

CONTENTS

<i>Preface</i>	xxiii
<i>Acknowledgments</i>	xxvii
<i>Introduction</i>	xxxii
<i>Torts: List of Chapters</i>	xxxix
<i>List of Abbreviations</i>	xli

PART ONE

PHYSICAL AND EMOTIONAL HARMS 1

CHAPTER 1

INTENTIONAL HARMS: THE PRIMA FACIE CASE AND DEFENSES 3

Section A. Introduction	3
Section B. Physical Harms	4
1. Trespass to Person and Land	4
<i>Vosburg v. Putney</i>	4
<i>Dougherty v. Stepp</i>	11
2. Defenses to Intentional Torts	15
a. Consensual Defenses	15
<i>Mohr v. Williams</i>	15
<i>Canterbury v. Spence</i>	23
<i>Hudson v. Craft</i>	23
b. Mental Disability	29
<i>McGuire v. Almy</i>	29
c. Self-Defense	33
<i>Courvoisier v. Raymond</i>	33
d. Defense of Property	37
<i>Bird v. Holbrook</i>	37
e. Necessity	44
<i>Ploof v. Putnam</i>	44
<i>Vincent v. Lake Erie Transportation Co.</i>	47
Thomson, The Trolley Problem	53
Section C. Emotional and Dignitary Harms	55
1. Assault	55

<i>I. de S. and Wife v. W. de S.</i>	55
<i>Tuberville v. Savage</i>	55
Blackstone, Commentaries	56
2. Offensive Battery	59
<i>Alcorn v. Mitchell</i>	59
3. False Imprisonment	60
<i>Coblyn v. Kennedy's, Inc.</i>	60
4. The Intentional Infliction of Emotional Distress: Extreme and Outrageous Conduct	65
<i>Wilkinson v. Downton</i>	65

CHAPTER 2

**STRICT LIABILITY AND NEGLIGENCE:
HISTORIC AND ANALYTIC FOUNDATIONS** 75

Section A. Introduction	75
Section B. The Formative Cases	76
<i>The Thorns Case (Hull v. Orange)</i>	76
<i>Weaver v. Ward</i>	82
Section C. The Forms of Action	86
1. The Significance of the Forms	86
2. Trespass and Case	87
<i>Scott v. Shepherd</i>	89
3. The Breakdown of the Forms of Action	93
Section D. Strict Liability and Negligence in the Second Half of the Nineteenth Century	96
<i>Brown v. Kendall</i>	97
<i>Fletcher v. Rylands (1865)</i>	101
<i>Fletcher v. Rylands (1866)</i>	104
<i>Rylands v. Fletcher</i>	107
<i>Brown v. Collins</i>	113
<i>Powell v. Fall</i>	116
Holmes, The Common Law	119
Section E. Strict Liability and Negligence in Modern Times	126
<i>Stone v. Bolton</i>	126
<i>Bolton v. Stone</i>	128
<i>Hammtree v. Jenner</i>	137

CHAPTER 3

NEGLIGENCE 143

Thayer, Public Wrong and Private Action	143
Green, Judge and Jury	143
Section A. Introduction	143

Section B. The Reasonable Person	145
<i>Harry Kalven, Jr.</i>	145
<i>Vaughan v. Menlove</i>	145
Holmes, The Common Law	150
<i>Roberts v. Ring</i>	152
<i>Daniels v. Evans</i>	155
<i>Breunig v. American Family Insurance Co.</i>	159
<i>Fletcher v. City of Aberdeen</i>	164
<i>Denver & Rio Grande R.R. v. Peterson</i>	166
Section C. Calculus of Risk	167
<i>Blyth v. Birmingham Water Works</i>	167
Terry, Negligence	168
Seavey, Negligence—Subjective or Objective?	170
<i>Osborne v. Montgomery</i>	171
<i>Cooley v. Public Service Co.</i>	173
<i>United States v. Carroll Towing Co.</i>	177
Ross, Settled Out of Court	185
<i>Andrews v. United Airlines</i>	186
Section D. Custom	188
<i>Titus v. Bradford, B. & K. R. Co.</i>	189
<i>Mayhew v. Sullivan Mining Co.</i>	191
<i>The T.J. Hooper (1931)</i>	193
<i>The T.J. Hooper (1932)</i>	194
<i>Lama v. Borrás</i>	200
<i>Murray v. UNMC Physicians</i>	208
Schuck, Rethinking Informed Consent	213
<i>Canterbury v. Spence</i>	214
Section E. Statutes and Regulations	226
Anon.	226
Thayer, Public Wrong and Private Action	227
<i>Osborne v. McMasters</i>	229
<i>Martin v. Herzog</i>	235
<i>Uhr v. East Greenbush Central School District</i>	240
Section F. Judge and Jury	244
Holmes, The Common Law	247
<i>Baltimore and Ohio R.R. v. Goodman</i>	249
<i>Pokora v. Wabash Ry.</i>	250
Section G. Proof of Negligence	258
1. Methods of Proof	258
2. Res Ipsa Loquitur	259
<i>Byrne v. Boadle</i>	259
<i>Colmenares Vivas v. Sun Alliance Insurance Co.</i>	265
<i>Ybarra v. Spangard</i>	273

