LEXISNEXIS LAW SCHOOL PUBLISHING
ADVISORY BOARD

Paul Caron
Professor of Law
Pepperdine University School of Law
Herzog Summer Visiting Professor in Taxation
University of San Diego School of Law

Olympia Duhart
Professor of Law and Director of Lawyering Skills & Values Program
Nova Southeastern University, Shepard Broad Law School

Samuel Estreicher
Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

Steven I. Friedland
Professor of Law and Senior Scholar
Elon University School of Law

Joan Heminway
College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried
Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

Paul Marcus
Haynes Professor of Law
William and Mary Law School

John Sprankling
Distinguished Professor of Law
McGeorge School of Law

Melissa Weresh
Director of Legal Writing and Professor of Law
Drake University Law School
UNDERSTANDING TORTS

FIFTH EDITION

John L. Diamond
Professor of Law
University of California
Hastings College of the Law

Lawrence C. Levine
Professor of Law
University of the Pacific
McGeorge School of Law

Anita Bernstein
Anita and Stuart Subotnick Professor of Law
Brooklyn Law School
Diamond, John L.
Understanding torts / John L. Diamond, Professor of Law, University of California, Hastings College of the Law; Lawrence C. Levine, Professor of Law, University of the Pacific, McGeorge School of Law; Anita Bernstein, Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. -- Fifth edition.

Library of Congress Cataloging-in-Publication Data

Diamond, John L.
Understanding torts / John L. Diamond, Professor of Law, University of California, Hastings College of the Law; Lawrence C. Levine, Professor of Law, University of the Pacific, McGeorge School of Law; Anita Bernstein, Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. -- Fifth edition.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2013 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.
No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS
To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.
Dedications

JLD: With love to my wife, Lucia, my son, Danny, and my mother, Rhoda Diamond, and in loving memory of my father, Monroe Thomas Diamond.

LCL: With love to my sister, Diane, and to my nephews, Ben and Alex, and with thanks to my students for making each class a new adventure.

AB: In honor of Guido Calabresi, a Torts mentor to many, and with thanks to my Torts students, from whom I learn every fall.
Preface

We are pleased to present the fifth edition of *Understanding Torts*. The response to the first four editions from students and professors has been gratifying. We hope and expect that you will find this updated version of the book equally helpful.

This book examines the common law of torts. A tort is a civil wrong beyond a breach of contract for which the law provides redress. These tortious wrongs can take various forms, such as personal injury or death, harm to property, or interference with other protectable interests such as the right to be free from unwarranted invasions of privacy. Although state and federal statutes define some facets of tort law, by and large contemporary tort law remains defined by judicial decisions. Tort law, then, provides an excellent vehicle for viewing the dynamic nature of the common law, and for observing how a given body of law, with its often complex rules, evolves over time.

Writing first and foremost for law students, we have endeavored to provide a readable and concise treatise without oversimplifying the rules or the policy considerations that affect those rules. We examine the key topics covered in virtually any torts course — intentional torts and privileges, negligence, strict liability, and products liability. We also explore other important areas — damages, joint and several liability, nuisance, economic torts, misuse of legal process, defamation, and privacy. Where appropriate, we cover contemporary developments in the law of torts, such as current efforts to redefine the scope of strict products liability and the modern treatment of intentional infliction of emotional distress. We have provided primary and secondary authority to support our textual analyses without overburdening the reader with excessive footnotes.

Central to the study of tort law is the fundamental question of the purposes to be served by the imposition of liability on wrongdoers (tortfeasors). The contours of the tort system reflect broad policy concerns and often conflicting goals on a larger societal basis. The system is pervasive and raises the threshold issue of how the legal system should compensate, if at all, those who suffer injury at the hands of another. A cornerstone of the debate involves the extent to which tort liability should rest on fault, as opposed to strict liability. Resolution of this central issue depends upon one’s perspective of the goal of tort liability. For example, the tort system could rely primarily on notions of corrective justice, seeking to right a wrong perpetrated on a specific individual. Alternatively, a utilitarian approach could be adopted instead that would seek to effect the greatest good for society as a whole. Or economic efficiency could serve as the driving force of the tort system. All these models, and more, are represented in American tort law and we have presented them as appropriate in the text. Our goal in so doing has not been to resolve the debate about the proper justifications for the tort system, but to illuminate the divergent, and often complex, policy issues confronting courts and legislatures as they seek to fine tune, or even substantially alter, the tort system.

