

The Types of American Tort Law

美国侵权法的种类

A tort is a private, or civil, wrong in which the defendant's actions cause injury to a person or to property. 侵权是指被告对他人人身或财产造成侵害的个人违法行为或民事违法行为。 Tort law provides redress for wrongs between individuals, while criminal law seeks to punish offenses against the public at large. 侵权法旨在矫正个人间的过错行为，而刑法则是旨在惩罚恣意侵犯公众利益的违法行为。 A tort lawsuit involves only the persons involved in the tort; the state is neutral in regard to the outcome (unless, of course, the state is a party to the lawsuit). 侵权案件涉及到案件双方当事人，州政府对案件结果保持中立态度（州政府为案件一方除外）。 There are elementary dissimilarities between torts and crimes: 侵权和犯罪之间有一些基本的区别： (1) In the civil action of tort, the injured person himself initiates and maintains the lawsuit, whereas in criminal trials, the State prosecutes; 在民事诉讼的侵权案件中由受害人本人提起并维持诉讼，在而刑事诉讼案件中是由州政府提起公诉。 and (2) the goal of each differs. Criminal law seeks to prevent wrongdoing and to punish the miscreant (by incarceration and/or fine), while tort law aims to place the victim in the same position he would have been in if the tort had not occurred (by assessment of monetary damages). 两者的目的也不同。刑法为了防止不法行为，而通过监禁或罚款来惩罚不法分子，但是侵权法主要是为了补偿受害者在不发生侵权行为时可能获得的利益，因此以评估损害赔偿金的方式实施惩罚。

The same act often spawns both civil and criminal sanctions. 同一行为经常会同时导致民事和刑事处罚。 Suppose that you are loitering in the hall before class when, without provocation, Joe suddenly comes up and hits you in the face. 假设上课前，你在大楼里闲逛，没有任何的挑衅行为，突然，乔过来揍了你的脸。 Joe is subject to criminal sanctions for his attack. 乔就要为他的袭击行为承受法律的制裁。 However, you will also wish to file a tort action against Joe to recover money to pay for your new front teeth, your dentist's bill, your pain and suffering, and your mental anguish. 但是，你还可以对乔提起侵权诉讼来获取补牙的一切费用、你所遭受的痛苦以及精神损失。 The purposes of the two suits, which will be heard separately,

are different. 这两种诉讼的目的是不一样的，因此会被分开审理。Society is punishing Joe for his antisocial behavior in the criminal trial, while you are seeking money from him. 社会会在刑事审判中对乔的反社会行为进行处罚，同时，你可以向他要求经济赔偿。The usual remedy for tort liability is monetary reimbursement for the harm suffered. 对侵权责任的法律补救措施通常为对受害人所遭受的伤害进行一定金额的赔偿。

Tort law is fluid; it changes as society's values shift. 侵权法的内容和范围随着社会价值观而不断变化。New torts are today being recognized where no cause of action had previously existed, and the boundaries of tort liability are constantly in flux. 许多从未曾视为侵权的诉讼案件今天得到了承认。侵权责任的范围也随之不断变化。One example is the expansion of liability in regard to drivers who injure someone while intoxicated. 对司机醉酒驾驶致人伤亡的责任范围扩大就是一个例证。Traditionally, only the drivers themselves were responsible, but courts are now finding liable for damages employers who release their intoxicated employees to go home as well as drinking establishments whose customers leave and subsequently injure someone. 以前，醉酒驾车的司机对其行为造成的伤害负责，但现在法院裁定，若雇主明知其雇员醉酒却放任其回家，结果造成他人伤害的，雇主将承担损害赔偿。New cause of action may be created by the courts to provide remedies for perceived wrongs, or they may be established through statutory law by the various legislative bodies. 法院可以创建一些新的诉讼事由来对一些违法行为提供救济，或者这些行为也可以通过其他的法机关以成文法的形式创建救济。

Tort law establishes certain legal standards of conduct by which all members of society must abide and then provides a remedy when such a standard is violated. 侵权法建立了一些所有人都必须遵守的行为标准，这些标准一旦被破坏就要提供救济。It is primarily designed to protect three types of interests: (1) the person, (2) tangible property, and (3) intangible interests, including relational interests such as business, family, and social relations. 侵权法主要保护三种类型的利益：（1）受害人，（2）有形财产，以及（3）其无形利益，包括其经营活动、家庭及社会关系等相关利益。The person who breaches the standard of conduct is known as the *tortfeasor*. 违反该行为标准的人就是所谓的侵权人。Generally, the tortfeasor

cannot be held liable for damages unless he has violated the prescribed standard of conduct.一般来说，除非侵权者破坏了规定的行为标准，否则他就不需要承担赔偿责任。

