规范。它以 一种最明确的方式,对当时社会成员的言论或行动作出规范与要求,因而法律制 度也清楚地反映了人类在各个历史发展阶段中对于不同的人所作出的种种具体要 求和限制。因此,从法律制度的发展变迁中,同样可以看到人类自身不断发展、 不断完善的历史轨迹。人类社会几千年的国家文明发展历史已经无可争辩地证 明,法律制度乃是维系社会、调整各种社会关系、保持社会稳定的重要的工具。 同时,法律制度的不断完善,也是人类社会文明进步的明显体现。

由于发展路径的不同、文化背景的差异,东方社会与西方世界对于法律的意义、底蕴的理解、阐释存有很大的差异。但是,在各自的发展过程中,都曾比较注重法律的制定与完善。中国古代虽然被看成是"礼治"的社会、"人治"的世

界,但从《法经》到《唐律疏议》、《大清律例》等数十部优秀成文法典的存在,充分说明了成文制定法在中国古代社会中的突出地位,惟这些成文法制所体现出的精神旨趣与现代法律文明有较大不同而已。时至本世纪初叶,随着西风东渐、东西文化交流加快,中国社会开始由古代的、传统的社会体制向近现代文明过渡,建立健全的、符合现代理性精神的法律文明体系方成为现代社会的共识。正因为如此,近代以来的数百年间,在西方、东方各主要国家里,伴随着社会变革的潮起潮落,法律改革运动也一直呈方兴未艾之势。

从历史上看,法律的文明、进步,取决于诸多的社会因素。东西方法律发展的历史均充分证明,法律是一门实践的科学。推动法律文明进步的动力,是现实的社会生活,是政治、经济和社会文化的变迁。同时,法律也是一门专业性极强的科学,法律内容、法律技术的发展,往往依赖于一大批法律专家以及更多的受过法律教育的社会成员的研究和推动。从这个角度看,法学教育、法学研究的发展,对于法律文明的发展进步,也有着异常重要的意义。正因为如此,法学教育和法学研究在现代国家的国民教育体系和科学研究体系中,开始占有越来越重要的位置。

中国近代意义上的法学教育和法学研究,肇始于一个世纪以前的清代末年。 清光绪二十一年(公元1895年)开办的天津大学堂,首次开设法科并招收学生, 虽然规模较小,但仍可以视为中国最早的近代法学教育机构。三年后,中国近代 著名的思想家、有"维新骄子"之称的梁启超先生即在湖南《湘报》上发表题为 《论中国宜讲求法律之学》的文章,用他惯有的富有感染力的激情文字,呼唤国 人重视法学,发明法学,讲求法学。梁先生是清代末年一位开风气之先的思想巨 子,在他的辉煌的学术生涯中,法学并非其专攻,但他仍以敏锐的眼光,预见到 了新世纪中国法学研究和法学教育的发展。数年以后,清廷在内外压力之下,被 迫宣布实施"新政"、推动变法修律。以修订法律大臣沈家本为代表的一批有识 之士,在近十年的变法修律过程中,在大量翻译西方法学著作、引进西方法律观 念,有限度地改造中国传统的法律体制的同时,也开始推动中国早期的法学教育 和法学研究。本世纪初,中国最早设立的三所大学——北洋大学、京师大学堂、 山西大学堂均设有法科或法律学科目,以期"端正方向,培养通才"。1906年, 应修订法律大臣沈家本、伍廷芳等人的奏请,清政府在京师正式设立中国第一所 专门的法政教育机构——京师法律学堂。次年,另一所法政学堂——直属清政府 学部的京师法政学堂也正式招生。这些大学法科及法律、法政学堂的设立, 应该 是中国历史上近代意义上的正规专门法学教育的滥觞。

自清末以来,中国的法学教育作为法律事业的一个重要组成部分,也随着中

国社会的曲折发展,经历了极不平坦的发展历程。在20世纪的大部分时间里,中国社会一直充斥着各种矛盾和斗争。在外敌入侵、民族危亡的沉重压力之下,中国人民为寻找适合中国国情的发展道路而花费了无穷心力,付出过沉重的代价。从客观上看,长期的社会骚动和频繁的政治变迁曾给中国的法制建设、法律进步事业带来过极大的消极影响,中国的法学教育与法学研究几乎遭受了灭顶之灾。直至70年代末期,以"文化大革命"宣告结束为标志,中国社会从政治阵痛中清醒过来,开始用理性的目光重新审视中国的过去,规划国家和社会的未来,中国由此进入长期稳定、发展的大好时期。以这种大的社会环境为背景,中国的法学教育在20世纪的最后20年中获得了前所未有的发展机遇。

