

法精要·影印本

West Nutshell Series

# 侵权法

第2版

## Torts



【美】爱德华·J·柯恩卡/著

EDWARD J. KIONKA



法律出版社



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**EDWARD J. KIONKA**

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## 总序

许传玺\*

在美国法律教育界与律师实务界,这套“美国法精要”是颇具特色的一套小书。这套书最突出的特点当推它们的简捷明快、深入浅出。每种书均由富有教学经验的法学院教授执笔,在三、四百页的篇幅内集中介绍某一法律部门的基本原理、主要法规和重点案例。

由于这些特点,这套丛书受到了无数美国读者的欢迎和喜爱。众多法学院的学生将这套书作为课外的辅助教材,由此掌握美国各主要部门法的精义。执业律师也经常借助这套书,以迅速了解自己尚未熟习的某些部门法,或者温习过去曾经学过的某些课程。

相信这套书也能赢得国内读者的欢迎。无论是法律专业的本科生、研究生,还是执业律师或其他人士,都能从这套丛书中获得有关美国法律的大量知识,对自己的学习和工作有所助益。此外,通过阅读原汁原味的英文来学习美国法律也应能提高读者的法律英语水平,促进与美国同行的对话和交流。

应原出版者的要求,这套丛书的国内版增加了中文前

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\* 哈佛大学法博士(J.D.),耶鲁大学社会人类学博士。

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言,以介绍美国各部门法的概况、每种书的内容及原书作者。这些前言作者都是在美国受过专业教育或从事专门研究的中国法律学者甚或专家。相信他们的介绍会对读者有所帮助。

Happy reading!

1999年4月  
于哈佛法学院

## 前言

龙卫球\*

为建构理想的近现代中国法律体系,我们的前辈抛弃了狭隘的本土意识和盲目自大意识,不只惟固有的传统,而追求变法图强,开创了借鉴、学习西方法律的局面,其用心实在于以中西之合璧,在现代化意义上复兴中华法系。中国民法建设一直是这个巨大变法工程的一个重要部分,因为它直接关系着中国社会的个人福祉。世界民法文化并无统一模式,那些发达国家在民法上呈现了多元化的特点。但是,既然要借鉴,我们就应该保持开放的心态和完全比较的立场,兼收并蓄,而不应该轻易地放弃对任何一个范例的研习。

美国法,尤其美国侵权法,是我们特别应该加以充分重视的一个范例。因为,它不仅浓缩了两大法系之一的普通法系的传统,具有人类法律历史中承前启后的典型示例意义,更为重要的是,它的发展代表了一种顺应社会潮流,勇于且善于合理革新的法律模式。在大陆法系,侵权法是民法之下的一个核心构成,它解决的是:在民事权利被侵害时,通过侵权责任方式救济、维护正常民事关系。由于特殊

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\* 中国政法大学副教授, Frank Irm Pierce 法律中心访问学者。

的英殖民地历史,18世纪末期取得独立的美国秉承了英国的法律传统,在法律分类上,没有概括意义的民法,只有具体的侵权法、财产法、合同法等。在法源上,美国也在传统普通法领域保持了以判例法作为主要法源形式的做法,美国侵权法即是这一领域的主要代表。

美国侵权法源自英国传统,因此,其基本框架和原则与英国侵权法一脉相承。美国侵权法继受了英国侵权法的“理性人”概念,一般侵权责任以是否逾越“理性人”注意义务为归责前提,当致害人违反“理性人”应尽的注意义务时,便构成“疏忽”或“过失”,应负侵权责任。在责任构成要件上,除“疏忽”要件之外,另有“损害”和“近因”二要件。美国侵权法也接受了英国法上的许多免责、不法阻却和其他例外规则。例如,有受害人过失时,区别其程度而引入“受害人单方过失”规则或“比较过失”规则,阻却或减却致害人责任;受害人也负有“积极避害”义务,不能就可以避免而未避免的损失部分获得损害赔偿。确认预定危险规则,如果不抵触公共利益或公共政策,当事人也可以事先以协议预定一定的疏忽范围,并约定于此范围减免或不予归责。正当的防卫和类似的行为也可以阻却不法。美国侵权法还继受英国法的许多传统的判例定型化所创造的具体侵权概念或类型,例如侵入(他人领地)、滋扰(土地持有人对土地的用益)和公共滋扰、殴打、攻击、不法监禁、毁损名誉等。

但是,美国侵权法经过数个世纪的发展,尤其是本世纪的突飞猛进,已经独树一帜,并且表现出最具有活力和最具有现代社会气息的特性。依当代美国著名侵权法专家马柯·A·富兰克林(Marc A. Franklin)所言,侵权法涉及的“是复杂社会的副成品——损害的放射,以及法律怎样反应由损害所产生的多样性问题”。美国是当今世界经济最发

