



法学译丛·民商法系列

美国侵权法

[美] 文森特·R·约翰逊 著
Vincent R. Johnson
赵秀文 等 译

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AMERICAN TORT LAW

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中文版前言

为社会成员提供福祉是文明社会的一个基本前提。实现这一重任的一个重要方面是政府负有为公民提供可靠的制度的道义责任。公民可以凭借这些制度将因意外事件和其他侵权行为给其造成的损害降低到最低限度。

这些制度可以表现为多种形式。其中一种便是侵权法，它是由法院主导的，侵权行为的受害人从负有责任的侵权人处获得合理赔偿的法律制度。这种侵权法制度可以使受侵害人的健康得以康复，精神得以慰藉，活力得以恢复；同时，该制度使原本可以防止侵权损害发生的人承担责任。追求上述目标的法律制度不仅可以惠及受侵害的当事人及其家属，还可以使整个社会从中受益。

美国侵权法制度就是一个体现国家在对意外事件进行补偿时如何处理的样本。应该说，美国法律提供的不止是1个范例，而是51个范例。因为美国侵权法主要是州法，而不是联邦法。侵权法在50个州和华盛顿特区各不相同。

当然，有关侵权赔偿的法律基本原则在各州被广泛接受。然而，对于疑难问题，各州通常有不同的做法。所以，在学习美国侵权法时，学习者会从阅读对相同问题持不同观点的许多案例中得益，这将使学习者较容易地理解在选择有关影响侵权法的个人责任和社会责任的法律原则时的艰难。

侵权法是美国法律的一个重要组成部分。所有法学院学生都学习它，众多的律师以它为业，普通群众依赖于它的保护，商人们必须遵守它。不过，历史并不是如此。正如我在《人大法律评论》（创刊号）中所写的^①：

^① *Tort Law of America at the Beginning of the 21st Century*，载《人大法律评论》（总第一辑），237页，北京，中国人民大学出版社，2000。（译者注）

20世纪是美国侵权法重大转变的一个时代。在20世纪初,人身伤害和财产损害的受害人们仅得到很少的救济。依据一系列法学理论——其中某些理论的苛刻令人震惊——侵权之诉的原告们被美国的法院惯例性地拒绝救济。无责任原则、严厉的抗辩原则以及其他一系列豁免原则,剥夺了受害人大部分的补偿机会。在当时,保护商人利益的原则,工业化进程,对商业利润的追求等都使得因危险的机器、瑕疵产品和不安全的行为而受害的不幸的个人的救济权利被剥夺。

经历了20世纪之后,美国侵权法的面貌焕然一新。缓慢地,但是不可抗拒地,最终美国侵权法的每一个条文都被审查和重新书写。无责任原则的糟粕被去除:创立了许多无责任原则的例外;有时,无责任原则则被完全摒弃了。完全排除原告获得救济的抗辩事由依据比较过错原则得到修正;因此,在大多数情况下,原告至少能得到部分救济,即使原告自身有某种过错。完全免除某些特定种类的人和组织履行注意义务的豁免原则被全部或部分地废除了。今天,在21世纪之初,美国侵权法的总的精神是:所有人都负有行使合理注意义务以避免对他人可预见的损害发生的责任。与该精神背离的观点被视为离经叛道。

尽管在国内取得了成功,但没有人会认为其他国家应该整体地移植美国侵权法。和其他有关意外事件赔偿的法律制度相同,美国侵权法也有瑕疵和缺点,这些瑕疵和缺点源于历史事件、政治妥协和其他不幸的情况。并且,自然地,在规定调整意外事件赔偿的法律原则时,各国都必须尽量平衡各方利益以达到各国自己的社会公正之理念。

当然,美国侵权法提供的范例是不可能被忽略的。美国侵权法的原则对现今的美国社会作出了巨大的贡献:

作为阻吓手段,侵权责任在20世纪的美国对个人和组织的行为的影响是难以估量的……今天在美国,产品的制造和行为的行使是依据最大限度地降低意外损害发生的原则进行的。同时,不幸受害的个人有合理的机会通过法律途径获得补偿,因此,他们可以最大限度地生活恢复原状并继续生活下去。^①

^① *Tort Law of America at the Beginning of the 21st Century*, Renmin University Law Review (2000), vol.1, p.237.