We have organized this treatise in a traditional format. We begin with an examination

---

1 The law of torts focuses on private rights of redress. The aggrieved party sues in tort to recover damages for the harm caused her by the defendant. Contrast this to the criminal law where the State, through government-employed prosecutors, pursues the action and exacts the punishment.

2 Because of space limitations, we have not undertaken discussion of alternative approaches to liability for accidents, such as workers’ compensation or no-fault insurance.
Preface

of intentional torts and privileges and turn next to negligence. Later chapters consider strict liability and other torts such as nuisance, misrepresentation, and defamation. We have tried to incorporate cases that students will confront in their study of torts, and we provide citations to Restatements of the law, particularly the Third and Second Restatements of Torts, cited respectively as “Restatement (Third)” and “Restatement (Second).” These references make Understanding Torts compatible with most casebooks and patterns of instruction in U.S. law schools.

Tort law has been undergoing unprecedented scrutiny. Within the legal community and in the public at large, there has been a sense that the civil litigation system generally, and personal injury law specifically, merit retooling and even wholesale restructuring. In the twenty-first century, the law of torts continues to undergo substantial change. In addition to helping readers understand the existing torts system, this text provides the basis from which an evaluation of the current torts system can be made with an eye toward understanding future developments.
Acknowledgments

Each of us has many people to thank for making this book a reality. Each of us remains grateful to Clark Kimball, our editor, and the editorial, composition and production staffs at LexisNexis for their faith, assistance, and patience.

Professor Diamond expresses appreciation for the outstanding research and other assistance provided by Justin Bezis, Anthony P. Canini, Ronak Daylami, Mark Diperna, Steven J. Dow, Ondrej Likar, Geoff S. Long, Amy B. Lovell, Daniel Merrick, Vincent Moyer, Martin L. Pitha, Mehriar Sharifi, Barbara A. Topchov, Lucia M. Walters, and Linda Weir. He would also like to express gratitude for the continuing insights provided by his colleagues in torts, past and present, at the University of California, Hastings College of the Law: Professors Margreth Barrett, Marsha N. Cohen, David J. Jung, Jamie S. King, David I. Levine, Leo J. O’Brien, Dorit Reis, Naomi Roht-Arriaza, Joseph Modeste Sweeney, and Francis R. Walsh. Thanks, too, to Divina Morgan for her expert manuscript preparation and assistance. In addition, Professor Diamond expresses heartfelt appreciation to his tort students who share the adventure of torts with him and teach him so much along the way.

Professor Levine is indebted to his colleague and friend, Julie Davies, for her extraordinarily generous and helpful assistance with this project. Outstanding research assistance was provided on this and earlier editions by McGeorge law students, John Bachman, Margaret Broussard, Robert Carlin, Vignesh Ganapathy, Max Hellman, Matt Hooper, Danielle Lenth, James McGuire, and Linda Yackzan, as well as New York Law School student John Marchione. Most importantly, Professor Levine expresses his enormous gratitude to his students for teaching him so much.

Professor Bernstein thanks Lucy Fagan and Lauren Numeroff for research assistance, along with her students, who continue to teach her. She also thanks Robin Deis for her assistance with the mechanics of the manuscript.

We welcome your suggestions, thoughts, comments, and criticisms. While this was a collaborative effort with each of us working on the entire book, to facilitate feedback, note that Chapters 1, 2, 11–15, 19, 20, and 22 were the primary responsibility of John Diamond; Chapters 3–10 and 21 were the primary responsibility of Lawrence Levine; and Chapters 16–18 were the primary responsibility of Anita Bernstein, as well as integrating the chapters together.

