

SUMMARY TABLE OF CONTENTS

| | |
|--|-----|
| PREFACE | i |
| SUMMARY OF CONTENTS | iii |
| CONTENTS | v |
| CHAPTER 1 INTRODUCTION: THE SUBJECT MATTER, POLICIES, AND PROCESS OF TORT LAW..... | 1 |
| A. The Subject Matter of Tort Law | 1 |
| B. The Policies Involved in Tort Law | 5 |
| C. The Process of Tort Litigation..... | 29 |
| CHAPTER 2 NEGLIGENCE AND SIMILAR BREACHES OF DUTY | 45 |
| A. Duty and Breach of Duty..... | 46 |
| B. Causation | 152 |
| C. Proof | 175 |
| D. Defenses..... | 201 |
| CHAPTER 3 STRICT LIABILITY..... | 245 |
| A. Nuisance..... | 245 |
| B. “Dangerous” Activities | 271 |
| CHAPTER 4 PRODUCTS LIABILITY | 279 |
| A. Theories of Liability..... | 281 |
| B. Defect..... | 321 |
| C. Causation | 341 |
| D. Defenses..... | 344 |
| E. Damages | 358 |
| CHAPTER 5 HARM TO ECONOMIC INTERESTS: FRAUD, OTHER MISREPRESENTATION, INTERFERENCE WITH ECONOMIC RELATIONSHIPS, AND CIVIL CONSPIRACY | 365 |
| A. Fraud and Other Misrepresentation..... | 369 |
| B. Interference with Economic Relationships..... | 424 |
| C. Civil Conspiracy..... | 431 |
| CHAPTER 6 INTENTIONAL TORTS | 437 |
| A. Interference with Persons..... | 442 |
| B. Interference with Property..... | 475 |
| C. Misuse of Legal Proceedings | 496 |
| CHAPTER 7 INTERFERENCE WITH REPUTATION, PRIVACY, AND FAMILY RELATIONSHIPS | 513 |
| A. Defamation | 513 |
| B. Privacy | 566 |
| C. Interference with Family Relationships..... | 586 |

| | |
|---|------------|
| CHAPTER 8 DAMAGES..... | 589 |
| A. Damages Generally | 589 |
| B. Compensatory Damages for Personal Injury and Death | 613 |
| C. Property Loss | 632 |
| D. “Pure Economic Loss” and the “Economic Loss Doctrine”..... | 640 |
| E. Punitive Damages..... | 641 |
| CHAPTER 9 WRONGFUL DEATH AND SURVIVAL ACTIONS | 679 |
| A. Wrongful Death..... | 681 |
| B. Survival Actions | 700 |
| CHAPTER 10 ALLOCATING LIABILITY..... | 709 |
| A. Joint Tortfeasors | 709 |
| B. Vicarious Liability | 722 |
| INDEX | 755 |

TABLE OF CONTENTS

| | |
|--|-----------|
| PREFACE | i |
| SUMMARY CONTENTS..... | iii |
| CONTENTS | v |
| CHAPTER 1 INTRODUCTION: THE SUBJECT MATTER, POLICIES, AND PROCESS OF TORT LAW..... | 1 |
| A. The Subject Matter of Tort Law | 1 |
| B. The Policies Involved in Tort Law | 5 |
| 1. Prevention of Injuries | 7 |
| 2. Spreading of Losses | 11 |
| 3. “Background Rights”..... | 13 |
| a. Fairness | 15 |
| (1) Proportionality | 15 |
| (2) Reciprocity | 16 |
| (3) Relative Power | 17 |
| (4) “Corrective Justice,” Indignation, Vindication, and Retribution..... | 17 |
| (5) Problems of Proof..... | 18 |
| (6) Equal Treatment | 19 |
| b. Autonomy, Expectation, and Privacy..... | 21 |
| c. Corporate “Persons” | 23 |
| 4. Institutional Concerns..... | 24 |
| 5. Goals and Policies Normally Addressed in Other Doctrinal Areas..... | 27 |
| 6. Summary and Conclusion — The Process of the Development and Application of Tort Rules..... | 27 |
| C. The Process of Tort Litigation..... | 29 |
| 1. The Jury | 29 |
| a. Inconsistent Verdicts | 29 |
| b. General Verdicts and the “Two Issue Rule” | 31 |
| c. Miscellaneous | 32 |
| 2. The Adversarial Process and Responsibilities of Attorneys | 33 |
| a. Pleading Affirmative Defenses..... | 33 |
| b. Settlements and Releases | 33 |
| c. Election of Remedies..... | 35 |
| d. Limitations of Actions | 37 |
| 3. Federalism..... | 41 |
| CHAPTER 2 NEGLIGENCE AND SIMILAR BREACHES OF DUTY | 45 |
| A. Duty and Breach of Duty..... | 46 |
| 1. Foreseeability and the Existence, Nature, and Scope of Duty | 46 |