CHAPTER 4

PLAINTIFF'S CONDUCT	285
Section A. Introduction	285
Section B. Contributory Negligence	286
1. Basic Doctrine	286
<i>Butterfield v. Forrester</i>	286
<i>Beems v. Chicago, Rock Island & Peoria R.R.</i>	287
Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation	288
<i>Gyerman v. United States Lines Co.</i>	291
<i>LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry.</i>	300
<i>Derheim v. N. Fiorito Co.</i>	304
2. Last Clear Chance	308
<i>Fuller v. Illinois Central R.R.</i>	308
Section C. Imputed Contributory Negligence	312
Section D. Assumption of Risk	315
<i>Lamson v. American Axe & Tool Co.</i>	315
<i>Murphy v. Steeplechase Amusement Co.</i>	319
<i>Dalury v. S-K-I Ltd.</i>	328
Section E. Comparative Negligence	334
1. At Common Law	334
Lombard Laws, King Liutprand	334
Beach, Contributory Negligence	335
Prosser, Comparative Negligence	335
<i>Li v. Yellow Cab Co. of California</i>	336
2. By Legislation	349
Federal Employers' Liability Act	349
New York	349
Pennsylvania	349
Wisconsin	350

CHAPTER 5

CAUSATION	353
Section A. Introduction	353
Section B. Cause in Fact	355
1. The "But For" Test	355
<i>New York Central R.R. v. Grimstad</i>	355
<i>Zuchowicz v. United States</i>	360
2. Joint and Several Liability and Multiple Causes	365
a. Joint and Several Liability	365
<i>Union Stock Yards Co. of Omaha v. Chicago, Burlington, & Quincy R.R.</i>	366

<i>American Motorcycle Association v. Superior Court</i>	370
b. Multiple Sufficient Causes	379
<i>Kingston v. Chicago & N.W. Ry.</i>	379
3. Indeterminate Causes	385
a. Alternative Liability	385
<i>Summers v. Tice</i>	385
b. Market Share Liability	388
<i>Sindell v. Abbott Laboratories</i>	388
c. Loss of Chance of Survival	399
<i>Herskovits v. Group Health Cooperative</i>	399
4. Proof of Factual Causation	406
<i>General Electric Co. v. Joiner</i>	406
Section C. Proximate Cause (Herein of Duty)	415
1. Physical Injury	415
Bacon, The Elements of the Common Lawes of England	415
Street, Foundations of Legal Liability	415
<i>Ryan v. New York Central R.R.</i>	416
<i>Berry v. Sugar Notch Borough</i>	420
<i>Brower v. New York Central & H.R.R.</i>	424
<i>Wagner v. International Ry.</i>	430
<i>In re Polemis & Furness, Withy & Co.</i>	432
<i>Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd. (Wagon Mound (No. 1))</i>	436
<i>Palsgraf v. Long Island R.R.</i>	444
<i>Marshall v. Nugent</i>	457
<i>Virden v. Betts & Beer Construction Company</i>	461
<i>Hebert v. Enos</i>	463
2. Emotional Distress	464
<i>Mitchell v. Rochester Ry.</i>	465
<i>Dillon v. Legg</i>	468

CHAPTER 6

AFFIRMATIVE DUTIES	481
Section A. Introduction	481
Section B. The Duty to Rescue	483
Luke 10:30-37 (King James Translation)	483
<i>Buch v. Amory Manufacturing Co.</i>	484
<i>Hurley v. Eddingfield</i>	486
Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability	487
Ames, Law and Morals	488
Epstein, A Theory of Strict Liability	489
Posner, Epstein's Tort Theory: A Critique	490

