

# CONTENTS

<i>Preface</i>	<i>xxv</i>
<i>Acknowledgments</i>	<i>xxix</i>

<b>1 INTRODUCTION TO TORTS</b>	<b>1</b>
<b>I. Torts Defined</b>	<b>1</b>
<b>II. Goals and Criticisms</b>	<b>2</b>
A. What Are the Purposes Behind Tort Law?	3
B. Has Tort Law Gotten Out of Control?	5
Rule 11 and Tort Reform: Myth, Reality, and Legislation	5
<b>III. Case Procedure and Definitions</b>	<b>9</b>
A. Pleadings and Attacks on Pleadings	9
B. Formal Discovery	10
C. Motions for Summary Judgment	10
D. Trial	11
E. Entry of Judgment	11
F. Appeal	12
<b>IV. Case Briefing</b>	<b>12</b>
A. Reasons for Briefing a Case	12
B. Preparation of a Case Brief	13
1. Facts	13
2. Procedural History	13
3. Issue	14
4. Rule	14
5. Analysis	14
6. Holding	15
<b>2 INTENTIONAL TORTS</b>	<b>17</b>
<b>I. Overview</b>	<b>17</b>
<b>II. Battery</b>	<b>18</b>
A. Introduction	18
B. Intent	19
	<b>xi</b>

<i>Garratt v. Dailey</i>	19
<i>Waters v. Blackshear</i>	24
C. Offensive, Indirect, and Intangible Contacts	26
<i>Fisher v. Carrousel Motor Hotel, Inc.</i>	27
<i>Richardson v. Hennly</i>	29
<i>Eichenwald v. Rivello</i>	30
D. Scope of Liability for Battery	35
<i>Nelson v. Carroll</i>	36
E. The Single vs. Dual Intent Debate	41
<i>White v. University of Idaho</i>	42
<i>White v. Muniz</i>	43
<b>III. Assault</b>	<b>49</b>
A. Introduction	49
B. The Elements	50
1. Intent	50
<i>Cullison v. Medley</i>	50
2. Reasonable Apprehension	53
<i>Bouton v. Allstate Ins. Co.</i>	53
3. Imminent Apprehension	56
<i>Brower v. Ackerly</i>	56
C. Transfer of Intent	60
<i>Hall v. McBryde</i>	60
<b>IV. False Imprisonment</b>	<b>63</b>
A. Introduction	63
B. The Elements	64
1. Intent to Detain	64
<i>William Whirl v. C.V. (Buster) Kern</i>	64
2. Detention	72
<i>Smith v. Comair, Inc.</i>	72
C. Shopkeeper's Privilege	75
<i>Wal-Mart Stores, Inc. v. Resendez</i>	76
<b>V. Trespass</b>	<b>80</b>
A. Introduction	80
B. Land	80
1. Intent	80
<i>Thomas v. Harrah's Vicksburg Corp.</i>	80
2. Scope of Liability	85
<i>Baker v. Shymkiv</i>	85
C. Personal Property	88
1. Trespass to Chattels	89
<i>Koepnick v. Sears Roebuck &amp; Co.</i>	89
2. Conversion	93
<i>Pearson v. Dodd</i>	93

<b>VI. Intentional Infliction of Emotional Distress</b>	<b>97</b>
A. Outrageous Conduct Intending Emotional Distress	97
<i>Zalnis v. Thoroughbred Datsun Car Co.</i>	97
<i>Strauss v. Cilek</i>	101
B. Severe Emotional Distress	103
<i>Miller v. Willbanks, M.D.</i>	104
<i>Jones v. Clinton</i>	107
C. Constitutional Protection of Outrageous Speech	112
<i>Snyder v. Phelps</i>	113
<b>3 DEFENSES TO INTENTIONAL TORTS</b>	<b>119</b>
<b>I. Introduction</b>	<b>119</b>
<b>II. Consent</b>	<b>120</b>
A. Standard and Effect	120
<i>McQuiggan v. Boy Scouts of America</i>	120
B. Limitations on Consent	125
1. Exceeding the Scope	125
<i>Koffman v. Garnett</i>	125
2. Fraud	128
<i>Hogan v. Tavzel</i>	128
<i>McPherson v. McPherson</i>	129
<b>III. Defense of Self, Others, and Property</b>	<b>132</b>
A. Self-Defense	132
<i>Slayton v. McDonald</i>	132
B. Defense of Others	137
<i>Young v. Warren</i>	137
C. Defense of Property	141
<i>Woodard v. Turnipseed</i>	141
<i>Katko v. Briney</i>	144
<b>4 NEGLIGENCE: BREACH OF DUTY OF REASONABLE CARE</b>	<b>149</b>
<b>I. Introduction</b>	<b>149</b>
<b>II. The Duty of Reasonable Care</b>	<b>150</b>
A. The Objective Standard	150
<i>Vaughan v. Menlove</i>	150
B. Actual and Constructive Knowledge; Hindsight	153
<i>Parrot v. Wells, Fargo &amp; Co.</i>	153