达的国家之一,其社会损害也最具有现代社会的复杂特点:车辆碰撞、飞机事故、医疗事件、成品致损、工业事故、毒害、侵犯隐私、消费欺诈等等。美国侵权法在应付这些方面的挑战中,受到新的社会思想的启发,对传统的源自英国法的侵权法规则作了果断的革新。美国大动作地在有关新生损害领域放弃和软化对传统规则的适用,例如在产品致害领域,引入严格责任;在毒害和误医事故领域,开始松动甚至放弃对近因理论的援引,实现无因化。美国也积极适应人本思潮的呼声,拓宽侵权法保护的範圍,例如对“毁损名誉”等传统概念的空间加以扩展,承认并深化对隐私的保护以及将故意的旨在经济损害的诈欺和误导活动也纳入侵权范围。对一些严重的故意侵权类型,例如有胁迫、欺騙或恶意情形的,包括加利福尼亚在内的许多州都启用了惩罚性赔偿。近 20 年来,经济分析理论对美国侵权法也发生了不可忽视的影响。美国侵权法还遇到了一个其他国家侵权法所不及的尖锐问题,这就是与其他现代社会补偿形式的共存与替代问题。在最近的 20 年,其他社会补偿形式在美国已经得到戏剧性的发展。最新一个研究资料表明,在美国,就非致命的事故所带来的经济损失,其补偿来源,侵权损害赔偿仅占 7%(若计入对无形损害的侵权补偿,为 11%),其他均来自保险和他种补偿体系。这一局面,虽不能说明侵权法的功能削弱,但产生了一个如何在各种补偿形式的配合下,保持合理运用侵权责任形式的命题。美国侵权法绝妙地调和了侵权损害赔偿与各种补偿制度的并存关系。

爱德华·J·柯恩卡教授所著《侵权法精要》一书,是一本精心筹划的供美国法律学生和律师阅读的美国侵权法著作。柯恩卡教授是美国当代出色的证据学专家和侵权法权威,也是知名的法律教育家。他于 1962 年在伊利诺伊大学



获得 J.D. 学位,并于 1974 年在哥伦比亚大学获得 LL.M 学位。他有过长期的法律实践经验,也有丰富的教学经历,先后在密歇根大学、哥伦比亚大学、伊利诺伊大学等著名学府供职。1973 年始任教于南伊利诺伊大学法学院,1977 年被聘为教授,并于 1984 年任该法学院副院长,1995 年任执行院长。他发表了大量著述,其主要论著,除这本《侵权法精要》一书外,还包括《侵权行为研究论文集》(合著,安德森出版公司 1993 年版)、《90 年代的证据——判例、资料及问题》(合著,密歇尔公司 1991 年版)、《共同责任、多数人责任和雇主责任的法律新动向》(论文,载《路易斯安那法律评论》1994 年总第 54 辑)。其中,《90 年代的证据》一书已成为全美法学院校证据课的通用教材。

柯恩卡教授的这本《侵权法精要》共 6 部分 14 章,就美国侵权法的基本原则和基本框架进行了深入浅出的阐明。美国侵权法建立在判例法的基础上,内容广博,法源堆积如山,常令初学者有见树不见林的感觉。这本书便是一部未入深林前的导图。即使深谙判例的法律职业人士和学者,亦乐于通过阅读此书,以便把握复杂的侵权法的纲要。对于初习美国侵权法的外国学生和学者,此书显然更有妙用。本书力求准确、简明、全面。所谓准确,在于该书尽量减少作者个人的观点,而从学术界和职业实践的权威理解出发。因此,本书所依据的主要材料是权威判例尤其是主导性的判例和最新发展的判例、美国法律研究所的《侵权法重述》(第 2 版)以及美国学界的权威教材和论文。所谓简明,指本书为了追求提纲挈领的效果,舍弃了次要的概念和规则,只对主要的美国侵权法规则及其基本框架加以扼要阐明。本书也强调全面,并跟踪美国侵权法发展的新领域,因此本书特别扩充了一些他人侵权法著作通常没有涉及到的重要

内容,例如雇主责任涉及的铁路雇员和海员的特殊问题,胎儿受害的侵权责任问题,出售酒精饮料的侵权责任问题等。该书没有过多涉及产品责任问题,是因为这是本丛书中另外一本书的任务。当然,正如柯恩卡教授本人所言,本书虽然力图比较可靠地揭示美国侵权法,但它不能替代判例分析资料。这本书略掉的许多具体规则虽然不是基本规则,但确实是美国侵权法不可忽略的构成部分。这本书也省略了不同州法的差异性,而美国恰恰是由各个州个别作为独立的法域发展其侵权法的。但是,无论如何,读者通过阅读此书,必定可洞悉美国侵权法的基本点,而达到事半功倍的效果。

1999年4月于美国波士顿

## PREFACE

This book, like all others in the Nutshell series, is intended for anyone seeking a concise exposition or review of the basic principles of American law. Its main value, however, will probably be to first-year law students taking the course in torts, who are struggling to get a glimpse of the elusive "big picture" of which my former dean and colleague John Cribbet of Illinois so often spoke. (Every law student and lawyer should know his famous "big picture" story. See J. Cribbet & C. Johnson, *Principles of the Law of Property* xi (3d ed. 1989).)