| | | |
|-----|--|-----|
| a. | The Scope of Duty—Foreseeable Risks and Foreseeable Victims | 47 |
| b. | Limits on the Existence of the Duty to Protect Foreseeable Victims from Foreseeable Risks | 48 |
| (1) | Emotional Distress..... | 49 |
| (2) | Economic Harm..... | 53 |
| (3) | Foreseeable Risk of Conduct by Others | 60 |
| (4) | Prenatal Injuries, “Wrongful Birth,” and “Wrongful Life” | 62 |
| 2. | Negligence, the Duty of Due Care, and Reasonable Conduct..... | 63 |
| a. | Calculus of Risk | 63 |
| b. | Reasonable Person | 65 |
| (1) | External Conduct | 65 |
| (2) | Abstract Standard | 66 |
| (3) | Generalized Standard | 66 |
| (a) | Age..... | 66 |
| (b) | Level of Skill, Expertise, and Knowledge | 67 |
| (c) | Handicaps | 68 |
| c. | Application of the Standard to the Circumstances | 69 |
| 3. | Recklessness and Other Levels of Care | 70 |
| a. | Definition of Recklessness | 72 |
| b. | Relevance | 72 |
| c. | Proof..... | 74 |
| d. | Constitutional Issues — Equal Protection..... | 75 |
| e. | Relationship of Recklessness to Other Types of Fault..... | 75 |
| 4. | Special Relationships and Obligations..... | 76 |
| a. | Fiduciary Relationships..... | 76 |
| b. | The Insurance Relationship — The Insurer’s Duty of “Good Faith” Dealing..... | 80 |
| c. | The Employment Relationship | 87 |
| (1) | Common Law Tort Claim for “Wrongful Discharge” or “Retaliatory Discharge”..... | 89 |
| (2) | Contract Claims — “Employee Handbooks” | 91 |
| (3) | Statutory Claims..... | 94 |
| (4) | Other Common Law Tort Claims..... | 97 |
| (5) | Public Employees..... | 98 |
| d. | Other Situations Involving the Duty of “Good Faith”..... | 101 |
| 5. | Affirmative Acts | 103 |
| a. | General Rule..... | 103 |
| b. | Exceptions..... | 105 |
| (1) | Special Relationship to Victim — Duty to Aid or Protect | 106 |
| (2) | Special Relationship to Injurer — Duty to Control, Supervise, or Warn..... | 112 |