John L. Diamond
Lawrence C. Levine
Anita Bernstein
# Table of Contents

## Chapter 1 INTENTIONAL INTERFERENCE WITH PERSONS AND PROPERTY .......................... 1

§ 1.01 INTENT ........................................ 3  
[A] Overview and Definition .................. 3  
[B] Intent as “Desire” .............................. 3  
[C] Intent as “Substantial Certainty” .......... 3  
[D] Transferred Intent ......................... 4  
[E] The Mistake Doctrine ..................... 5  
[F] Insanity and Infancy ...................... 6  

§ 1.02 BATTERY ..................................... 7  
[A] Overview and Definition ................. 7  
[B] Intent Requirement ....................... 7  
[C] Harmful or Offensive Contact .......... 8  
[D] Causation .................................. 9  
[E] Policy Rationale ......................... 9  

§ 1.03 ASSAULT ................................... 9  
[A] Overview .................................. 9  
[B] Definition ................................ 10  
[1] Intent Requirement ...................... 10  
[3] Imminent Harmful or Offensive Contact .. 11  
[C] Justifications for the Tort ............... 13  

§ 1.04 FALSE IMPRISONMENT ....................... 14  
[A] Overview and Definition ................. 14  
[B] Bounded Area .............................. 15  
[C] Means of Confinement or Restraint ...... 15  
[1] Physical Barrier ........................... 15  
[2] Force or Threat of Immediate Force ...... 16  
[3] Omissions .................................. 16  
[4] Improper Assertion of Legal Authority (False Arrest) ...... 17  
[D] Contrast with Malicious Prosecution and Abuse of Process .... 17
# Table of Contents

[A] Overview ............................................. 37

[B] Limited Privilege Rule ................................. 37

[C] Restatement Rule ..................................... 37

[D] Competing Policy Considerations .................... 38

§ 2.04 DEFENSE AND RECOVERY OF PROPERTY .......... 38

[A] Overview ............................................. 38

[B] Reasonable Force .................................... 38

[C] Force Against a Privileged Party ....................... 39

[D] Defense of Habitation ................................ 39

[E] Mechanical Devices .................................. 39

[F] Recovery of Personal Property ....................... 40

§ 2.05 NECESSITY ...................................... 41

[A] Overview and Definition .............................. 41

[B] Private Necessity .................................... 41

[C] Public Necessity ..................................... 42

[D] Intentional Injury and Killing ...................... 43

Chapter 3 THE NEGLIGENCE CONCEPT AND THE REASONABLE PERSON STANDARD OF CARE ............ 45

§ 3.01 OVERVIEW ...................................... 45

§ 3.02 HISTORICAL DEVELOPMENT ...................... 46

§ 3.03 THE STANDARD OF CARE ......................... 47

§ 3.04 THE REASONABLE PERSON ......................... 47

[A] The Characteristics of the Reasonable Person .... 49

[B] Flexibility in the Reasonable Person Standard .... 50

[1] Emergency ........................................... 51

[2] Physical Conditions ................................ 52


[4] The Effect of Superior Abilities, Skill, or Knowledge .... 55

[C] Gender Bias in the Reasonable Person Standard .... 56

§ 3.05 THE CHILD STANDARD OF CARE ................ 58

§ 3.06 DEGREES OF NEGLIGENCE ......................... 59

Chapter 4 THE DETERMINATION OF UNREASONABLENESS: BREACH OF DUTY, CUSTOM, AND THE ROLE OF THE JURY .......................... 61

§ 4.01 OVERVIEW ...................................... 61

§ 4.02 THE RISK CALCULUS .............................. 62

[A] Probability ........................................... 63

[B] Magnitude of the Loss ................................ 64

[C] Burden of Avoidance ................................ 65
# Table of Contents

[D] Value of the Hand Formula ................................................. 66  
§ 4.03 THE ROLE OF CUSTOM .................................................. 68  
[A] Deviation from Custom .................................................... 68  
[B] Compliance with Custom .................................................. 69  
§ 4.04 THE ROLE OF THE JURY ................................................ 69  