<b>III. The Reasonable Person Under the Circumstances</b>	<b>157</b>
A. Extraordinary Knowledge and Skill	157
<i>Cervelli v. Graves</i>	157
B. Physical Disability	160
<i>Poyner v. Loftus</i>	161
<i>Roberts v. State</i>	164
C. Mental Disability	168
<i>Creasy v. Rusk</i>	168
D. Children	174
<i>Robinson v. Lindsay</i>	174
E. Extraordinarily Dangerous Activities	178
<i>Stewart v. Motts</i>	178
F. Sudden Emergency	182
<i>Myhaver v. Knutson</i>	182
<b>IV. Proving Breach of Duty</b>	<b>185</b>
A. The Learned Hand Formula	186
<i>United States v. Carroll Towing Co.</i>	186
<i>Davis v. Consolidated Rail Corp.</i>	189
B. Negligence Per Se — Violation of Statutes	196
1. Origins and Rationale	196
<i>Martin v. Herzog</i>	196
2. Type of Harm and Membership in Protected Class	200
<i>Wawanesa Mutual Ins. v. Matlock</i>	200
3. Excuse	204
<i>Sikora v. Wenzel</i>	205
C. Custom	210
1. Industry Custom	210
<i>The T.J. Hooper</i>	210
2. Personal Custom	213
<i>Wal-Mart Stores, Inc. v. Wright</i>	213
D. Res Ipsa Loquitur	216
<i>Byrne v. Boadle</i>	217
<i>Krebs v. Corrigan</i>	218
<b>V. Recklessness as an Alternative Standard</b>	<b>221</b>
<i>Mobil v. Ellender</i>	222
<b>5 CAUSATION</b>	<b>229</b>
<b>I. Introduction</b>	<b>229</b>
<b>II. Actual Cause</b>	<b>230</b>
A. The “But-For” Test	230
<i>Cay v. Louisiana</i>	231

	<i>Lyons v. Midnight Sun Transportation Services</i>	235
	<i>East Texas Theatres, Inc. v. Rutledge</i>	236
<b>B.</b>	<b>Alternatives to But-For Causation</b>	<b>239</b>
1.	Multiple Sufficient Independent Causes	239
	<i>Kingston v. Chicago &amp; Northwestern Railway</i>	240
2.	Alternative Liability	244
	<i>Summers v. Tice</i>	244
	<i>Burke v. Schaffner</i>	248
3.	Modified Alternative Liability: Market Share	252
	<i>Sindell v. Abbott Laboratories</i>	253
4.	Increased Risk of Future Harm	259
	<i>Temple-Inland Products Corp. v. Carter</i>	259
5.	Loss of Chance	263
	<i>Lord v. Lovett</i>	264
<b>III.</b>	<b>Proximate Cause</b>	<b>267</b>
A.	Introduction	268
	<i>Palsgraf v. Long Island Railway Co.</i>	269
B.	The Direct Cause Test	277
	<i>In re Polemis</i>	278
	<i>Laureano v. Louzoun</i>	279
C.	The Foreseeability Test	280
1.	Whether the Type of Accident Was Within the Scope of the Risk	281
	<i>Tieder v. Little</i>	281
2.	Breach of Duty Does Not Necessarily Prove Proximate Cause	286
	<i>Crankshaw v. Piedmont Driving Club</i>	286
D.	The Substantial Factor Test	288
1.	Introduction to the Substantial Factor Test	289
	<i>Brisboy v. Fibreboard Paper Products Corp.</i>	289
2.	Substantial Factor as a Test for Proximate Cause	292
	<i>American Truck Leasing, Inc. v. Thorne Equipment Co.</i>	293
E.	Superseding vs. Intervening Causes	296
	<i>Price v. Blaine Kern Artista, Inc.</i>	296
	<i>McCane-Sondock Protection Systems v. Emmittee</i>	298
<b>6</b>	<b>SPECIAL DUTY RULES</b>	<b>305</b>
<b>I.</b>	<b>Introduction</b>	<b>305</b>
<b>II.</b>	<b>Duty to Act</b>	<b>306</b>
A.	Acts vs. Omissions	306
1.	No General Duty to Aid Others	307
	<i>Yania v. Bigan</i>	307
2.	When Acting, the Duty of Care Exists	309
	<i>United States v. Lawter</i>	309