| | |
|--|------------|
| (3) Voluntary Undertaking..... | 115 |
| (4) Creation of Risk..... | 118 |
| (5) Statutory Imposition of Duty..... | 118 |
| 6. Premises Liability..... | 121 |
| a. The Variable Standards of Care for Owners and Occupiers | 121 |
| (1) Persons off the Premises | 123 |
| (2) Persons on the Premises..... | 124 |
| (a) Adult Trespassers | 125 |
| (b) Licensees | 125 |
| (c) Invitees..... | 128 |
| (d) Children | 132 |
| b. Landlords, Tenants, and the Duty to Provide Reasonably Safe Premises..... | 135 |
| (1) General Common Law Rule | 135 |
| (2) Exceptions | 137 |
| (a) Existing or Foreseeable Danger to Those Outside the Premises..... | 137 |
| (b) Concealed Dangers | 138 |
| (c) Premises Open to the Public | 138 |
| (d) Common Areas Under Control of Lessor | 139 |
| (e) Undertaking..... | 139 |
| (3) Warranty, Strict Liability in Tort, and Statutory Duties of Landlords | 141 |
| (4) Foreseeable Misconduct by Third Parties..... | 144 |
| c. Buyers and Sellers..... | 146 |
| 7. Professional Malpractice | 146 |
| 8. Related Concepts—Proximate Cause, Assumption of Risk, and Immunities | 151 |
| B. Causation | 152 |
| 1. The Two Aspects of Causation Analysis—“Cause-in-Fact” and “Legal Cause” | 152 |
| 2. Cause-in-Fact | 154 |
| a. The Burden of Proof and the Roles of Judge and Jury | 154 |
| (1) General Rule | 154 |
| (2) Experts and the “Most Probably Rule”..... | 155 |
| (3) “Loss of Chance” of Survival Resulting from Medical Malpractice | 157 |
| (4) Informed Consent and Disclosure of Risks | 158 |
| b. Several Special Applications of the “But For” Test of Cause-in-Fact | 160 |
| (1) Independent Causal Factors that Are Sufficient to Cause Injury | 160 |

| | |
|--|-----|
| (2) Multiple Wrongdoers Where Only One Caused Complete Injury | 160 |
| (3) Multiple Wrongdoers Causing Separate, Independent Injuries — Apportionment of Damages..... | 161 |
| 3. “Legal Cause” — Proximate Cause, Foreseeability, and the Problems of Unusual Results and Intervening Actors | 163 |
| a. Consequences | 166 |
| b. Intervening Actors | 167 |
| (1) Foreseeability | 168 |
| (2) Nature of the Initial Act and of the Intervening Act..... | 172 |
| c. Roles of Judge and Jury | 173 |
| 4. “Act of God” | 174 |
| C. Proof..... | 175 |
| 1. The Burdens of Proof—Going Forward and Persuasion..... | 175 |
| 2. Circumstantial Evidence..... | 177 |
| a. Flexible Approach to Permissible Inferences | 177 |
| b. Constructive Notice..... | 181 |
| c. Similar Acts | 184 |
| d. Payment of Medical Bills, Offers of Settlement, and Settlements..... | 187 |
| e. Liability Insurance..... | 187 |
| 3. Role of Statutes, Private Codes, and Custom..... | 188 |
| 4. Role of Experts..... | 193 |
| 5. Miscellaneous | 199 |
| D. Defenses..... | 201 |
| 1. Victim’s Conduct and Comparative “Fault” | 201 |
| a. Contributory Negligence | 202 |
| (1) Nature and Proof..... | 202 |
| (2) Effects of Contributory Negligence..... | 204 |
| (a) Traditional Common Law Rule and Comparative Negligence | 204 |
| (b) Exceptions to General Rule..... | 207 |
| 1) Recklessness | 207 |
| 2) Last Clear Chance..... | 209 |
| 3) Protected Classes | 209 |
| (3) Imputed Contributory Negligence | 211 |
| b. Assumption of Risk | 212 |
| (1) Implied Assumption of Risk | 215 |
| (2) Express Assumption of Risk | 216 |
| (3) Related Doctrines | 218 |
| (a) Contributory Negligence | 218 |
| (b) Duty and Comparative Fault | 219 |
| (c) Informed Consent and Medical Malpractice | 219 |
| 2. Limitations of Actions | 220 |