Chapter 5 PROOF OF BREACH .................................................. 73  
§ 5.01 OVERVIEW ................................................................. 73  
§ 5.02 KINDS OF EVIDENCE ..................................................... 74  
§ 5.03 SLIP AND FALL CASES AND THE ROLE OF CONSTRUCTIVE NOTICE .................................................. 75  
§ 5.04 RES IPSA LOQUITUR ...................................................... 76  
[A] Byrne v. Boadle .............................................................. 77  
[B] Probably Negligence ....................................................... 77  
[C] Probably the Defendant ................................................... 78  
[E] The Effect and Value of Res Ipsa Loquitur ........................................ 81  
[F] The Role of the Defendant’s Superior Knowledge ........................................ 82  

Chapter 6 STATUTORY STANDARDS OF CARE — “NEGLIGENCE PER SE” .................................................. 85  
§ 6.01 OVERVIEW ................................................................. 85  
§ 6.02 FACTORS USED FOR DETERMINING THE PROPRIETY OF ADOPTING A STATUTE AS THE STANDARD OF CARE .................................................. 86  
[A] Type of Harm ............................................................... 87  
[B] Plaintiff in Protected Class ................................................ 88  
[C] Licensing Statutes ............................................................ 88  
§ 6.03 EFFECTS OF NON-ADOPTION AND ADOPTION OF STATUTE .................................................. 88  
[A] Effects of Non-Adoption of a Statute .................................... 88  
[B] Effects of Adoption of the Statute and Statutory Violation .................................................. 89  
§ 6.04 THE ROLE OF EXCUSE .................................................. 89  
§ 6.05 NEGLIGENCE PER SE AND CHILDREN ........................................ 90  
§ 6.06 COMPLIANCE WITH STATUTE ........................................ 91  
§ 6.07 CRITICISMS OF THE NEGLIGENCE PER SE DOCTRINE .................................................. 91  

Chapter 7 PROFESSIONAL NEGLIGENCE ........................................ 93  
§ 7.01 OVERVIEW ................................................................. 93  
§ 7.02 MEDICAL MALPRACTICE ............................................... 94  
[A] Alternative Approaches to the Practice of Medicine ........................................ 95  
[B] Proof Issues in Medical Malpractice ....................................... 96  
[1] Expert Witnesses ............................................................ 96
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 7.03</td>
<td>INFORMED CONSENT</td>
<td>98</td>
</tr>
<tr>
<td>[A]</td>
<td>Battery</td>
<td>99</td>
</tr>
<tr>
<td>[B]</td>
<td>Negligence</td>
<td>99</td>
</tr>
<tr>
<td>[1]</td>
<td>The Physician Rule</td>
<td>100</td>
</tr>
<tr>
<td>[2]</td>
<td>The Patient Rule</td>
<td>100</td>
</tr>
<tr>
<td>[C]</td>
<td>Extensions of the Informed Consent Doctrine</td>
<td>102</td>
</tr>
<tr>
<td>§ 7.04</td>
<td>ATTORNEY MALPRACTICE</td>
<td>103</td>
</tr>
</tbody>
</table>

## Chapter 8 DUTY IN NEGLIGENCE CASES .......................... 105

| § 8.01  | OVERVIEW | 106 |
| § 8.02  | NONFEASANCE | 107 |
| [A]     | Duty to Rescue | 108 |
| [1]     | Creating the Peril | 110 |
| [2]     | Special Relationships | 111 |
| [3]     | Undertaking to Act and Reliance | 111 |
| [4]     | Contract | 113 |
| [5]     | Conclusion | 113 |
| [B]     | Duty to Control and to Protect | 114 |
| [1]     | Duty to Control | 114 |
| [a]     | Tarasoff v. Regents of University of California | 115 |
| [b]     | Suppliers of Liquor | 117 |
| [c]     | Negligent Entrustment | 118 |
| [2]     | Duty to Protect | 119 |
| [a]     | Landlord Duty to Protect | 120 |
| [b]     | Business Duty to Protect | 121 |
| [c]     | Police Duty to Protect and the Public Duty Doctrine | 122 |
| [i]     | Police Duty | 122 |
| [ii]    | The Public Duty Doctrine in Other Contexts | 124 |
| § 8.03  | THE LIMITS OF THE MISFEASANCE/NONFEASANCE DISTINCTION | 125 |
| § 8.04  | THE FORESEEABLE PLAINTIFF REQUIREMENT | 125 |
| § 8.05  | THE THIRD RESTATEMENT | 128 |
| § 8.06  | CONCLUSION | 128 |

