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【英】阿拉斯泰尔·马里斯

【英】肯·奥里芬特

Alastair Mullis
& Ken Oliphant

侵权法

TORTS

第二版

2nd edition



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出版说明

1843年,来自苏格兰的麦克米伦兄弟在英国创立了麦克米伦出版社,筚路蓝缕,以启山林。一百多年来,这家出版社早已发展成为国际知名的跨国出版集团,以出版学术著作和高等教育教材而享有盛誉,其包括法学在内的人文社会科学出版物更是广有嘉声。

麦克米伦法学精要丛书是麦克米伦近年来重点推出的一套法学教材。风格明晰简约,内容深浅适中。丛书以方便学生学习为目标,阐发原理,评介法律;析解制度,品读案例;引导思考,提供练习。既适用于专业课程的学习,也有助于职业技能的改进,受到学生与教师的广泛欢迎。对我们非英语国家的学生和研究者来说,这样一套教材恰好是学习、了解英语国家法学和提高法律英语水平的极好读物。

法律出版社作为中国最大的法律图书出版机构,一直致力于法律图书的全品种出版。2002年,成立专门的法律教育出版中心,将服务于中国法律教育事业的发展引为重责。在从事法律教育出版的过程中,我们一直认为,中国学子不仅应该阅读中文法学教材,通过母语了解本土或域外法学知识,同时也应该眼界高远,进一步阅读外文学教材与文献,在原汁原味中学取域外知识,提升专业水平,适应日益全球化的现实需要。1999年,本社曾经出版英文影印本的美国法精要系列丛书,受到佳评。如今,我们再次引进这套麦克米伦法学精要丛书,影印出版,期冀于在中文教材之外,为广大学子和研究人员进一步提供优秀英文教材读物,谨献绵薄之力,给进步中的中国法治事业和进步中的中国年轻一代。

本书为《侵权法》。在我国,不存在一部独立的侵权法,也未形成对侵权法的一个明确的、普适的界定。而在侵权法已有其独立历史的英美法系国家,人们同样无法给出一个完整明晰的定义,直到今天还存在 tort 和 torts 的争论:即侵权法究竟是一个有着其基本规则和上位性原则的完整法律体系,还是一个囊括着众多各有其特征、情节与相应解决

方式的驳杂又散乱的百宝囊?

本书中,作者虽然清楚地认识到了侵权法固有的松散性,但他还是力图使此书成为一本分类明晰、体系完整的教材,所以在成书过程中,他采用了这样一种方式,即首先不去追问侵权法的经典定义到底如何概括,而是通过将侵权与刑事违法、侵权与衡平法权利以及侵权责任与其他民事责任的比较,使读者自然产生一个对侵权概念与范围的认识。这的确是一种对模糊问题简洁而又行之有效的处理方式。

本书在体例上大体可划分为三部分:第一部分讲述的是过失侵权的法律问题。它独立成章是因其在英国侵权法中占据着举足轻重的地位。本书在这一部分中着墨较多,引用了大量代表性的重要判例为佐证,尤其是在论述人身震颤(nervous shock, 一项侵权行为的起诉理由)和经济损失两项侵权事由时,引入了1996年赔偿法案(Damages Act 1996)和毁誉法案(Defamation Act 1996)两个最新法律文本的相关内容。本书的第二部分介绍了多种侵权起诉事由,根据侵权利益客体的不同予以分类,大致包括人身安全、私有财产、土地、住宅、名誉等等。值得一提的是,过失免责在每一部分中都有渗透,都对是否可将过失作为减免其侵权责任的问题作了探讨。由此,本书第一部分与第二部分也就得以更加紧密地结合。最后一部分介绍了侵权归责原则和救济方式,其特色之处是对转承责任的讲解。这一原则表面看来与英美法学的责任自负原则背道而驰,一直是学界争论的焦点。在如何建构其合法性的问题上,本书列举了大量的理论依据和现实原因。

本书是一本对侵权法的入门读物,并未涵盖所有侵权法的庞杂内容,而旨在以点带面地使读者对侵权领域有一个既清晰又概括的认识。本书论述的逻辑性较强,尤其注重课后对知识的回顾与总结。另外,本书在主体内容之前对涉及到的判例与法规作了详尽列举,以供读者参考。每章具体内容的组织也比较详尽与周全:首先第一小节基本上也是该章的导论;然后详尽地介绍主干内容,接着是对本章内容的小结;随后是相关的练习,最后还列举了所引用的书目、关键术语的索引,满足了读者不同的阅读需求。

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Preface

Torts make headline news. From mass disasters like Hillsborough and King's Cross to scandal-mongering in the popular press, torts are seldom far from the front pages. Yet, despite its human interest, the law of torts is notoriously difficult for students.

We aim in this book to provide an accessible introduction to the law of torts. We cover the basic principles of the law and examine them in the context of those torts which most commonly feature in degree courses. In doing so, we hope to stimulate thought about the complexities of the subject and about the law's role in society.

In this second edition, we have extensively revised the section on negligence in order to take account of crucial recent decisions in relation to nervous shock, economic loss and the liability of local authorities; important caselaw developments elsewhere have also been incorporated. New legislation considered includes the Damages Act 1996, the Defamation Act 1996 and the Prevention of Harassment Act 1997.

In preparing the new edition, we have benefitted greatly from discussions with many of our colleagues at King's and we thank them for their help and encouragement. We are also indebted to our external reader for his constructive criticisms. Others to whom we are grateful include Keith Povey and John Winckler. Alastair Mullis's special thanks are due to Camilla, Lara and Max for their love and support.

As in the first edition, 'he' and 'she' are used in alternating parts of the book to indicate persons of both genders.

We have endeavoured to state the law on the material available to us on 1 July 1997.

ALASTAIR MULLIS
KEN OLIPHANT

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