| | |
|---|------------|
| 3. Immunities | 224 |
| a. Family Immunities | 224 |
| b. Charitable Immunity | 225 |
| c. Governmental and Official Immunity | 226 |
| d. Miscellaneous | 235 |
| 4. Workers' Compensation — Exclusivity of Remedy | 235 |
| 5. Other Defenses/Arbitration | 243 |
| CHAPTER 3 STRICT LIABILITY..... | 245 |
| A. Nuisance..... | 245 |
| 1. Nature and "Elements" of the Cause of Action in Nuisance | 245 |
| a. Use and Enjoyment of Land..... | 246 |
| b. "Unreasonable Interference"..... | 247 |
| c. Causation and Responsibility..... | 248 |
| d. Comparison with Other Doctrines | 248 |
| 2. Types of Nuisance..... | 251 |
| 3. Examples | 254 |
| 4. Remedies | 258 |
| a. Damages..... | 258 |
| b. Injunction | 261 |
| 5. "Defenses" | 264 |
| a. Victim's Conduct | 264 |
| (1) "Contributory Negligence"/Failure to "Mitigate Damages" | 264 |
| (2) "Assumption of Risk," "Consent," and "Coming to the Nuisance" | 265 |
| b. Laches and Prescription..... | 267 |
| c. Statute of Limitations | 268 |
| d. Preemption | 269 |
| e. Sovereign Immunity | 269 |
| f. Agricultural Operations | 270 |
| g. Shooting Ranges..... | 270 |
| B. "Dangerous" Activities | 271 |
| 1. Dynamite Blasting and Other "Abnormally Dangerous Activities" | 271 |
| 2. Animals..... | 273 |
| 3. Basis and Scope of Liability..... | 275 |
| 4. Defenses | 276 |
| CHAPTER 4 PRODUCTS LIABILITY..... | 279 |
| A. Theories of Liability..... | 281 |
| 1. Negligence | 282 |
| 2. Warranty Under the Uniform Commercial Code | 285 |
| a. Transactions Covered by the Code | 286 |
| b. The Three Types of Warranties..... | 287 |

| | | |
|-----|---|-----|
| c. | Losses Covered | 291 |
| d. | Exclusion and Modification of Warranties | 292 |
| e. | Limitation of Remedies | 295 |
| f. | Parties | 296 |
| g. | Other Statutory Schemes | 297 |
| h. | Common Law Warranties for Services? | 298 |
| i. | Hybrid Sales-Service Transactions | 300 |
| 3. | Strict Tort Liability | 301 |
| a. | Persons Protected | 303 |
| b. | Persons Liable | 304 |
| c. | Losses Covered | 305 |
| d. | Products Covered | 306 |
| e. | Defect | 308 |
| 4. | Improved Realty | 308 |
| a. | Negligence | 309 |
| b. | Implied Warranty | 310 |
| (1) | Warranty of Habitability | 311 |
| (2) | Warranty of Workmanlike Construction | 314 |
| (3) | Basis of Implied Warranty | 317 |
| 5. | Fraud and Other Misrepresentation | 318 |
| B. | Defect | 321 |
| 1. | Types of Defect | 321 |
| a. | Manufacturing or Production Line Defects | 322 |
| b. | Defective Design | 323 |
| c. | Warnings and Instructions | 328 |
| (1) | Existence of the Duty to Warn | 329 |
| (2) | Adequacy of the Warning | 331 |
| (3) | Conveying the Warning to the User | 331 |
| (4) | Statutory Schemes and Preemption | 333 |
| (5) | Assumption of Risk and Causation | 333 |
| 2. | Proof of Defect | 334 |
| C. | Causation | 341 |
| D. | Defenses | 344 |
| 1. | Strict Liability in Tort | 344 |
| 2. | Warranty | 346 |
| 3. | Statutes of Limitation and Notice Requirements | 350 |
| 4. | The “Successor Corporation” Problem | 354 |
| 5. | Workers’ Compensation Exclusivity: Direct Claims and Indirect Claims for Contribution or Indemnity | 355 |
| 6. | Federal Preemption | 356 |
| 7. | Indemnification and Contribution | 357 |
| E. | Damages | 358 |
| 1. | Generally—Tort, Contract, and “Economic Loss” | 358 |
| 2. | Punitive Damages | 360 |

