CONTENTS

Preface xxiii
Acknowledgments xxvii
Introduction xxxi
Torts: List of Chapters xxxix
List of Abbreviations 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
     Vosburg v. Putney 4
     Dougherty v. Stepp 11
  2. Defenses to Intentional Torts 15
     a. Consensual Defenses 15
        Mohr v. Williams 15
        Canterbury v. Spence 23
        Hudson v. Craft 23
     b. Mental Disability 29
        McGuire v. Almy 29
     c. Self-Defense 33
        Courvoisier v. Raymond 33
  d. Defense of Property 37
     Bird v. Holbrook 37
  e. Necessity 44
     Ploof v. Putnam 44
     Vincent v. Lake Erie Transportation Co. 47
     Thomson, The Trolley Problem 53
Section C. Emotional and Dignitary Harms 55
  1. Assault 55
## Contents

   *Tuberville v. Savage* 55  
   Blackstone, Commentaries 56

2. Offensive Battery 59  
   *Alcorn v. Mitchell* 59

3. False Imprisonment 60  
   *Coblyn v. Kennedy’s, Inc.* 60

4. The Intentional Infliction of Emotional Distress: Extreme and Outrageous Conduct 65  
   *Wilkinson v. Downton* 65

---

### CHAPTER 2

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

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

### CHAPTER 3

**NEGLIGENCE**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Introduction</td>
<td>143</td>
</tr>
</tbody>
</table>

---

Thayer, Public Wrong and Private Action 143  
Green, Judge and Jury 143

**Section A. Introduction** 143
Section B. The Reasonable Person

Harry Kalven, Jr. 145
Vaughan v. Menlove 145
Holmes, The Common Law 150
Roberts v. Ring 152
Daniels v. Evans 155
Breunig v. American Family Insurance Co. 159
Fletcher v. City of Aberdeen 164
Denver & Rio Grande R.R. v. Peterson 166

Section C. Calculus of Risk

Blyth v. Birmingham Water Works 167
Terry, Negligence 168
Seavey, Negligence — Subjective or Objective? 170
Osborne v. Montgomery 171
Cooley v. Public Service Co. 173
United States v. Carroll Towing Co. 177
Ross, Settled Out of Court 185
Andrews v. United Airlines 186

Section D. Custom

Titus v. Bradford, B. & K. R. Co. 189
Mayhew v. Sullivan Mining Co. 191
The T.J. Hooper (1931) 193
The T.J. Hooper (1932) 194
Lama v. Borras 200
Murray v. UNMC Physicians 208
Schuck, Rethinking Informed Consent 213
Canterbury v. Spence 214

Section E. Statutes and Regulations

Anon. 226
Thayer, Public Wrong and Private Action 227
Osborne v. McMasters 229
Martin v. Herzog 235
Uhr v. East Greenbush Central School District 240

Section F. Judge and Jury

Holmes, The Common Law 247
Baltimore and Ohio R.R. v. Goodman 249
Pokora v. Wabash Ry. 250

Section G. Proof of Negligence

1. Methods of Proof 258
2. Res Ipsa Loquitur 259
   Byrne v. Boadle 259
   Colmenares Vivas v. Sun Alliance Insurance Co. 265
   Ybarra v. Spangard 273
CHAPTER 4

PLAINTIFF’S CONDUCT

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

CHAPTER 5

CAUSATION

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

- American Motorcycle Association v. Superior Court 370
- Multiple Sufficient Causes
  - Kingston v. Chicago & N.W. Ry. 379
- Indeterminate Causes
  - Alternative Liability
    - Summers v. Tice 385
  - Market Share Liability
    - Sindell v. Abbott Laboratories 388
  - Loss of Chance of Survival
    - Herskovits v. Group Health Cooperative 399
- Proof of Factual Causation
  - General Electric Co. v. Joiner 406

### Section C. Proximate Cause (Herein of Duty)

1. Physical Injury
   - Bacon, The Elements of the Common Lawes of England 415
   - Street, Foundations of Legal Liability 415
   - Ryan v. New York Central R.R. 416
   - Berry v. Sugar Notch Borough 420
   - Brower v. New York Central & H.R.R. 424
   - Wagner v. International Ry. 430
   - In re Polemis & Furness, Withy & Co. 432
   - Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd. (Wagon Mound (No. 1)) 436
   - Palsgraf v. Long Island R.R. 444
   - Marshall v. Nugent 457
   - Virden v. Betts & Beer Construction Company 461
   - Hebert v. Enos 463
2. Emotional Distress
   - Mitchell v. Rochester Ry. 465
   - Dillon v. Legg 468