3. Special Relationships Compelling Action	310
<i>Lundy v. Adamar of New Jersey, Inc.</i>	310
4. Duty Ends at Expiration of Special Relationship	319
<i>Boyette v. Trans World Airlines, Inc.</i>	319
B. Rescuers	321
1. The Rescue Doctrine	322
<i>McCoy v. American Suzuki Motor Corp.</i>	322
2. The Firefighter Rule	325
<i>Moody v. Delta Western</i>	325
<i>Snellenberger v. Rodriguez</i>	327
<b>III. Duty to Protect Third Parties from Another's Harm</b>	<b>329</b>
A. Health Care Workers	330
<i>Emerich v. Philadelphia Center for Human Development</i>	330
<i>Bradshaw v. Daniel, M.D.</i>	339
B. Employer-Employee Relationships	343
<i>Otis Engineering Corp. v. Clark</i>	344
<b>IV. Duty Limited by the Nature of the Primary Harm</b>	<b>349</b>
A. Emotional Distress	350
1. From Impact Rule to Zone of Danger	350
<i>Robb v. The Pennsylvania Railroad Co.</i>	350
2. From Zone of Danger to <i>Dillon</i> Rule of Foreseeability	355
<i>Dillon v. Legg</i>	355
<i>Grotts v. Zahner</i>	362
3. Is There a General Duty Not to Cause Emotional Distress?	365
<i>Boyles v. Kerr</i>	365
B. "Mere" Economic Harm	371
<i>532 Madison Avenue Gourmet Foods v. Finlandia Center, Inc.</i>	371
C. Wrongful Pregnancy, Wrongful Life, and Wrongful Birth	377
1. Wrongful Pregnancy	377
<i>Johnson v. University Hospitals of Cleveland</i>	377
2. Wrongful Birth and Wrongful Life	382
<i>Nelson v. Krusen</i>	382
<b>V. Duty Limited by Nature of the Activity: Primary Assumption of the Risk</b>	<b>387</b>
A. Introduction	387
B. Inherent Risk	388
<i>Murphy v. Steeplechase Amusement Co., Inc.</i>	388
C. A More Refined Test for Inherent Risks	390
<i>Clover v. Snowbird Ski Resort</i>	390
<b>VI. Duty Based Upon Victim's Status</b>	<b>396</b>
A. Introduction	396
B. Trespassers	396
1. Adult Trespassers	396