The plaintiff in the suit decides on the theory of tort recovery and draws the complaint to reflect the theory. 诉讼中的原告确定侵权赔偿，并通过提起诉讼来获得赔偿。Each theory contains certain elements that the plaintiff must prove in order to collect damages from the defendant. 每项赔偿都包含一些要素，为了收集被告给原告造成的损害，原告必须证明这些要素的存在。 It is not unusual for a plaintiff to plead alternative theories of recovery, which may contain contradictory elements, in the complaint. 即使构成不同索赔方式的某些要素相互矛盾，原告仍可以其他方式提出索赔，这样的现象十分常见。 Then, through discovery, it can be determined which is the strongest, and the plaintiff then proceeds to trial on that theory. 然后，通过披露证据，可以被证明哪一种索赔方式最有力，然后原告就可以通过法庭来获取那些赔偿。 The only requirement is that defendants be given adequate notice in the complaint of the possible causes of action in order that they may properly prepare the defense. 侵权诉讼的要件之一即必须充分告知被告诉讼原因，使其能够正常准备辩护。

In our discussion of tort law, we will look at the concepts of negligence, intentional torts, strict liability, and product liability. 在对侵权法的讨论中，我们来看一下几组概念：过失侵权、故意侵权、严格责任和产品责任。

I. Negligence 过失侵权

Most injuries that result from tortious behavior are the product of negligence, not intentional wrongdoing. 大部分由侵权行为造成的损害都是过失侵权，而非故意的违法行为。 Negligence is the term used by tort law to characterize behavior that creates unreasonable risks of harm to persons and property. 过失侵权是侵权法中的一个术语，指对个人或者财产造成的一种无意识的损害风险的行为。 A person acts negligently when his/her behavior departs from the conduct ordinarily expected of a reasonably prudent person under the circumstances. 当一个人的行为与在此种情况下心智正常之人的行为相背离时，他的行为属于过失（行为）。 In general, the law requires jurors to use their common sense and life experience in determining the

proper degree of care and vigilance with which people must lead their lives to avoid imperiling the safety of others.通常来讲，法律规定陪审团成员须用其常识及生活经验来判断行为人是否具有判断并采取安全措施和阻止侵害他人行为的能力。

Not every accident producing injury gives rise to liability for negligence.并非所有的过失行为造成的损害都会引起责任。Some accidents cannot be avoided even with the exercise of reasonable care.一些事故即使是在合理的注意之下也是难以避免的。An accident that results from a defendant's sudden and unexpected physical ailment, such as a seizure or a blackout, generally relieves the defendant of liability for harm caused during his period of unconsciousness.有时侵害人意料之外突然发作的疾病（诸如晕厥等脑病）会成为侵害人对其在丧失意识之时造成的伤害减轻侵权责任的理由。However, defendants who have reason to know of such medical problems are expected to take reasonable precautions against the risks the problems create.然而，如果被告有理由知道这样的病理问题，他就被要求采取合理的预防来避免这样的危险发生。In some jurisdictions unavoidable accidents are called *acts of God*.在一些司法区域内，不可避免的事故被称作不可抗力。

Assumption of risk is another defense to negligence actions.自担风险是对过失侵权的另一个抗辩事由。This defense prevents plaintiffs from recovering for injuries sustained as a result of a relationship or transaction they entered with full knowledge and acceptance of the risks commonly associated with such undertakings.这种抗辩使得原告无法从损害中获得赔偿，这主要是基于一种关系或者交易，原告在设立这种关系或者交易时已经完全知晓并接受了这种风险或者做过类似的保证。Assumed risks include most of those encountered by spectators attending sporting events.自担风险包括大不多参见体育赛事的观众所遇到的损害。However, the law will not assume that individuals accept the risk of intentionally inflicted harm or damage, such as injuries resulting from assault and battery.但是，法律不会假设受害人有接受对其蓄意伤害或破坏的可能，例如由侵犯或殴打造成的伤害。