## Chapter 9 LAND OCCUPIER DUTY ................................. 131

| § 9.01  | OVERVIEW | 131 |
| § 9.02  | THE COMMON LAW STATUS APPROACH | 132 |
| [A]     | Trespassers | 132 |
| [1]     | Frequent or Known Trespassers | 133 |
| [2]     | Child Trespassers | 134 |
Table of Contents

[B] Licensees ................................................. 136
[C] Invitees .................................................. 137
[D] Determining Status ................................. 138
§ 9.03 THE UNITARY STANDARD ......................... 140
§ 9.04 LAND POSSESSOR DUTY TO THOSE OUTSIDE THE LAND .... 142
§ 9.05 LANDLORD-TENANT RELATIONS ..................... 143

Chapter 10 DUTY LIMITED BY KIND OF HARM ................. 145

§ 10.01 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS .......... 146
[A] Overview ................................................. 146
[B] Direct Actions ........................................... 147
[1] The Impact Rule ........................................ 147
[3] Special Cases .......................................... 148
[6] Conclusion ............................................. 151
[C] Bystander Actions ........................................ 151
[1] Zone of Danger ......................................... 152
[4] Policy Considerations ................................... 155

§ 10.02 WRONGFUL CONCEPTION, WRONGFUL BIRTH, AND
WRONGFUL LIFE .................................................. 156
[A] Overview ................................................. 156
[B] Wrongful Conception .................................... 157
[C] Wrongful Birth .......................................... 159
[D] Wrongful Life ............................................ 160
[E] Conclusion ............................................. 161

§ 10.03 LOSS OF CONSORTIUM, WRONGFUL DEATH, AND
SURVIVAL .......................................................... 161
[A] Overview ................................................. 161
[B] Loss of Consortium ....................................... 162
[C] Wrongful Death ......................................... 164
[1] Who May Recover ....................................... 165
[2] Recoverable Damages ................................... 165
[3] Proof Problems ......................................... 165
[4] Defenses .................................................. 166
[D] Survival Actions .......................................... 167

§ 10.04 NEGLIGENTLY INFlicted ECONOMIC LOSS ................. 168
[A] Overview ................................................. 168
Table of Contents

[B] Pure Economic Loss .................................................. 168
[C] Liability of Negligent Information Suppliers ......................... 171
[1] Quasi-Privity .......................................................... 172
[2] Restatement (Second) § 552 ............................................ 174
[D] Attorney Liability ..................................................... 177

Chapter 11 CAUSE-IN-FACT ............................................ 179

§ 11.01 OVERVIEW .......................................................... 179
§ 11.02 “BUT FOR” ANALYSIS ............................................. 180
§ 11.03 SUBSTANTIAL FACTOR TEST .................................. 181
§ 11.04 PROOF PROBLEMS IN CAUSE-IN-FACT .................... 182
[A] Shifting the Burden of Proving Causation ............................ 182
[B] Market Share Liability .................................................. 183
[C] Medical Uncertainty Cases .......................................... 186
[D] Statistical Evidence of Causation .................................. 187
[E] Future Developments .................................................. 188