从宏观上看,经过20年的努力,中国的法学教育事业所取得的成就是辉煌 的。首先,经过"解放思想,实事求是"思想解放运动的洗礼,在中国法学界迅 速清除了极左思想及苏联法学模式的影响,根据本国国情建设社会主义法治国家 已经成为国家民族的共识,这为中国法学研究和法学教育的发展奠定了稳固的思 想基础。其次, 随着法学禁区的不断被打破、法学研究的逐步深入, 一个初步完 善的法学学科体系已经建立起来。理论法学、部门法学各学科基本形成了比较系 统和成熟的理论体系和学术框架,一些随着法学研究逐渐深入而出现的法学子学 科、法学边缘学科也渐次成型。1997年,国家教育主管部门对原有专业目录进 行了又一次大幅度调整,决定自1999年起法学类本科只设一个单一的法学专业, 按照一个专业招生,从而使法学学科的布局更加科学和合理。同时,在经过充分 论证的基础上,确定了法学专业本科教学的14门核心课程,加上其他必修、选 修课程的配合,由此形成了一个传统与更新并重、能够基本适应国家和社会发展 需要的教学体系。再次,法学教育的规模迅速扩大,层次日趋齐全,结构日臻合 理。据初步统计,目前中国有330余所普通高等院校设置了法律院系或法律专 业,在校学生已达6万余人。除本科生外,在一些重点大学、全国知名的法律院 系,法学专业硕士研究生、博士研究生已经成为培养的重点。

众所周知,法律的进步、法制的完善,是一项综合性的社会工程。一方面,现实社会关系的发展、国家政治、经济和社会生活的变化,为法律的进步、变迁提供动力,提供社会的土壤。另一方面,法学教育、法学研究的发展,直接推动法律进步的进程。同时,全民法律意识、法律素质的提高,则是实现法治国理想的关键的、决定性的因素。在社会发展、法学教育、法学研究等几个攸关法律进步的重要环节中,法学教育无疑处于核心的、基础的地位。中国法学教育过去20年所走过的历程令人激动,所取得的成就也足资我们自豪。随着国家的发展、社会的进步,在即将到来的21世纪,我们将面临更严峻的挑战和更灿烂的前景。

"建设世界一流法学教育", 任重道远。

首先,法律是建立在经济基础之上的上层建筑,以法律制度为研究对象的法学也就成为一个实践性很强的学科。社会生活的发展变化,势必要对法学教育、法学研究不断提出新的要求。经过20年的奋斗,中国改革开放的第一阶段目标已顺利实现。但随着改革开放的逐步深入,国家和社会的一些深层次问题,比如说社会主义市场经济秩序的真正建立、国有企业制度的改革、政治体制的完善、全民道德价值的重建、环境保护和自然资源的合理利用等等,也已经开始浮现出来。这些复杂问题的解决,无疑最终都会归结到法律制度的完善上来。建立一套完善、合理的法律制度,当然是一项庞大的社会工程,需要全民族的智慧和努力。其中的基础性工作,如理论的论证、框架的设计、具体规范的拟订、法律实施中的纠偏等等,则有赖于法学研究的不断深入,以及高素质社会人才、特别是法律人才的养成,而培养法律人才的任务,则是法学教育的直接责任。

其次,21世纪将是一个多元化的世纪。在20世纪中叶发生的信息技术革命,正在极大地改变着我们的世界。现代科学技术,特别是计算机网络信息技术的发展,使传统的生活方式、思想观念发生了根本的改变,并由此引发许多人类从未面对过的问题。就法学教育而言,在21世纪所将要面临的,不仅是教学内容、研究对象的多元化问题,而且还有培养对象、培养目标的多元化、教学方式的多元化等一系列问题,这些问题,都需要法学界去思考、去探索。