This Nutshell, again like all others, must be used with caution and with a clear understanding of its limitations. Overall, I believe that it presents an accurate "big picture" of the subjects discussed. But many of the rules are subject to minor exceptions and qualifications which space does not permit to be mentioned. Some rules and subrules, not essential to an understanding of the basic principles, have been omitted altogether. Some hard problems are only alluded to. In addition, the tort law of every jurisdiction is a little bit different from that of every other, and each contains its own idiosyncracies, judicial and sometimes statutory. This text must not be taken as the law of any particular jurisdiction, but rather as a composite view.

## PREFACE

The law student would be well-advised to base his or her study of tort law primarily on other sources. There is no substitute for a careful analysis of casebook materials for a more thorough treatment and for a necessary perspective of tort law in action. And it would be wise to flesh out one's knowledge of the various areas by study of a more complete text, such as Dean Prosser's classic *Hornbook* (now Prosser & Keeton), and also of the Restatement (Second) of Torts. Reference to other sources available in the law library is sometimes necessary in areas where enlightenment seems slow to come. Nevertheless, it is my firm belief that law students (as all of us are) must have a clear view of the forest before they can truly understand and appreciate the various trees. I hope that this book will help to provide that overview, a solid structural framework of concepts to which the elaborations and refinements of ever more specific rules can be attached. May it serve as an entree into the proverbial seamless web.

No single *Nutshell* could do justice to all of tort law. This one's focus is the basic principles of liability, defenses, and damages. The volatile area of products liability, discussed briefly here, is the subject of a separate *Nutshell* (J. Phillips, *Products Liability in a Nutshell* (3d ed. 1988)). And the law governing the liability of those who provide medical services has been undergoing rapid growth and change, and there are important statutory developments in this area. See J. King, *The Law of Medical Malpractice in a Nutshell* (2d ed. 1986).

## *PREFACE*

On the other hand, I have covered some subjects not normally included in basic torts texts and courses (see e.g., Chapter 1 and §§ 8-14, 8-15, 8-21, and 8-22) because I believe that they are important to an accurate overview.

I am deeply grateful to all those—students, lawyers, and legal scholars—who have helped me learn about tort law and its processes, and to my colleagues, friends, and family who supported me in this project. Many thanks also to Southern Illinois University School of Law, which, as always, has provided excellent support and encouragement to faculty scholarship. And special thanks to Prof. James F. Meara, S.J., who helped edit the manuscript of the first edition and who taught me the difference between “inferable” and “inferrible.”

Portions of the Restatement of the Law, Second, Torts (copyright 1965, 1971, 1972, 1976, 1977, 1979 by the American Law Institute) are reprinted herein with the permission of the American Law Institute.

EDWARD J. KIONKA

Carbondale, Illinois  
January, 1992

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## EXPLANATORY NOTES

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The following notes may be helpful in using this book.

**Cases.** For obvious reasons, cases have been cited sparingly. In general, the cases cited are either (1) leading authorities on a particular point, (2) landmark cases, or (3) illustrative cases, particularly recent ones in developing areas.

Only the name, court of decision, and date are cited in the text. The full citation may be found in the Table of Cases. If only the name of the state is given, it is the highest court of that state.

**Restatement of Torts.** The Restatement of Torts, now in its second edition, has been particularly well regarded by the courts, and it is highly authoritative in most jurisdictions. Frequent references to it are given, but I have not cited every relevant section. Ordinarily it is cited where the provision or its comments provide further illumination of the point under discussion. Citations are to the Restatement (Second) unless otherwise noted. For simplicity and to save space, I use the form "R. § \_\_\_\_."

**Texts.** Texts and articles are cited only occasionally. It is generally agreed that the most authoritative and useful text is the Hornbook origi-

## EXPLANATORY NOTES

nally authored by the late Dean William L. Prosser, now in its fifth edition (Prosser and Keeton on The Law of Torts (5th ed.1984)). For convenience, it is cited as "Prosser." There is also a useful six-volume treatise, F. Harper, F. James & O. Gray, The Law of Torts (2d ed.1986). Texts on individual subtopics are also available.

**References to Parties.** For convenience and consistency, the terms "plaintiff" and "defendant" are used throughout to include not only persons who technically have that status (i.e., those who have brought suit or been sued) but also persons who *potentially* occupy one status or the other—one who has been harmed, or one who is arguably a tortfeasor. Also, plaintiffs and defendants are personalized by use of the pronouns which refer to natural persons (e.g., "he"), which should be read to include, where appropriate, legal entities such as corporations. And "he" and "man" are used throughout in a generic sense to include both men and women.

Where appropriate, the term "plaintiff" should be read to include one who was *fatally* injured. Technically, in such a case the proper term would be "plaintiff's decedent," since the plaintiff would be a living person or entity suing on behalf of the decedent's estate or beneficiaries. To conserve space, I will use the term "plaintiff" generically to mean the immediate victim of the tortious conduct.

### *EXPLANATORY NOTES*

The terms "injury" or "harm" include fatal injuries unless the context otherwise requires.

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# TABLE OF CASES

References are to Pages

---

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Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (Wash. 1932), 222

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Butler v. United States, 365 F.Supp. 1035 (D.C.Hawaii 1973), 302

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## C

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