Fletcher, Law and Morality: A Kantian Perspective	491
Bender, An Overview of Feminist Torts Scholarship	491
<i>Montgomery v. National Convoy & Trucking Co.</i>	496
Section C. Duties of Owners and Occupiers	501
<i>Robert Addie & Sons (Collieries), Ltd. v. Dumbreck</i>	501
<i>Rowland v. Christian</i>	509
Section D. Gratuitous Undertakings	519
<i>Coggs v. Bernard</i>	519
<i>Erie Railroad Co. v. Stewart</i>	521
<i>Moch Co. v. Rensselaer Water Co.</i>	526
Section E. Special Relationships	533
<i>Kline v. 1500 Massachusetts Avenue Apartment Corp.</i>	534
<i>Tarasoff v. Regents of University of California</i>	543
CHAPTER 7	
<hr/>	
STRICT LIABILITY	553
Section A. Introduction	553
Section B. Trespass to Chattels and Conversion	554
1. Trespass to Chattels	554
<i>Intel Corp. v. Hamidi</i>	555
2. Conversion	563
<i>Poggi v. Scott</i>	563
<i>Moore v. Regents of the University of California</i>	567
Section C. Animals	576
<i>Gehrts v. Batteen</i>	576
Section D. Ultrahazardous or Abnormally Dangerous Activities	585
<i>Spano v. Perini Corp.</i>	585
<i>Indiana Harbor Belt R.R. v. American Cyanamid Co.</i>	595
Section E. Nuisance	603
1. Private Nuisance	604
<i>Vogel v. Grant-Lafayette Electric Cooperative</i>	604
<i>Michalson v. Nutting</i>	610
<i>Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.</i>	614
<i>Rogers v. Elliott</i>	620
<i>Ensign v. Walls</i>	623
<i>Boomer v. Atlantic Cement Co.</i>	628
2. Public Nuisance	637
<i>Anonymous</i>	637
<i>Burgess v. M/V Tamano</i>	639
<i>City of Oakland v. BP P.L.C.</i>	641
Section F. Vicarious Liability	649
<i>Ira S. Bushey & Sons, Inc. v. United States</i>	649
<i>Saleem v. Corporate Transportation Group Ltd.</i>	657

 CHAPTER 8

PRODUCTS LIABILITY	667
Section A. Introduction	667
Section B. Exposition	671
<i>Winterbottom v. Wright</i>	671
<i>MacPherson v. Buick Motor Co.</i>	674
<i>Escola v. Coca Cola Bottling Co. of Fresno</i>	683
Section C. The Restatements	693
1. A Tale of Two Texts	693
Restatement (Second) of Torts §402A	693
Restatement (Third) of Torts: Products Liability §§1-2	697
2. The Theory of Products Liability: Tort or Contract	699
<i>Casa Clara Condominium Ass’n, Inc. v.</i>	
<i>Charley Toppino & Sons, Inc.</i>	699
3. Proper Defendants Under Section 402A	705
<i>Oberdorf v. Amazon.com Inc.</i>	705
Section D. Product Defects	713
1. Manufacturing Defects	713
<i>Speller v. Sears, Roebuck and Co.</i>	714
2. Design Defects	718
<i>Campo v. Scofield</i>	718
2 Harper and James, Torts §28.5	718
Wade, On the Nature of Strict Tort Liability for Products	719
a. Development of the Negligence Test	720
<i>Volkswagen of America, Inc. v. Young</i>	720
b. Consumer Expectations versus Risk-Utility Tests	728
<i>Barker v. Lull Engineering Co.</i>	728
c. Third Restatement and the Alternative Design Test	736
3. The Duty to Warn	741
<i>MacDonald v. Ortho Pharmaceutical Corp.</i>	742
<i>Vassallo v. Baxter Healthcare Corp.</i>	752
<i>Hood v. Ryobi America Corp.</i>	755
<i>Air & Liquid Sys. Corp. v. DeVries</i>	760
Section E. Plaintiff’s Conduct	765
<i>Daly v. General Motors Corp.</i>	765
Section F. Federal Preemption	773
<i>Geier v. American Honda Motor Co.</i>	775
<i>Wyeth v. Levine</i>	781

 CHAPTER 9

DAMAGES	793
<i>Sullivan v. Old Colony Street Ry.</i>	793
<i>Zibbell v. Southern Pacific Co.</i>	793
Section A. Introduction	793
Section B. Recoverable Elements of Damages	794