另外，就美国侵权法对美国在 19 世纪和 20 世纪从发展中国家向发达国家迈进过程中所作的贡献作一比较研究，我们也许可以洞察中国在向 21 世纪迈进时同样会遇到的挑战。

作为富布赖特项目的访问学者，在 1998 年于中国人民大学教授美国侵权法期间，我非常高兴地发现我的中国学生们在理解美国侵权法的基本概念上有着惊人的能力。同样地，我在 2001 年应邀于山东大学讲学时也有同样的发现。因此，我有充足的理由来期待本书可以对中国建设自己的富有成效的侵权法律制度有所贡献。果真如此，本书将会实现我在美国出版原书（本书英文书名为：Mastering Torts）第一、二版时未曾预见的效果。

文森特·R·约翰逊

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圣玛丽大学法学院

法学院副院长兼法学教授

2002 年 9 月 7 日

Preface to the Chinese Edition

It is a fundamental premise of civilized society that a country should provide for the welfare of its inhabitants. One aspect of that weighty responsibility is the moral obligation of government to afford individuals reliable mechanisms through which they can minimize the adverse impact of harm caused by accidents and other wrongful conduct.

Such mechanisms might take many forms. One possibility is a tort system administered by courts through which the victims of injurious conduct may obtain compensation from those who, in fairness, should be held responsible. Such tort remedies can enable persons who have been injured to be healthier, happier, and more productive, while at the same time holding accountable those who were in a position to have prevented the harm. A system that pursues those ends can benefit not simply the injured individual and his or her family, but the general community and society as a whole.

The American tort system is one example of how a country might elect to deal with issues of accident compensation. Indeed, American law offers not just one example, but fifty-one, since in the United States tort law is mainly state law, rather than federal law. Tort rules differ in important respects among the fifty states and the District of Columbia.

Of course, the basic principles of American tort compensation are widely shared throughout the United States, but on difficult questions states may, and often do, elect to follow different paths. Thus, one who studies American tort law typically enjoys the benefit of seeing competing views laid side-by-side, making it easier to understand the difficult choices relating to personal responsibility and social accountability that inevitably shape any tort system.

Tort law in America is a major field of law. All law students study it, many lawyers practice it, ordinary persons depend on it, and businesses

must comply with it. That was not always the case. As I wrote in the inaugural volume of the *Renmin University Law Review*^①:

The twentieth century was a time of great change for tort law in America. At the beginning of the 1900s, victims of physical injury and property damage were afforded little in the way of redress. Under a variety of legal doctrines—some of which were almost stunning in their severity—tort plaintiffs were routinely denied recovery by American courts. No-duty rules, harsh defenses, and a wide range of immunities conspired to deprive injured persons of most opportunities to secure compensation. The prevailing rules protected the interests of business, the process of industrialization, and the pursuit of commercial progress by denying relief to the unfortunate individuals harmed by dangerous machines, defective products, and unsafe practices.

Over the course of the twentieth century, the legal landscape of American tort law was thoroughly transformed. Slowly but inexorably, virtually every feature of the American tort system was examined and reshaped. No-duty rules were eviscerated with exceptions and sometimes jettisoned entirely. Defenses which once totally barred recovery were modified in accordance with comparative principles so that in a wide range of cases at least partial recovery is permitted, even if the plaintiff has engaged in some form of misconduct. Immunities excusing certain classes of persons and institutions from the obligation to exercise care have been widely abrogated, in whole or in part. Today, at the beginning of the 21st century, the general rule in American tort law is that all persons are obliged to exercise reasonable care to avoid foreseeable harm to others. Doctrinal departures from this basic principle are viewed with considerable skepticism.

Despite its success at home, no one would argue that any other country should adopt the American tort system in its entirety. Like other accident-compensation regimes, the American tort law has flaws and weaknesses as a

① *Tort Law of America at the Beginning of the 21st Century*, *Renmin University Law Review* (2000), vol.1, p.237.

result of historical accidents, political compromises, and other unfortunate circumstances. And, naturally, in defining the rules governing accident compensation, each country must strike a balance that comports with its own notions of social justice.

Still it is hard to ignore the example set by American tort law. Those rules have contributed significantly to a rather remarkable state of affairs.

By way of deterrence, the expansion of tort liability in America during the twentieth century has had a tremendous impact on what persons and institutions do. . . . Today in America, products are made and activities are conducted in a way that greatly minimizes the risk of accidental harm. At the same time, persons who nevertheless suffer injury have a fair chance of obtaining compensation through the legal system so that they may put their lives back together and move on, as best possible.^①

As a Fulbright Scholar teaching American Tort Law at Renmin University in 1998, I had the pleasure seeing how remarkably able my Chinese students were in grappling with the ideas that are central to the American system of accident compensation. The same was true when I taught torts at Shandong University as a visiting professor in 2001. Consequently, I have good reason to hope that this book can contribute to the building of an effective tort regime in China. If it does so, the book will have fulfilled a much larger role than I envisioned when it appeared in its first and second editions in the United States under the title “Mastering Torts”.