<i>Ryals v. United States Steel Corp.</i>	396
2. Child Trespassers: The Attractive Nuisance Doctrine	399
<i>Bennett v. Stanley</i>	399
C. Licensees	405
<i>Knorpp v. Hale</i>	406
D. Invitees	410
1. Time as a Trigger of Duty	410
<i>Richardson v. The Commodore</i>	410
<i>Wal-Mart Stores, Inc. v. Gonzalez</i>	413
2. Open and Obvious Dangers	418
<i>O'Sullivan v. Shaw</i>	418
3. Duty to Protect Invitees from Criminal Attack	422
a. Actual Awareness of Danger	422
<i>Gould v. Taco Bell</i>	422
b. Foreseeable Risk of Danger	425
<i>Delta Tau Delta v. Johnson</i>	426
E. Modern Rejection of Three Categories	430
<i>Nelson v. Freeland</i>	430
<b>VII. Duty Based Upon Defendant's Status: Professionals</b>	<b>438</b>
A. The Professional Standard of Care	438
1. Professional Custom	438
<i>Osborn v. Irwin Memorial Blood Bank</i>	438
<i>Hodges v. Carter</i>	442
2. Who Is a Professional?	446
<i>Rossell v. Volkswagen of America</i>	447
B. Informed Consent	451
<i>Scott v. Bradford</i>	452
C. Limitations on a Professional's Duty	456
<i>Barcelo, III v. Elliott</i>	456
<b>7 AFFIRMATIVE DEFENSES</b>	<b>465</b>
<b>I. Introduction</b>	<b>465</b>
<b>II. Contributory Negligence and Comparative Fault</b>	<b>466</b>
A. Contributory Negligence	466
<i>Butterfield v. Forrester</i>	467
<i>Harris v. Meadows</i>	467
B. The Comparative Fault Reform	470
1. The Decision to Switch to Comparative Fault	470
<i>McIntyre v. Balentine</i>	470
2. The Apportionment Problem	476
<i>Sandford v. Chevrolet</i>	476

3. Multiple Tortfeasors in Modified Comparative Fault	481
<i>Beaudoin v. Texaco, Inc.</i>	481
<b>III. Assumption of the Risk</b>	<b>487</b>
A. Express Assumption of the Risk	487
1. Public Policy Hurdle	488
<i>Tunkl v. Regents of the University of California</i>	488
2. The Drafting Hurdle	492
<i>Alack v. Vic Tanny International of Missouri, Inc.</i>	492
B. Secondary Implied Assumption of the Risk	498
1. Qualified Secondary Implied Assumption of the Risk	499
<i>Riddle v. Universal Sport Camp</i>	499
2. Unqualified Secondary Implied Assumption of the Risk	502
<i>Schroyer v. McNeal</i>	502
3. Does Comparative Fault Abolish Secondary Implied Assumption of the Risk?	507
<i>Davenport v. Cotton Hope Plantation Horizontal Property Regime</i>	508
<b>IV. Immunities</b>	<b>513</b>
A. Sovereign Immunity	513
1. The Federal Government	513
<i>Cestonaro v. United States</i>	513
2. State and Local Governments	519
<i>Campbell v. Indiana</i>	519
B. Spousal and Parental Immunity	523
1. Spousal Immunity	524
<i>Price v. Price</i>	524
2. Parental Immunity	527
<i>Sandoval v. Sandoval</i>	527
<b>V. Statutes of Limitation and Repose</b>	<b>532</b>
A. Statutes of Limitation	533
1. Accrual of a Claim	533
<i>Crumpton v. Humana, Inc.</i>	533
2. The Legal Injury Rule and the Discovery Rule Exception	534
<i>S.V. v. R.V.</i>	534
B. Statutes of Repose	539
1. Constitutional Challenges	540
<i>Sedar v. Knowlton Constr. Co.</i>	540
2. Fraudulent Concealment Tolling	546
<i>Kern v. St. Joseph Hospital</i>	546

<b>8 DAMAGES</b>	<b>553</b>
<b>I. Introduction</b>	<b>553</b>
<b>II. Actual, Compensatory Damages</b>	<b>554</b>
A. Special (Economic) Damages	554
<i>Martin v. United States</i>	555
B. General (Noneconomic) Damages	562
1. Review of Jury's Award	563
<i>Miraglia v. H&amp;L Holding Corp.</i>	563
2. Per Diem Arguments	569
<i>Beagle v. Vasold</i>	570
3. Day in the Life Videos	576
<i>Donnellan v. First Student, Inc.</i>	576
4. Hedonic Damages	581
<i>McDougald v. Garber</i>	581
C. Wrongful Death and Survival Claims	585
<i>Jordan v. Baptist Three Rivers Hospital</i>	586
D. Property Damages	592
<i>Strickland v. Medlen</i>	593
<b>III. Limitations on Actual Damages</b>	<b>599</b>
A. Failure to Mitigate Damages	600
1. Failure to Mitigate as a Damage Consideration	601
<i>Klanseck v. Anderson Sales &amp; Service, Inc.</i>	601
2. Failure to Mitigate as "Fault"	602
<i>Miller v. Eichhorn</i>	602
3. Seat-Belt Defense as Failure to Mitigate or Fault?	605
<i>Nabors Well Services v. Romero</i>	605
B. Collateral Source Rule	612
<i>Helfend v. Southern California Rapid Transit District</i>	613
C. Statutory Limits	618
1. Examples of Statutory Limits	619
California Civ. Code §333.2 (1975)	619
Maryland Code Ann., Ct. & Jud. Proc. §11-108 (1997)	619
Texas Civ. Prac. & Rem. Code §74.301 (2003)	619
Texas Civ. Prac. & Rem. Code §74.303 (2003)	620
2. Constitutionality of Limits on Actual Damages	620
<i>Samsel v. Wheeler Transport Services, Inc.</i>	621
<i>Knowles v. United States</i>	623
<b>IV. Nominal Damages</b>	<b>628</b>
<i>Longenecker v. Zimmerman</i>	629