1. Pain and Suffering	794
<i>McDougald v. Garber</i>	794
2. Economic Losses	802
<i>O'Shea v. Riverway Towing Co.</i>	802
<i>Duncan v. Kansas City Southern Railway</i>	810
Section C. Wrongful Death and Loss of Consortium	817
1. Wrongful Death	817
a. History	817
b. Measure of Damages	819
2. Survival of Personal Injury Actions	821
3. Actions for Loss of Consortium	821
a. History	821
b. Parents and Children	822
c. Nontraditional Families	823
d. Damages in Consortium Cases	824
Section D. Punitive Damages	824
<i>Kemezy v. Peters</i>	824
<i>State Farm Mutual Automobile Insurance Co. v. Campbell</i>	831
Section E. Litigation Financing	840
1. Contingent Fees	841
2. Class Actions	843
3. Fee Shifting	843
4. Sale of Tort Claims	844
5. Litigation Insurance	845
6. Alternative Litigation Financing	845
Section F. Collateral Benefits	845
<i>Harding v. Town of Townshend</i>	846

CHAPTER 10

**TORT EXTENSIONS: INSURANCE
AND NO-FAULT SYSTEMS** 851

Section A. Introduction	851
Section B. Liability Insurance	852
1. Automobile and Other Basic Lines of Insurance	852
a. The March to Compulsory Insurance	852
b. The Distinctive Provisions of the Automobile Insurance Contract	855
i. The Omnibus Clause	855
ii. "Drive the Other Car" Clauses	856
iii. Uninsured Motorist Coverage	856
iv. Medical Payments	857
c. Key Provisions of the Standard Insurance Contract	857
Commercial General Liability Coverage Form	858

i. Misrepresentation and Nondisclosure	858
ii. Notice and Cooperation	859
iii. The Duty to Defend	861
iv. The Obligation to Settle in Good Faith	862
<i>Crisci v. Security Insurance Co.</i>	862
<i>Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp.</i>	867
2. Cumulative Trauma Cases	873
Section C. The No-Fault Systems	875
1. Workers' Compensation	876
a. Historical Origins	877
b. The Scope of Coverage: "Arising Out of and in the Course of Employment"	883
<i>Clodgo v. Rentavision, Inc.</i>	883
<i>Wilson v. Workers' Compensation Appeals Board</i>	891
c. Benefits Under the Workers' Compensation Statutes	894
d. Exclusive Remedy	897
<i>Rainer v. Union Carbide Corp.</i>	897
2. Automobile No-Fault Insurance	902
a. The Basic Reform Proposal	902
American Bar Association, Special Committee on Automobile Insurance Legislation, Why the Statistical Studies Critical of the Fault System Are Flawed	904
Epstein, Automobile No-Fault Plans: A Second Look at First Principles	905
b. Constitutionality	905
c. The Implementation of Automobile No-Fault Plans	907
d. The 2019 Michigan No-Fault Law Reforms	909
3. No-Fault Insurance for Medical and Product Injuries	910
Section D. The 9/11 Victim Compensation Fund	913
Section E. The New Zealand Plan	914
Report of the Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand	915
Accident Compensation: Options for Reform	917

PART TWO

TORTS AGAINST NONPHYSICAL INTERESTS 921

CHAPTER 11

DEFAMATION 923

Section A. Introduction	923
Section B. Publication	925
<i>Mims v. Metropolitan Life Insurance Co.</i>	925

<i>Firth v. State of New York</i>	929
<i>Blumenthal v. Drudge</i>	934
Section C. False or Defamatory Statements	940
<i>Parmiter v. Coupland</i>	940
<i>Muzikowski v. Paramount Pictures Corp.</i>	940
<i>Wilow v. Forbes, Inc.</i>	948
Section D. Libel and Slander	955
<i>Varian Medical Systems, Inc. v. Delfino</i>	955
Section E. Basis of Liability: Intention, Negligence, and Strict Liability in Defamation	961
<i>E. Hulton & Co. v. Jones</i>	961
Section F. Damages	963
1. Special Damages	963
<i>Terwilliger v. Wands</i>	963
<i>Ellsworth v. Martindale-Hubbell Law Directory, Inc.</i>	965
2. General Damages	968
McCormick, Damages	968
<i>Faulk v. Aware, Inc. (1962)</i>	968
<i>Faulk v. Aware, Inc. (1963)</i>	969
3. Other Remedies	971
a. Injunctions	971
b. Retraction	972
c. Reply Statutes	973
d. Declaratory Relief and “Libel Tourism”	974
Section G. Nonconstitutional Defenses	974
1. Truth	974
<i>Auvil v. CBS 60 Minutes</i>	974
2. Privileges in the Private Sphere	981
<i>Watt v. Longsdon</i>	981
3. Privileges in the Public Sphere	988
a. Legal Proceedings and Reports Thereon	988
<i>Kennedy v. Cannon</i>	988
b. Reports of Public Proceedings or Meetings	994
<i>Brown & Williamson Tobacco Corp. v. Jacobson</i>	994
c. Fair Comment: Artistic and Literary Criticism	998
Veeder, Freedom of Public Discussion	999
Section H. Constitutional Privileges	1002
1. Public Officials and Public Figures	1002
<i>New York Times Co. v. Sullivan</i>	1002
<i>Curtis Publishing Co. v. Butts</i>	1010
2. Private Parties	1018
<i>Gertz v. Robert Welch, Inc.</i>	1018
<i>Obsidian Finance Group, LLC v. Cox</i>	1026