## CHAPTER 6

### AFFIRMATIVE DUTIES

#### Section A. Introduction

#### Section B. The Duty to Rescue

- Luke 10:30-37 (King James Translation) 483
- Buch v. Amory Manufacturing Co. 484
- Hurley v. Eddingfield 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
## Contents

Fletcher, Law and Morality: A Kantian Perspective 491  
Bender, An Overview of Feminist Torts Scholarship 491  
Montgomery v. National Convoy & Trucking Co. 496

**Section C. Duties of Owners and Occupiers** 501  
Robert Addie & Sons (Collieries), Ltd. v. Dumbreck 501  
Rowland v. Christian 509

**Section D. Gratuitous Undertakings** 519  
Coggs v. Bernard 519  
Erie Railroad Co. v. Stewart 521  
Moch Co. v. Rensselaer Water Co. 526

**Section E. Special Relationships** 533  
Kline v. 1500 Massachusetts Avenue Apartment Corp. 534  
Tarasoff v. Regents of University of California 543

---

**CHAPTER 7**

### STRICT LIABILITY 553

**Section A. Introduction** 553

**Section B. Trespass to Chattels and Conversion** 554  
1. Trespass to Chattels 554  
   Intel Corp. v. Hamidi 555  
2. Conversion 563  
   Poggi v. Scott 563  
   Moore v. Regents of the University of California 567

**Section C. Animals** 576  
Gehrts v. Batteen 576

**Section D. Ultrahazardous or Abnormally Dangerous Activities** 585  
Spano v. Perini Corp. 585  
Indiana Harbor Belt R.R. v. American Cyanamid Co. 595

**Section E. Nuisance** 603  
1. Private Nuisance 604  
   Vogel v. Grant-Lafayette Electric Cooperative 604  
   Michelson v. Nutting 610  
   Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc. 614  
   Rogers v. Elliott 620  
   Ensign v. Walls 623  
   Boomer v. Atlantic Cement Co. 628  
2. Public Nuisance 637  
   Anonymous 637  
   Burgess v. M/V Tamano 639  
   City of Oakland v. BP P.L.C. 641

**Section F. Vicarious Liability** 649  
Ira S. Bushey & Sons, Inc. v. United States 649  
Saleem v. Corporate Transportation Group Ltd. 657
CHAPTER 8

PRODUCTS LIABILITY

Section A. Introduction

Section B. Exposition
  Winterbottom v. Wright
  Escola v. Coca Cola Bottling Co. of Fresno

Section C. The Restatements
  1. A Tale of Two Texts
      Restatement (Second) of Torts §402A
      Restatement (Third) of Torts: Products Liability §§1-2
  2. The Theory of Products Liability: Tort or Contract
      Casa Clara Condominium Ass’n, Inc. v. Charley Toppino & Sons, Inc.
  3. Proper Defendants Under Section 402A
      Oberdorf v. Amazon.com Inc.

Section D. Product Defects
  1. Manufacturing Defects
      Speller v. Sears, Roebuck and Co.
  2. Design Defects
      Campo v. Scafied
      2 Harper and James, Torts §28.5
      Wade, On the Nature of Strict Tort Liability for Products
      a. Development of the Negligence Test
          Volkswagen of America, Inc. v. Young
      b. Consumer Expectations versus Risk-Utility Tests
          Barker v. Lull Engineering Co.
      c. Third Restatement and the Alternative Design Test
  3. The Duty to Warn
      MacDonald v. Ortho Pharmaceutical Corp.
      Vassallo v. Baxter Healthcare Corp.
      Hood v. Ryobi America Corp.
      Air & Liquid Sys. Corp. v. DeVries

Section E. Plaintiff’s Conduct
  Daly v. General Motors Corp.

Section F. Federal Preemption
  Wyeth v. Levine

CHAPTER 9

DAMAGES

Sullivan v. Old Colony Street Ry.
Zibbell v. Southern Pacific Co.