<b>V. Punitive Damages</b>	<b>632</b>
A. When Civil Punishment Is Permitted	633
1. Malicious Conduct	633
<i>Shugar v. Guill</i>	633
2. Corporate Liability for Reckless Conduct	637
<i>Mobil v. Ellender</i>	637
B. The Amount of Punitive Damages	640
1. Due Process Limits	640
<i>State Farm Mutual v. Campbell</i>	640
2. Statutory Limits	647
<b>9 APPORTIONMENT</b>	<b>651</b>
<b>I. Introduction</b>	<b>651</b>
<b>II. Joint and Several Liability</b>	<b>653</b>
<i>Sitzes v. Anchor Motor Freight, Inc.</i>	654
<b>III. Several Liability</b>	<b>659</b>
A. Rejection of Joint and Several Liability in Favor of Several Liability	659
<i>McIntyre v. Balentine</i>	660
B. Threshold Level Joint and Several Liability Statutes	662
New Jersey Stat. §2A:15-53 (2009)	663
Texas Civ. Prac. & Rem. Code §33.013 (2003)	663
Hawaii Rev. Stat. §663-10.9 (1995)	663
C. Apportionment with Absent or Immune Actors	665
<i>Sullivan v. Scoular Grain Co.</i>	665
D. Negligent Enabling	671
<i>Turner v. Jordan, M.D.</i>	671
<b>IV. Equitable Doctrines Creating Joint Liability</b>	<b>678</b>
A. Introduction	678
B. Vicarious Liability	678
<i>Trahan-Laroche v. Lockheed Sanders, Inc.</i>	679
1. Employees v. Independent Contractors	683
<i>Throop v. F.E. Young &amp; Co.</i>	683
2. Course and Scope of Employment	688
<i>Fruit v. Equitable Life Assurance Society</i>	688
3. Vicarious Liability for Intentional Torts	693
<i>Nichols v. Land Transp. Corp.</i>	693
C. Concert of Action	698
1. Conduct Creating Joint Liability	698
<i>Herman v. Wesgate</i>	698
<i>Shinn v. Allen</i>	699
<i>Kubert v. Best</i>	703
2. Extent of Liability for Acting in Concert	707
<i>American Family Mut. Ins. Co. v. Grim</i>	708

<b>10 STRICT LIABILITY</b>	<b>713</b>
<b>I. Introduction</b>	<b>713</b>
<b>II. Unusually Dangerous Activities</b>	<b>714</b>
<i>Exner v. Sherman Power Const. Co.</i>	715
<b>III. Wild and Trespassing Animals</b>	<b>720</b>
<i>Byram v. Main</i>	720
<i>Clark v. Brings</i>	723
<b>11 PRODUCTS LIABILITY</b>	<b>731</b>
<b>I. Introduction</b>	<b>731</b>
<b>II. Historical Development and Adoption</b>	<b>732</b>
A. Limitations on Duty	732
<i>MacPherson v. Buick Motor Company</i>	733
B. Rejection of Fault or Contract Breach as Prerequisites to Recovery	737
<i>Escola v. Coca Cola Bottling Co. of Fresno</i>	738
C. Restatement (Second) §402A (1965)	743
D. Strict Liability Is for Product Sellers	745
<i>Amazon.com, Inc. v. McMillan</i>	745
<b>III. Defects</b>	<b>754</b>
A. Manufacturing	754
<i>American Tobacco Co. v. Grinnell</i>	755
B. Design Defects	759
1. The Consumer Expectation Test	759
<i>Sparks v. Owens-Illinois, Inc.</i>	760
2. The Risk Utility Test	766
<i>Dawson v. Chrysler Corp.</i>	766
3. Is Hindsight Knowledge of Risks Appropriate to Use in Risk-Utility Analysis?	774
<i>Dart v. Wiebe Mfg.</i>	774
<i>Branham v. Ford Motor Corp.</i>	778
4. The Alternative Feasible Design Requirement	782
<i>American Tobacco Co. v. Grinnell</i>	782
5. Comparing the Consumer Expectation and Risk Utility Tests	784
<i>Denny v. Ford Motor Co.</i>	785
C. Marketing Defects	791
1. The Duty to Warn	792
<i>Richter v. Limax International</i>	792
2. Common Knowledge Exception	799
<i>American Tobacco Co. v. Grinnell</i>	800