Vincent R. Johnson

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St. Mary's University

San Antonio, Texas, USA

September 7, 2002

^① *Tort Law of America at the Beginning of the 21st Century*, Renmin University Law Review (2000), vol.1, p.237.

英文版前言

[此书英文版 *Mastering Torts* (2nd ed.) 由卡罗来纳州学术出版社于 1999 年出版]

《美国侵权法》是法学院学生的教科书。当然，本书对其他人员也有一定的参考价值。本书试图用明晰的、叙述性的语言阐述侵权法的基本原则。通过对支配侵权行为的基本规则的阐述以及对它们适用于具体案情的论述，《美国侵权法》为读者提供了掌握侵权法律制度的主要面貌的坚实基础。

在本书中，作者通过对两百多个案例的介绍和分析，进而对侵权法进行了阐述。这些案例及各案例的法院意见，经编辑后，都被收集在《美国侵权法研究》[*Studies in American Tort Law*, (SATL)] 第 2 版中。^① 使用 SATL 的学生们将会发现《美国侵权法》对他们特别有帮助，因为《美国侵权法》对如何将 SATL 收集的各个基本判例适用于对人身伤害或财产损失的受害人作出赔偿的庞大的法律机制作了一一阐述。使用其他案例教科书的同学们也会得益于《美国侵权法》，因为《美国侵权法》采取了传统的内容编排顺序并遵循了学习侵权法应当遵循的主流方法。本书中所讨论的许多案例被收集在 SATL 以外的其他案例教科书中，对这些案例的阐述旨在使读者能即刻掌握它们的要点。

然而，同学们不应该以为本书可以替代上课前对老师布置的案例的阅读和归纳，或者代替通过课后复习笔记和归纳侵权法主要内容而掌握侵权法的学习进程。相反，本书旨在对侵权法采用“辅导丛书”(horn-book) 的形式为上述学习侵权法的方法提供辅助。^② 同学们在使用本书时，可以在准备课程作业之前阅读《美国侵权法》的相关章节，因为它

^① Vincent R. Johnson & Alan Gunn, *Studies in American Tort Law* (Carolina Academic Press) (2nd ed. 1999).

^② 本书中所涉及的法律主张可以在第 2 版《美国侵权法研究》(*Studies in American Tort Law*) 一书中找到参考。该书引用了二千四百多个案例。该书采用的编排方式与本书相同。

为你的学习提供了方向，这可以使你比较容易地达到预习目的；同学们也可以在课后对所学内容进行归纳时，使用本书作为对先前的阅读和课上讨论内容的总结。

对许多重要的问题，本书还没有涉及。例如，本书对于公共政策在侵权行为规则的形成和适用中的作用只是略有探讨。此外，侵权法中的许多重要问题（如法律经济学派提出的一些问题）几乎全部被省略了。本书没有提及这些问题并非它们不重要，而是出于如下考虑：对多数学生而言，学习侵权法的最佳起点是对现行规则有一个比较清晰的理解。只有奠定了扎实的基本功，同学们才能更好地从事更加富有挑战性的工作，即何为法律的应然面目。

最后应当提及的是：对侵权法的掌握，取决于个人的努力。正如 John W. Davis，这位 20 世纪的法学家和政治学家所指出的那样：

个人自身的努力比任何学校为他所能提供的都更加重要。如果你勤奋努力，就能成为一个优秀的法律工作者……总之，世界上只存在着两种法律工作者：勤奋努力的和不勤奋努力的。

本书试图帮助那些愿意通过勤奋努力而成为优秀法律工作者的法学院学生：通过对本书的使用，使他们的工作更加卓有成效。

在此，我感谢 Notre Dame 法学院的 Alan Gunn 教授 [他同我合写了《美国侵权法研究》和该书的姊妹篇《侵权法的教学》（1999 年第 2 版）]。他审阅了本书的第 1 版并提出了很好的意见，Gunn 教授使我少犯了许多错误，并使我对许多问题都有了更为深刻的理解。