Chapter 12 PROXIMATE CAUSE OR SCOPE OF LIABILITY ...... 189

§ 12.01 OVERVIEW .......................................................... 189
§ 12.02 THE PROBLEM PROXIMATE CAUSE ADDRESSES ............ 190
§ 12.03 PROXIMATE CAUSE TESTS ..................................... 191
[A] Foreseeability Test — Definition ..................................... 191
   Foreseeable Consequences ............................................ 192
[2] Type of Harm Versus Manner and Extent ............................ 193
[3] Superseding Intervening Forces ..................................... 194
[B] “Eggshell” Plaintiff Personal Injury Rule ............................ 196
[C] Direct Causation Test .................................................. 197
[D] “Practical Politics” and “Rough Sense of Justice” Test .......... 198
[E] Restatement (Second) Test ............................................ 199
[F] Restatement (Third) Test ............................................. 201
§ 12.04 POLICY OBJECTIVES ADDRESSED BY PROXIMATE CAUSE ... 201

Chapter 13 JOINT AND SEVERAL LIABILITY ......................... 203

§ 13.01 OVERVIEW AND DEFINITION .................................. 203
§ 13.02 JOINT TORTFEASORS ........................................... 204
[A] Acting in Concert ...................................................... 204
[B] Independent Acts Causing a Single Indivisible Injury ............ 204
Table of Contents

[C] Vicarious Liability .......................................................... 205
[D] “Joint and Several Liability” ............................................. 206
§ 13.03 SPECIAL PROBLEMS AFTER COMPARATIVE FAULT .......... 207
[A] Allocations of Liability Among Joint Tortfeasors ................. 207
[B] Impact of Settlement on Percentage Shares ......................... 207
[C] Contribution and Indemnification ...................................... 209
[D] Policy Debate and Reform Statutes .................................... 211

Chapter 14 DAMAGES .......................................................... 213

§ 14.01 OVERVIEW ............................................................. 213
§ 14.02 PROPERTY DAMAGES ............................................... 215
§ 14.03 PERSONAL INJURY ..................................................... 216
[A] Medical Expenses ......................................................... 216
[B] Lost Wages or Diminished Earning Capacity ......................... 216
[C] Incidental Economic Consequences ................................... 217
[D] Reduction to “Present Value” ............................................. 217
[E] Pain and Suffering .......................................................... 218
§ 14.04 MITIGATION OR DOCTRINE OF AVOIDABLE CONSEQUENCES ..... 220
§ 14.05 PUNITIVE DAMAGES .................................................. 220
[A] Overview and Constitutionality ....................................... 220
[B] Policy Arguments for and Against Punitive Damages .......... 222
[C] Insurance Liability for Punitive Damages ......................... 223
[D] Respondeat Superior and Punitive Damages ....................... 224
§ 14.06 COLLATERAL SOURCE RULE ....................................... 224

Chapter 15 DEFENSES ......................................................... 227

§ 15.01 OVERVIEW ............................................................. 228
§ 15.02 CONTRIBUTORY NEGLIGENCE ....................................... 229
[A] Definition ................................................................. 229
[B] Last Clear Chance Doctrine ............................................. 231
[C] Plaintiffs Unable to Exercise Self-Protection ...................... 232
§ 15.03 COMPARATIVE NEGLIGENCE ......................................... 232
[A] Pure Comparative Negligence ......................................... 232
[B] Modified Comparative Negligence ................................... 233
[2] 50 Percent or Greater Approach ..................................... 233
[3] “Slight” Comparative Negligence ..................................... 233
[C] Determining the Percentage of Fault Attributable to the Plaintiff 233
[D] Comparisons Between Different Systems .......................... 234
[1] Contributory Negligence Versus Comparative Negligence ........ 234
[2] Comparison Between Pure and Modified Systems of Comparative Negligence 234
Fault .......................................................... 235

§ 15.04 ASSUMPTION OF RISK ................................................. 235
[A] Definition ......................................................... 235
[1] Knowledge of a Particular Risk ......................... 236
[2] Voluntariness .................................................... 236
[B] Classifications of Assumption of Risk ................. 237
[3] Implied Assumption of Risk ..................... 238
[a] Approach One: Assumption of Risk Remains a Complete
    Defense ....................................................... 238
[b] Approach Two: Questioning the Reasonableness of the
    Assumed Risk .............................................. 239
[c] Approach Three: Absorption of Assumption of Risk into
    Comparative Negligence ......................... 240
[C] The “Firefighter’s Rule” .................................. 242