<b>IV. Defenses Arising Out of Plaintiff’s Misconduct</b>	<b>806</b>
A. Is Negligence a Defense to Strict Liability?	807
<i>Bowling v. Heil Co.</i>	807
<i>Daly v. General Motors Corp.</i>	811
B. When, and How, Does Product Misuse Provide a Defense?	816
<i>Daniell v. Ford Motor Co.</i>	817
<i>Hernandez v. Tokai Corp.</i>	820
<b>12 DEFAMATION</b>	<b>827</b>
<b>I. Introduction</b>	<b>827</b>
<b>II. Elements of Claim</b>	<b>828</b>
A. False and Defamatory Statements	828
1. Early Application	828
<i>Burton v. Crowell Pub. Co.</i>	828
2. Modern Application	831
<i>Busch v. Viacom International</i>	831
<i>Henderson v. Henderson</i>	835
B. Libel vs. Slander	840
<i>Agriss v. Roadway Express, Inc.</i>	840
<b>III. Privileges</b>	<b>849</b>
A. Common Law	850
<i>Johnson v. Queenan</i>	850
<i>Lester v. Powers</i>	852
Florida Stat. §768.095 (1999)	858
Louisiana Rev. Stat. §14.50 (1950)	858
Texas Civ. Prac. & Rem. Code §73.002 (1985)	858
Texas Civ. Prac. & Rem. Code §73.004 (1985)	859
Federal Communications Decency Act 47 U.S.C.A. §230(c)(1996)	859
Wisconsin Stat. Ann. §895.05	859
B. Constitutional Privilege	861
1. Speech About Public Officials, Public Figures, and Public Matters	861
<i>Khawar v. Globe International, Inc.</i>	861
2. Private Matters	872
<i>Dun &amp; Bradstreet, Inc. v. Greenmoss Builders, Inc.</i>	872
<b>13 BUSINESS TORTS</b>	<b>877</b>
<b>I. Introduction</b>	<b>877</b>
<b>II. Fraud</b>	<b>878</b>
A. Misrepresentations	878

1. Existing Facts or Opinions Based Upon Facts	879
<i>Trenholm v. Ratcliff</i>	879
2. Affirmative Acts of Concealment	884
<i>Lindberg Cadillac Co. v. Aron</i>	884
3. Promissory Fraud	889
<i>Smehlik v. Athletes and Artists, Inc.</i>	890
B. Justifiable Reliance	894
<i>Judd v. Walker</i>	895
<b>III. Negligent Misrepresentation</b>	<b>901</b>
A. Introduction	902
<i>Staggs v. Sells</i>	902
B. Duty Revisited	907
<i>Bily v. Arthur Young &amp; Co.</i>	907
<b>IV. Tortious Interference with Contract</b>	<b>918</b>
A. Rejection of Negligent Interference	919
<i>State of Louisiana v. M/V Testbank</i>	919
B. Intentional Interference with Contract	928
<i>Lumley v. Gye</i>	929
C. Interference with Prospective Contractual Relations	933
<i>Wal-Mart Stores, Inc. v. Sturges, III</i>	933
<b>V. Distinguishing Tort vs. Contract Claims</b>	<b>945</b>
<i>Southwestern Bell Telephone v. Delanney</i>	945
<i>Table of Cases</i>	951
<i>Index</i>	959