中国人民大学法学院建立于 1950 年,是新中国诞生后创办的第一所正规高等法学教育机构。在半个世纪的岁月中,中国人民大学法学院以其雄厚的学术力量、严谨求实的学风、高水平的教学质量以及丰硕的学术研究成果,在全国法学教育领域处于领先地位,并已开始跻身于世界著名法学院之林。据初步统计,人大法学院已经为国家培养法学专业本科生、硕士生、博士生一万余人,培养各类成人法科学生 30 余万人。经过多年的努力,人大法学院形成了较为明显的学术优势,在现职教师中,既有一批资深望重、在国内外享有盛誉的法学前辈,更有一大批在改革开放后成长起来的优秀学术中坚。这些老中青法学专家多年来在勤奋研究法学理论的同时,也积极投身于国家的立法、司法实践,对国家法制建设贡献良多。

有鉴于此,中国人民大学法学院与中国人民大学出版社经过研究协商,决定结合人大法学院的学术优势和人大出版社的出版力量,出版这套"21世纪法学系列教材"。本套教材包括按照国家教育部所确定的法学专业核心课程和颁布印发的《全国高等学校法学专业核心课程基本要求》而编写的14门核心课程教材,也包括法学各领域、各新兴学科教材,及数部案例分析在内,共50本。我们设

想,本套教材的编写,将更加注意"高水准"与"适用性"的合理结合。首先,本套教材将以人大法学院具有全国影响的各学科的学术带头人领衔,约请全国高校优秀学者参加,形成学术实力强大的编写阵容。同时,在编写教材时,将注意吸收改革开放以来中国法学研究的最新的学术成果,注意国际学术发展的最新动向,力争使教材内容能够站在21世纪初的学术前沿,反映各学科成熟的理论,反映20世纪后期中国法学的水平。其次,本套教材主要供法学专业本科教学使用。因此,在编写教材时,我们将针对本科教学和新时期本科学生特点,将学术性、新颖性、可读性有机结合起来,注意运用比较生动的案例、简明流畅的语言去阐释法律理论与制度。

我们期望并且相信,经过组织者、编写者、出版者的共同努力,这 50 本法学教材将以其质量效应、规模效应,成为奉献给新世纪的精品教材,并以此作为庆祝中国人民大学法学院建院 50 周年的一份贺礼。

1999年9月

### Preface

It is 30 years since Patrick Atiyah wrote the first edition of this book, and about 15 years since I had the honour of being asked to assume responsibility for its future. When the first edition was published, Atiyah held a chair at the same institution to which I now belong. It seems an appropriate time for reflection.

The Preface to the First Edition contains the following passage:

This book is put forward then in the hope that it may lead university teachers to question the way in which tort syllabuses are drawn up... It is also put forward in the hope that even students tied to existing syllabuses will find something to arouse their interest in a more 'relevant' approach. It is put forward finally as a book which raises a number of fundamental questions about the legal system which require consideration if not answers from lawyers and non-lawyers alike.

The book was intended as a contribution to legal education and to social debate. It is probably true to say that the book has had more influence as a model for academic legal research and writing than on legal education, which is still largely concerned with the study of cases and statutes using analytical methods. This is inevitable so long as a law degree constitutes the basic training for practising law as a solicitor or advocate, and so long as an institutional distinction exists in legal education between 'academic' and 'practical' skills. This is not to say that analysis of legal rules is not important — my view is quite the contrary. However, 'the law' is a huge and enormously rich tapestry, of which legal doctrine is only one portion. The more pieces of the tapestry we study, and the more perspectives we adopt in doing so—analytical, experimental, historical, anthropological, statistical, etc — the fuller our appreciation of it will be.