Section A. Introduction

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

CHAPTER 10
TORT EXTENSIONS: INSURANCE AND NO-FAULT SYSTEMS 851

Section A. Introduction 851
Section B. Liability Insurance
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
      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
      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
  *Crisci v. Security Insurance Co.* 862
  *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp.* 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
     *Closgo v. Rentavision, Inc.* 883
     *Wilson v. Workers’ Compensation Appeals Board* 891
   c. Benefits Under the Workers’ Compensation Statutes 894
d. Exclusive Remedy 897
   *Rainer v. Union Carbide Corp.* 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

DEFA MATION 923

Section A. Introduction 923

Section B. Publication 925

*Mims v. Metropolitan Life Insurance Co.* 925
Contents

Firth v. State of New York 929
Blumenthal v. Drudge 934

Section C. False or Defamatory Statements 940
Parmiter v. Coupland 940
Muzikowski v. Paramount Pictures Corp. 940
Wilkow v. Forbes, Inc. 948

Section D. Libel and Slander 955
Varian Medical Systems, Inc. v. Delfino 955

Section E. Basis of Liability: Intention, Negligence, and Strict Liability in Defamation 961
E. Hulton & Co. v. Jones 961

Section F. Damages 963
1. Special Damages 963
   Terwilliger v. Wands 963
   Ellsworth v. Martindale-Hubbell Law Directory, Inc. 965
2. General Damages 968
   McCormick, Damages 968
   Faulk v. Aware, Inc. (1962) 968
   Faulk v. Aware, Inc. (1963) 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
   Auvil v. CBS 60 Minutes 974
2. Privileges in the Private Sphere 981
   Watt v. Longsdon 981
3. Privileges in the Public Sphere 988
   a. Legal Proceedings and Reports Thereon 988
      Kennedy v. Cannon 988
   b. Reports of Public Proceedings or Meetings 994
      Brown & Williamson Tobacco Corp. v. Jacobson 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
   New York Times Co. v. Sullivan 1002
   Curtis Publishing Co. v. Butts 1010
2. Private Parties 1018
   Gertz v. Robert Welch, Inc. 1018
   Obsidian Finance Group, LLC v. Cox 1026
CHAPTER 12

PRIVACY

Section A. Introduction

Section B. Historical Background
  Warren & Brandeis, The Right to Privacy
  Prosser, Privacy
  Kalven, Privacy in the Tort Law — Were Warren and Brandeis Wrong?

Section C. Intrusion Upon Seclusion
  Nader v. General Motors Corp.
  Boring v. Google Inc.
  Desnick v. American Broadcasting Co., Inc.

Section D. Public Disclosure of Embarrassing Private Facts
  Sidis v. F-R Publishing Corp.
  Haynes v. Alfred A. Knopf, Inc.
  Cox Broadcasting Corp. v. Cohn

Section E. False Light
  Time, Inc. v. Hill

Section F. Commercial Appropriation of Plaintiff’s Name or Likeness, or the Right of Publicity
  In re NCAA Student-Athlete Name and Likeness Litigation
  Factors Etc., Inc. v. Pro Arts, Inc.

CHAPTER 13

MISREPRESENTATION

Section A. Introduction

Section B. Fraud
  Pasley v. Freeman
  Vulcan Metals Co. v. Simmons Manufacturing Co.
  Swinton v. Whitinsville Savings Bank
  Laidlaw v. Organ
  Edgington v. Fitzmaurice
  BV Nederlandse Industrie Van Eiiproducten v. Rembrandt Enterprises, Inc.
  Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.

Section C. Negligent Misrepresentation
  Ultramares Corp. v. Touche
CHAPTER 14

ECONOMIC HARMs

Section A. Introduction

Section B. Inducement of Breach of Contract

The Statute of Labourers (1351)
Lumley v. Gye
Asahi Kasei Pharma Corp. v. Actelion Ltd.

Section C. Intentional Interference with Prospective Advantage

Tarleton v. M’Gawley

Section D. Negligent Interference with Economic Relationships

People Express Airlines, Inc. v. Consolidated Rail Corp.
Southern California Gas Co. v. Superior Court of Los Angeles County

Section E. Unfair Competition

Mogul Steamship Co. v. McGregor, Gow & Co.
International News Service v. Associated Press
The National Basketball Association v. Motorola, Inc.
Barclays Capital Inc. v. Theflyonthewall.com
Ely-Norris Safe Co. v. Mosler Safe Co.
Mosler Safe Co. v. Ely-Norris Safe Co.

CHAPTER 15

TORT IMMUNITIES

Section A. Introduction

Section B. Domestic or Intrafamily Immunities

1. Parent and Child
   a. Suits Between Parent and Child
   b. Third-Party Actions

2. Spouses

Section C. Charitable Immunity

Section D. Municipal Corporations

1. At Common Law
2. By Statute
3. Under the Constitution

Section E. Sovereign Immunity

Federal Tort Claims Act §§2671-2680
Berkowitz v. United States

Section F. Official Immunity

Clinton v. Jones

Table of Cases
Table of Restatement Sections
Table of Secondary Authorities
Index