II. Intentional Torts 故意侵权

An intentional tort is any deliberate interference with a legally recognized interest, such as the rights to bodily integrity, emotional tranquility, dominion over property, seclusion from public scrutiny, and freedom from confinement or deception.故意侵

权是指任何对他人身体完整权、情绪安宁权、财产支配权、排除公众聚焦的隐私权、解除限制及防止欺骗权的干扰。These interests are violated by the intentional torts of assault, battery, trespass, false imprisonment, invasion of privacy, conversion, misrepresentation, and fraud.这些利益被蓄意的损害，方式有：侵犯，殴打，侵入，非法拘禁，干预他人私生活，非法占有他人财产，歪曲事实，以及欺诈。The intent element of these torts is satisfied when the tortfeasor acts with the desire to bring about harmful consequences and is substantially certain that such consequences will follow. 当侵权人的行为属有意造成上述伤害且能明确预见该行为导致的后果时，这就构成了侵权行为的故意因素。Mere reckless behavior, sometimes called willful and wanton behavior, does not rise to the level of an intentional tort.纯粹肆意的行为，有时称作故意行为，不能构成故意侵权的程度。

Under certain circumstances the law permits individuals to intentionally pursue a course of conduct that will necessarily result in harm to others.在一些情况下，法律允许个人有意的做一些可能会对别人造成损害的行为。The harm that results from such conduct is said to be outweighed by more important interests. Self-preservation is one such interest and is embodied in the right of self-defense.由上述行为造成的损害是为了保护更重要的利益。自卫是其中的一种，它属于正当防卫范畴。Individuals may exert sufficient force in self-defense to repel an imminent threat of bodily harm.在正当防卫中，个人可以行使与侵权相对应的暴力来防止对身体的侵害。Deadly force may only be used by persons who reasonably believe that their lives are endangered and for whom there are no reasonable means of escape. 只有那些确实存在生命危险的人，在没有其他方法可以逃脱的情况下才能使用致命暴力。Reasonable force, but not deadly force, may be employed in defense of property.在保卫财产安全时应使用正当的武力，而非致命的武力。

Consent is a defense to virtually every intentional tort. 自愿承担损害常常是故意侵权的辩护理由。The law will not compensate persons who knowingly allow someone to injure them. 法律不会补偿那些明确允许他人来伤害自己的人。However, consent must be given freely and voluntarily to be effective. 但是，自愿承担必须完全自愿，才能有效。Consent induced by coercion, duress, undue influence, or chicanery is not legally effective. 如果是由于受到强迫、威胁、不当影响或者蒙

骗而产生的自愿承担则不具有法律效力。Nor is consent legally effective when given by an incompetent person. 无民事行为能力人作出的自愿承担也不具有法律效力。Consent to intentional torts involving grievous bodily harm is also deemed ineffective in a number of jurisdictions.在许多司法管辖区，涉及严重损害身体的自愿承担也不具有法律效力。

III. Strict Liability 严格责任

In some cases tort law imposes liability on defendants who are neither negligent nor guilty of intentional wrongdoing. 在一些案件中，对于那些既没有过失也没有故意违法的行为，侵权法也要求它们承担责任。Known as strict liability, or liability without fault, this branch of torts seeks to regulate those activities that are useful and necessary but that create abnormally dangerous risks to society. 严格责任也称为无过错责任。侵权法的这个分支主要是为了规范那些有益的、也很有必要，但又可能对社会造成一些不寻常的危险行为。These activities include blasting, transporting hazardous materials, storing dangerous substances, and keeping certain wild animals in captivity. 严格责任包括的行为有：爆破、运输危险物品、存储危险物质及非法驯养野生动物。

A distinction is sometimes drawn between moral fault and legal fault. 道德过错和法律过错有时有所区别。Persons who negligently or intentionally cause injury to others are often considered morally blameworthy for having failed to live up to a minimal threshold of human conduct. 过失或者故意给他人造成损害的个人常常被认为在道义上应该受到谴责，因为他们都没有履行人类最低限度的行为。On the other hand, legal fault is more of an artificial standard of conduct that is created by government for the protection of society. 另一方面，法律过错更多的属于一个认为制定的行为规范，它由政府创设，目的是为了保护社会。