§ 15.05 IMMUNITIES ......................................................... 242
[A] Overview ........................................................... 242
[B] Charitable Immunity ........................................... 243
[C] Spousal Immunity ............................................... 243
[D] Parent-Child Immunity ....................................... 244
[E] Governmental Immunity .................................... 245

Chapter 16 STRICT LIABILITY ......................................... 249

§ 16.01 OVERVIEW .......................................................... 249

§ 16.02 STRICT LIABILITY FOR INJURIES CAUSED BY ANIMALS ...... 251
[A] Livestock ......................................................... 251
[B] Domestic Animals ............................................ 252
[C] Wild Animals ................................................... 253
[D] Defenses .......................................................... 254

§ 16.03 STRICT LIABILITY FOR ABNORMALLY DANGEROUS
ACTIVITIES ............................................................ 255
[A] Generally ......................................................... 255
[B] Restatement (Second) §§ 519–520 ......................... 257
[C] Common Law Criteria ......................................... 260
[1] Requirement of an Activity under Defendant’s Control .... 260
[2] Type of Hazard Contemplated ............................... 262
[D] Defenses .......................................................... 262
[E] The Three Restatements Compared ...................... 263

§ 16.04 OTHER APPLICATIONS ............................................ 264
Chapter 17 PRODUCTS LIABILITY ........................................ 267

§ 17.01 PRODUCTS LIABILITY: GENERALLY .................. 268

§ 17.02 PRODUCTS LIABILITY IN TORT ....................... 269
[A] Negligence .............................................. 269
[B] Strict Tort Products Liability as Advanced in Restatement (Second) of Torts § 402A (1965) .... 270
[1] Generally ............................................. 270
[2] Necessity of Showing a Defect ....................... 272
[a] The Consumer Expectations Test .................. 272
[b] The Risk/Utility Test ................................ 274
[c] Hybrid Tests for Defective Design ................. 275
[3] Necessity of Showing Unreasonable Danger .... 276
[4] Changes to the Product after Leaving Control of Defendant .... 277

§ 17.03 THE THIRD RESTATEMENT’S TRIPARTITE APPROACH .......... 278
[A] Manufacturing Defects ................................ 278
[B] Design Defects ........................................ 278
[C] Defects of Warning, Instruction, or Marketing .... 280
[1] Generally ............................................. 280
[2] Obvious Dangers ..................................... 281
[3] Causation Questions Involving Disregard of Warnings .... 283
[4] The Learned Intermediary Rule ...................... 284
[5] Persons to be Warned ................................ 285
[a] Nonbuyers ............................................ 285
[b] The Allergic or Idiosyncratic User ................ 286
[c] Professional Users .................................. 287
[D] Defenses and Apportionment ......................... 289
[1] Among Multiple Defendants ......................... 290
[2] Between or Among the Plaintiff and Defendant(s) .... 290

§ 17.04 ISSUES OF APPLICABILITY, PROOF, AND STATUTORY REGULATION ............................................. 291
[A] Applicability ........................................... 291
[2] Sellers of Used Products ............................ 292
[3] Lessors .................................................. 292
[4] Services ................................................. 293
[5] Sellers of Real Property .............................. 294
Table of Contents

[A] Overview .................................................. 326
[B] The Requirement of Intent .................................. 327
[C] The Requisite Physical Invasion and Harm ..................... 328
[D] Above and Below the Surface .................................. 330
[E] Trespassing Animals ........................................ 331
[F] Statutes of Limitation ........................................ 331
[1] Permanent Trespass; Continuing Trespass ...................... 331
[2] “Discovery” Statutes of Limitation ................................ 332

Chapter 19 ECONOMIC TORTS .................................. 333

§ 19.01 FRAUDULENT MISREPRESENTATION ..................... 334
[A] Overview .................................................. 334
[B] Definition .................................................. 334
[1] Material Misrepresentation by Defendant ....................... 334
[2] Scienter .................................................. 337
[3] Intent to Induce Reliance .................................... 337
[4] Causation .................................................. 338