 CHAPTER 12

PRIVACY
1033

Section A. Introduction	1033
Section B. Historical Background	1034
Warren & Brandeis, The Right to Privacy	1034
Prosser, Privacy	1036
Kalven, Privacy in the Tort Law—Were Warren and Brandeis Wrong?	1038
Prosser, Privacy	1040
Section C. Intrusion Upon Seclusion	1041
<i>Nader v. General Motors Corp.</i>	1042
<i>Boring v. Google Inc.</i>	1048
<i>Desnick v. American Broadcasting Co., Inc.</i>	1054
Section D. Public Disclosure of Embarrassing Private Facts	1062
<i>Sidis v. F-R Publishing Corp.</i>	1063
<i>Haynes v. Alfred A. Knopf, Inc.</i>	1067
<i>Cox Broadcasting Corp. v. Cohn</i>	1073
Section E. False Light	1078
<i>Time, Inc. v. Hill</i>	1079
Section F. Commercial Appropriation of Plaintiff's Name or Likeness, or the Right of Publicity	1084
<i>In re NCAA Student-Athlete Name and Likeness Litigation</i>	1085
<i>Factors Etc., Inc. v. Pro Arts, Inc.</i>	1097

 CHAPTER 13

MISREPRESENTATION
1103

Section A. Introduction	1103
Section B. Fraud	1104
<i>Pasley v. Freeman</i>	1104
<i>Vulcan Metals Co. v. Simmons Manufacturing Co.</i>	1112
<i>Swinton v. Whitinsville Savings Bank</i>	1116
<i>Laidlaw v. Organ</i>	1121
<i>Edgington v. Fitzmaurice</i>	1124
<i>BV Nederlandse Industrie Van Eiprodukten v. Rembrandt Enterprises, Inc.</i>	1127
<i>Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.</i>	1138
Section C. Negligent Misrepresentation	1144
<i>Ultramares Corp. v. Touche</i>	1144

CHAPTER 14

ECONOMIC HARMS	1157
Section A. Introduction	1157
Section B. Inducement of Breach of Contract	1158
The Statute of Labourers (1351)	1158
<i>Lumley v. Gye</i>	1159
<i>Asahi Kasei Pharma Corp. v. Actelion Ltd.</i>	1169
Section C. Intentional Interference with Prospective Advantage	1175
<i>Tarleton v. M’Gawley</i>	1175
Section D. Negligent Interference with Economic Relationships	1178
<i>People Express Airlines, Inc. v. Consolidated Rail Corp.</i>	1178
<i>Southern California Gas Co. v. Superior Court of Los Angeles County</i>	1187
Section E. Unfair Competition	1195
<i>Mogul Steamship Co. v. McGregor, Gow & Co.</i>	1195
<i>International News Service v. Associated Press</i>	1204
<i>The National Basketball Association v. Motorola, Inc.</i>	1211
<i>Barclays Capital Inc. v. Theflyonthewall.com</i>	1214
<i>Ely-Norris Safe Co. v. Mosler Safe Co.</i>	1217
<i>Mosler Safe Co. v. Ely-Norris Safe Co.</i>	1219

CHAPTER 15

TORT IMMUNITIES	1229
Section A. Introduction	1229
Section B. Domestic or Intrafamily Immunities	1230
1. Parent and Child	1230
a. Suits Between Parent and Child	1230
b. Third-Party Actions	1234
2. Spouses	1235
Section C. Charitable Immunity	1237
Section D. Municipal Corporations	1239
1. At Common Law	1239
2. By Statute	1241
745 Ill. Comp. Stat. (2019)	1242
3. Under the Constitution	1244
Section E. Sovereign Immunity	1246
Federal Tort Claims Act §§2671-2680	1247
<i>Berkovitz v. United States</i>	1248
Section F. Official Immunity	1257
<i>Clinton v. Jones</i>	1257
 <i>Table of Cases</i>	 1267
<i>Table of Restatement Sections</i>	1293
<i>Table of Secondary Authorities</i>	1299
<i>Index</i>	1313