So far as the social debate is concerned, the historical moment when the large themes of this book had most chance of radically changing the way we, as a society, deal with personal injuries and disability has passed — certainly for the foreseeable future, and perhaps for ever. Why, then, not let the book quietly pass away too? The answer is simple: the issues dealt with here are as important today as they were in

■ [英] 沙律师 在 15 世纪英格 兰的衡平法院、起草诉讼文 书和契据的工作由书记员担 任, 而对其他事务的法律代 理的需要促进了事务律师的 出现。沙律师为个人和团体 当事人提供服务。经过适当 培训后,他们也可以出庭代 理案件、但沙律师在法庭上 代理当事人案件的权利依然 受到相当大的限制。事务律 师的工作通常包括起草法律 文件、进行诉讼初级阶段的 准备工作,如提交相应的文 件和会见证人。出庭律师和 辩护律师通常不直接与当事 人联系,而是由沙律师代表 当事人对其进行指示。沙律 师将法律问题交给出庭律师 或辩护律师。

> 需要注意的是,solicitor (沙律师)和 barnister(巴律师) 多用于英国和一些英联邦国 多用于英国和一些英联邦国 多成地区,这与美国、加纳鲁尔 等国的律师师、初海明治法律师师、初高 多师等,若有有有一出庭律师,初高级 律师,专门出庭大律师等。 是依据陈忠诚教授和宋智教 授的规点,上述译别,不如翻译 为沙律师和巴律师。

1970, and an up-to-date and accessible discussion of them should continue to be available for anyone who is interested.

The rules of tort liability for personal injury are quite stable. Even so, it has been necessary to revise the chapters dealing with tort doctrine in a variety of ways. Also, I have taken the opportunity in this edition to rewrite much of the chapter on causation in order to make it clearer and to reflect changes in my thinking about the topic. Parts of Chapter 18 on the functions of compensation systems have been considerably modified, especially the section dealing with compensation. The most fluid part of tort law is that concerned with assessment of damages, and this is reflected in many small modifications to Chapter 6 to deal, for instance, with the new legislation on recoupment of social security benefits and the cost of NHS care.

Some topics covered in the book have witnessed radical change in the last 5 years. The new disability discrimination regime is dealt with in Chapter 14 and the 'modified tariff' criminal injuries compensation scheme, which came into operation in 1996, is described in Chapter 12. Social security is in a state of perpetual flux, and since the last edition there have been significant developments affecting the disabled (amongst others) in respect of both benefits and administration. More reforms were announced in the 1998 Queen's Speech, and the Welfare Reform and Pensions Bill was published in February 1999. Relevant provisions are noted briefly at appropriate places. The most sweeping changes of all have been (and continue to be) in the area of court procedure and the financing of tort claims. Completely new civil procedure rules for the High Court and the County Court come into operation in April 1999 at which point the term 'plaintiff' will be superseded by the word 'claimant'; legal aid is to be replaced by a new system of litigation funding administered by the Community Legal Services Commission, and in future, personal injury claims (other than medical negligence claims) will be ineligible for public funding; the rules governing conditional fee agreements have been changed to make them more attractive to plaintiffs; and so on. This edition has been prepared on the cusp of these various radical changes, and the treatment of them is inevitably provisional and partial.

Since the preparation of the 5th edition, I have moved from Oxford to Canberra. This has generated certain logistical problems. In overcoming them I have relied greatly on the Internet supplemented by two visits to England, for which thanks are due to the Australian National University. Professor Andrew Ashworth and Professor Nick Wikeley were kind enough to answer some specific queries thoroughly and promptly. The team at Butterworths defeated the tyranny of distance with exemplary courtesy and efficiency. I owe Professor Atiyah an enormous debt of gratitude for his support and inspiration over the years. As readers of the last pages of this edition will realise, we do not see eye to eye on all matters; and this being the third edition which I have prepared, there is now much in the book over which the original author has had no control and for which he bears no responsibility. Nevertheless, the fundamental message of this edition is the same as that of the first, and the major themes are unchanged.

PFC Canberra February 1999

- 国民卫生服务, 英文全拼为 National Health Service, 为具 有社会福利性质的公共医疗 制度。自第二次世界大战后, 20世纪50年代便开始实施、 迄今已有半个世纪之久。由 英国政府设立且资助的国民 卫生服务,包括两个层级的 医疗体系, 即以社区为主的 第一线医疗网 (Communitybased primary health care), 通 常为于社区驻诊提供医疗保 健的一般家庭医师 (General Practitioner, GP) 及护士, 第 二层则为 NHS 的医院服务 ( Hospital -based specialist services), 由各科的专科医师 负责并接手由 GP 所转介 (refer) 的病人,或处理一些 重大的意外事故及急诊者。
- ■《福利改革与年金法案》
- 社区法律服务委员会

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