Sylvia Kim Rhee, Kristopher S. Walker, Alexis A. Schultz, Laura Ramirez-Cruz 在准备第 2 版的书稿中发挥了至关重要的作用。此外，Leslie Lipps, Sarah Zottarelli, Linda Chelvum 和 John Michael Pool 仔细地阅读了本书。对上述同学们的辛勤工作，我深表谢意。法学院院长 Bill Piatt 对本书的付梓出版也给予了大量的支持。我的秘书 Caroline Buckley 小姐打印了本书的全部手稿，并帮助我做了大量的编辑工作。我的夫人 Jill Torbert 是圣安东尼奥市的一位律师，她对本版的工作和先前的版本均给予了大力的支持，她从来没有对我利用许多周末时间进行写作而抱怨过。

本书第 1 版于 1995 年出版，在美国许多法学院中使用。1998 年我作为富布赖特高级访问学者，在中国教授美国侵权法期间，使用的也是

这本书。中国人民大学出版社正计划在中华人民共和国出版本书的中文译本。

本书谨献给尊敬的 Thomas E. Fairchild 法官。多年前，我曾很荣幸地做过他的书记员。他做过威斯康星州最高法院法官，美国联邦第七巡回上诉法院的法官、首席法官，以及美国法学会的理事。在过去的四十多年里，Fairchild 法官对于美国侵权法作出了突出的贡献，影响了在他身边工作的几代年轻的法律工作者。在如何将幽默感和自己的能力及职业感很好地结合在一起方面，他为年轻人树立了良好的典范。他是位最忠实于普通法传统的法官。

文森特·R·约翰逊

美国圣玛丽大学法学院
得克萨斯州圣安东尼奥市

1999年6月30日

Preface to the English Edition

American Tort Law was originally published in English by Carolina Academic Press, Durham, North Carolina, USA, under the title *Mastering Torts* (1st ed. 1995; 2nd ed. 1999). This is the preface to the second edition of *Mastering Torts*.

Mastering Torts is a book for law students—although perhaps others may find it useful as well. The book attempts to present in a clear, narrative form a doctrinal overview of the law of torts. By clarifying the basic rules governing tort liability, and illuminating their application to specific fact situations, *Mastering Torts* provides the reader with a firm understanding of the main features of the tort system.

Concise descriptions of more than two hundred cases are used as illustrations in *Mastering Torts*. Each of those cases was decided with an opinion which appears, in edited form, in the second edition of *Studies in American Tort Law*^① (SATL). Law students who are using SATL in their classes will find *Mastering Torts* to be particularly helpful, for it clarifies how each of the principal cases in SATL fits into the larger legal scheme for providing compensation to victims of personal injury or property damage. Students who are using other casebooks will also benefit from *Mastering Torts*, for it is organized along traditional subject lines and follows a mainstream approach to the task of learning torts. Many of the cases discussed in *Mastering Torts* appear in casebooks other than SATL, and

① Vincent R. Johnson & Alan Gunn, *Studies in American Tort Law* (Carolina Academic Press) (2nd ed. 1999).

they are described here in terms that allow their key points to be grasped readily.

No law student should think that *Mastering Torts* is a substitute for reading and briefing assigned cases before class, or for the process of consolidating one's knowledge of torts by reviewing notes and materials after class and building an outline of the subject. Rather, *Mastering Torts* is intended to supplement those efforts by providing a brief hornbook-style treatment of the law of torts.^① One possible approach is for a student to read the relevant sections of *Mastering Torts* before preparing class assignments, for it is usually easier to reach a destination if one knows where one is going. Another approach is to read *Mastering Torts* after class and before starting to work on an outline, as a means for clarifying the material covered in prior readings and class discussions.

There are many important issues which *Mastering Torts* does not address. For example, the role of public policy in the shaping and application of tort rules is only lightly explored, and many important perspectives on tort law (such as those offered by the law-and-economics school) are almost entirely omitted. The decision not to deal with those subjects in this book does not mean they are unimportant. Rather, it reflects a judgment that, for most students, the best place to begin the study of tort law is with a clear understanding of the current rules. Once that foundation is in place, students are better able to undertake the more-challenging task of considering crucial questions about what the law should be.

In the end, mastering torts is a question of personal effort. As John W. Davis, a twentieth-century lawyer-statesman, once said:

What [one] does for [oneself] is more important than what any school can do. . . . If you work hard, you'll come out quite [a] good lawyer. . . . After all, there are only two classes of lawyers in the world—those who work and those who do not.