§ 19.02 INTENTIONAL INTERFERENCE WITH CONTRACT AND
INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC
RELATIONS .................................................. 340
[A] Overview .................................................. 340
[B] Definitions .................................................. 341
[1] Valid Contract or Economic Expectancy ....................... 342
[2] Knowledge of Valid Contract or an Economic Expectancy by the
Defendant .................................................. 342
[3] Intent by the Defendant to Interfere With the Contract or Economic
Expectancy .................................................. 342
[4] Interference Caused by the Defendant ....................... 343
[5] Damages .................................................. 343
[C] Justifications for Interference ................................ 343

§ 19.03 TORTIOUS BREACH OF THE COVENANT OF GOOD FAITH AND
FAIR DEALING .................................................. 345

Chapter 20 MISUSE OF LEGAL PROCESSES ..................... 349

§ 20.01 OVERVIEW ........................................ 349

§ 20.02 MALICIOUS PROSECUTION AND MALICIOUS INSTITUTION OF
CIVIL PROCEEDINGS: DEFINITION ..................... 350
[A] Institution or Continuation of Criminal or Civil Proceedings Against the
Plaintiff .................................................. 350
## Table of Contents

[B] Termination of the Proceeding in Favor of the Plaintiff ............... 351  
[C] Absence of Probable Cause ......................................... 352  
[D] Improper Purpose or Malice of the Accuser .......................... 352  
[E] Damages ................................................................. 353  

§ 20.03 IMMUNITY OF PUBLIC OFFICIALS ................................. 353  

§ 20.04 INTERACTION BETWEEN FALSE IMPRISONMENT AND MALICIOUS PROSECUTION AND MALICIOUS INSTITUTION OF CIVIL PROCEEDINGS ...................................................... 354  

§ 20.05 ABUSE OF PROCESS ....................................................... 354  

Chapter 21 DEFAMATION ............................................................. 357  

§ 21.01 OVERVIEW ................................................................. 358  

§ 21.02 COMMON LAW DEFAMATION ......................................... 358  

[A] Defamatory Statement ....................................................... 359  

[1] Defamatory to Whom? ...................................................... 359  

[2] Statements Not Facialy Defamatory: Inducement and Innuendo ... 360  

[B] Of and Concerning the Plaintiff .......................................... 361  

[1] Group Defamation .......................................................... 361  


[C] Publication and Republication ............................................ 362  

[D] Damages ................................................................. 363  

[1] The Libel/Slander Distinction ............................................. 363  

[2] Slander and Slander Per Se .............................................. 364  

[3] Libel and Libel Per Quod ................................................. 364  

[E] Common Law Defenses .................................................... 364  

[1] Substantial Truth .......................................................... 365  


[3] Qualified Privileges ....................................................... 366  

§ 21.03 CONSTITUTIONAL CONSTRAINTS ..................................... 367  

[A] Public Officials ............................................................... 368  

[B] Public Figures ............................................................... 369  

[C] Private Persons .............................................................. 371  

[1] Public Concern ............................................................. 371  

[2] Private Concern ............................................................ 372  

[D] Actual Malice ............................................................... 372  

[E] Falsity ................................................................. 373  

[F] Conclusion ................................................................. 373  

Chapter 22 INVASION OF PRIVACY .............................................. 375  

§ 22.01 OVERVIEW ................................................................. 375  

§ 22.02 INTRUSION UPON SECLUSION ....................................... 375
**Table of Contents**

§ 22.03  APPROPRIATION OF NAME OR PICTURE AND THE RIGHT OF PUBLICITY  ................................................. 377

§ 22.04  FALSE LIGHT ................................................................. 378

§ 22.05  PUBLIC DISCLOSURE OF PRIVATE FACTS  ................. 380

  TABLE OF CASES .......................................................... TC-1

  INDEX ................................................................. I-1