Persons who engage in ultra-hazardous activities may be morally blameless because no amount of care or diligence can make their activities safe for society. 从事过渡危险行为的人可能在道德上免于处罚，因为再多的注意和勤奋也依旧会对社会产生危害。However, such persons will nonetheless be held legally responsible for harm that results from their activities as a means of shifting the costs of injury from potential victims to tortfeasor. 若从事危险活动的行为人其活动造成他人伤

害，并且该危险活动使行为人从中获利，该行为人就必须承担侵权责任。As a matter of social policy, then, individuals and entities that engage in abnormally dangerous activities for profit must be willing to ensure the safety of others as a price of doing business.作为社会政策的问题，个人或者为了利益而从事不寻常的危险活动的个体必须确保他人的安全，这是他们应付的代价。

Consumers who have been injured by defectively manufactured products also rely on strict liability. 消费者因为使用生产者有缺陷的产品而受伤，同样也适用严格责任的规定。Under the doctrine of strict product liability, a manufacturer must guarantee that its goods are suitable for their intended use when they are placed on the market for public consumption. 在严格产品责任的原理下，生产者必须保证在将自己的产品放在超市进行销售的时候，这些产品必须能够满足预期的用途。The law of torts will hold manufacturers strictly liable for any injuries that result from placing unreasonably dangerous products into the stream of commerce, without regard to the amount of care exercised in preparing the product for sale and distribution and without regard to whether the consumer purchased the product from, or entered into a contractual relationship with, the manufacturer.侵权法要求厂商承担严格产品责任，即任何由其不合理的危险产品造成消费者的损害都要承担责任呢，而不考虑在产品销售和分类的过程中是否尽到了应该的注意义务，也不考虑消费者是否是从厂商那里购买的产品。

IV. Product liability 产品责任

Product liability comprises a number of laws and court rulings that apply to any business that makes or sells a product. 产品责任包含于许多法律和法庭规则中，这些法律和规则适用于产品制造和销售的商业活动中。Businesses that make or sell products are responsible for ensuring that those products are safe and do not pose a hazard to the public. 任何制造或销售产品的企业必须确保其产品安全，不得危害公众。Such businesses can be held liable for any damage or harm their products might cause.这些企业必须对自己产品所造成的损害承担责任。

According to *Section 102(2) of the Uniform Product Liability Act*, product liability includes “all claims or action brought for personal injury, death, or property damage caused by the manufacture, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of any

product.”依据 《统一产品责任示范法》第 102 节第 2 款，产品责任包括“所有由生产者的行为，包括设计、制造、准备、加工、组装、测试、警告、说明书、市场营销、包装或者产品的标签等造成个人的损害，死亡或者财产损失而应承担的所有的损害赔偿和履行行为。” Product liability issues have become increasingly important to manufacturers and marketing managers, due to the spread of the doctrine of strict liability and the adoption of new theories that permit recovery in so-called “delayed manifestation” cases. 由于严格责任理念的扩大和允许就所谓的延迟履行案件进行索赔，产品责任问题对于生产者和市场管理者变的越来越重要。

Because of their limited resources, small businesses must be particularly aware of their responsibilities under product liability laws. 由于资源有限，小型企业一并会在产品责任法的范围内特别注意自己的责任。 In addition to making safe products, this responsibility extends to prominently displaying warnings of any potential hazards on products and packaging. 除了制造安全的产品，这种责任还扩大到对要显著的列举产品和包装存在的潜在危险。 Experts recommend that small business owners consult with legal counsel experienced in the product liability field. 专家们建议，在产品责任领域，小型企业所有者可以咨询有经验的法律顾问。 An attorney can help the small business owner sift through the numerous federal and state laws that apply to different types of products. 律师能够帮助小企业的所有者认真审查大量联邦和州的关于使用不同类型产品的法律。 Small businesses are also encouraged to purchase product liability insurance. 政府也鼓励小企业购买产品责任险。 Unfortunately, the increasing number of lawsuits and large damage awards in this area have made such insurance very expensive and reduced the amount of coverage available. 不幸的是，随着侵权案件的日渐增多和索赔金额的日益攀升，企业在此方面的投保负担越来越重，而保险公司在此方面的投保范围也越来越窄。 In fact, the expense of insuring against product liability has prevented small manufacturers from competing in certain product areas. 事实上，产品责任保险的费用已经妨碍了小型企业在一些产品领域的竞争力。