① References to authority for the legal propositions advanced in *Mastering Torts* can be found in the second edition of *Studies in American Tort Law*, which cites more than 2400 cases. SATL follows the same pattern of organization as *Mastering Torts*.

This book is intended to help those law students who are willing to work to become good lawyers by making their tasks easier and more effective.

I am indebted to Professor Alan Gunn of Notre Dame Law School (my co-author on *Studies in American Tort Law* and its companion volume *Teaching Torts* (Carolina Academic Press) (2nd ed. 1999) for reviewing and commenting upon the first edition of this book. Alan has saved me from numerous errors, and has deepened my understanding of many subjects.

Sylvia Kim Rhee, Kristopher S. Walker, Alexis A. Schultz, and Laura Ramirez-Cruz played a key role in preparing the final manuscript for the second edition. Help with proof-reading was cheerfully supplied by Leslie Lipps, Sarah Zottarelli, Linda Chelvum, and John Michael Pool. I am very grateful to each of these students for doing fine work under difficult deadlines and to Dean Bill Piatt for his support of their work. My secretary, Ms. Caroline Buckley, typed the entire manuscript and helped with many related editorial tasks. Teresa Cottrell and Mercedes Elias provided help with computer matters. My wife Jill Torbert, a San Antonio attorney, facilitated both this project and the prior edition of *Mastering Torts* by never complaining during the many weeks when I disappeared while bringing the book to completion.

The first edition of *Mastering Torts* (1995) was used at law schools throughout the United States, as well as in China, where I had the pleasure of teaching American Tort Law to Chinese graduate students as a Fulbright Senior Scholar in 1998. Plans are now underway for China Renmin University Press to translate the second edition of *Mastering Torts* into Chinese for publication in the P.R.C.

Mastering Torts is dedicated to the Honorable Thomas E. Fairchild, a judge for whom I had the pleasure of clerking many years ago. As a Justice of the Wisconsin Supreme Court, a Judge and Chief Judge of the United States Court of Appeals for the Seventh Circuit, and a member of the Council of the American Law Institute, Judge Fairchild, over the course of four decades, has made a major contribution to the American law of torts. He has influenced more than a generation of young lawyers who worked in his courts by providing an example of how a member of the legal profession

can combine compassion with competence and professionalism with good humor. Thomas Fairchild has been a judge to the best traditions of the Common Law.

Vincent R. Johnson
St. Mary's University
San Antonio, Texas
June 30, 1999

作者简介

文森特·R·约翰逊教授自 1982 年以来一直在美国得克萨斯州圣安东尼奥市圣玛丽大学法学院任教，现为该院副院长、法学教授。他主要的研究领域是侵权法和律师职业道德，《美国侵权法》（英文全称为 Mastering Torts）是他在此领域出版的第三本著作，在此之前他还与他的同事共同出版了两本有关美国侵权法的学术专著。此外，他还在包括美国 Northwestern, Georgetown, Texas, Boston College, Missouri, Pittsburgh, Notre Dame, Fordham, Texas Tech 等大学的法学杂志上发表了多篇论文。

文森特·R·约翰逊教授毕业于 Notre Dame 大学法学院，获法学博士学位（J.D.）；后来在 Yale 大学法学院获得法学硕士学位（LL.M.）。他曾在纽约州最高法院工作，作为 Bernard S. Meyer 法官的书记员，以及为芝加哥的美国联邦第七上诉巡回法院首席法官 Thomas E. Fairchild 工作过，并曾作为美国华盛顿特区最高法院的工作人员。约翰逊教授还曾作为访问学者，在俄罗斯国立圣彼得堡大学 Vermont 法学院和中国山东大学法学院任教。

约翰逊教授还担任过圣玛丽大学法学院世界法律问题研究所所长达十年之久，在此期间，连续主持了每年在奥地利因思布鲁克大学举办的暑期班，美国最高法院一半以上的法官都为该暑期班授过课。

文森特·R·约翰逊教授是美国法学会的会员。他还是美国宾夕法尼亚州圣文森特学院的荣誉博士。他曾获奥地利因思布鲁克市文化艺术奖。作为富布赖特项目的高级访问学者，文森特·R·约翰逊教授曾在中国人民大学法学院任教，此后他曾五次访问中国，为中国 14 所大学法学院学生作过专题演讲。^①

^① 这 14 所大学是：中国人民大学、北京大学、清华大学、北京外国语大学、武汉大学、吉林大学、浙江大学、广东外国语大学、中山大学、厦门大学、海南大学、中国政法大学、苏州大学和南京大学。