| | |
|---|------------|
| CHAPTER 5 HARM TO ECONOMIC INTERESTS: FRAUD, OTHER MISREPRESENTATION, INTERFERENCE WITH ECONOMIC RELATIONSHIPS, AND CIVIL CONSPIRACY | 365 |
| A. Fraud and Other Misrepresentation | 369 |
| 1. Fraud | 369 |
| a. Elements of the Cause of Action | 371 |
| (1) The Representation | 371 |
| (a) Existing Fact..... | 371 |
| (b) Falsity, “Half-truths,” and the Duty to Disclose | 374 |
| (c) Materiality | 376 |
| (2) Mental State of Defendant — “Scienter” | 377 |
| (3) Reliance by the Victim | 378 |
| (a) Ignorance and Actual Reliance..... | 378 |
| (b) The Right to Rely — Legitimacy of Reliance | 379 |
| (c) The Right to Rely — Parties and Duty in the Absence of Privity | 384 |
| (4) Injury Proximately Caused by Misrepresentation | 384 |
| b. Proof..... | 386 |
| c. Defenses..... | 388 |
| d. Remedies | 389 |
| (1) Equitable Relief | 391 |
| (2) Compensatory Damages | 392 |
| (3) Punitive Damages | 397 |
| 2. Negligent Misrepresentation | 399 |
| a. Elements of the Cause of Action | 400 |
| (1) Negligence and the Duty of Due Care..... | 400 |
| (a) Direct Contractual Relationship Between Plaintiff and Defendant | 401 |
| (b) Third Party Situations..... | 406 |
| (2) False Representation of Material Fact | 407 |
| (3) Causation and Justifiable Reliance..... | 407 |
| b. Damages and Other Remedies..... | 408 |
| c. Defenses — Contributory Negligence and the Requirement of “Justifiable” Reliance | 409 |
| 3. Strict Liability in Tort..... | 410 |
| 4. Contractual and Equitable Approaches to Misrepresentation | 411 |
| 5. Statutory Schemes | 415 |
| a. The South Carolina Unfair Trade Practices Act..... | 415 |
| (1) Unfair Competition and Unfair or Deceptive Acts..... | 416 |
| (2) Conduct of Trade or Commerce | 418 |
| (3) Impact on Public Interest | 418 |
| (4) Defendants..... | 420 |
| (5) Exemptions..... | 420 |
| b. Other Statutory Schemes | 421 |

| | |
|--|------------|
| 6. Survival of claims | 422 |
| B. Interference with Economic Relationships | 424 |
| 1. Contract..... | 426 |
| 2. Causation..... | 426 |
| 3. Nature of Interference..... | 427 |
| 4. Injury/Remedies | 429 |
| C. Civil Conspiracy..... | 431 |
| CHAPTER 6 INTENTIONAL TORTS | 437 |
| A. Interference with Persons..... | 442 |
| 1. Assault and Battery | 442 |
| a. Elements of the Causes of Action | 442 |
| (1) Assault | 442 |
| (2) Battery | 444 |
| (3) Transferred Intent..... | 445 |
| b. Defenses..... | 446 |
| (1) Actual Consent..... | 446 |
| (2) Implied Consent, Privilege, and Authorization | 448 |
| (3) Mere “Provocation” Not A Defense..... | 449 |
| (4) Defense of Self or Others | 450 |
| (5) Defense of Property | 452 |
| (6) Arrest and Law Enforcement..... | 453 |
| (7) Statute of Limitations..... | 453 |
| c. Damages..... | 454 |
| 2. False Imprisonment..... | 455 |
| a. Elements of the Cause of Action | 455 |
| b. Defenses..... | 457 |
| (1) Consent..... | 457 |
| (2) Authorization..... | 457 |
| (a) Police Arrest | 458 |
| (b) Citizen Arrest | 459 |
| (c) Other Lawful Confinement..... | 462 |
| (3) Statute of Limitations..... | 462 |
| (4) Federal Preemption..... | 462 |
| c. Damages..... | 463 |
| d. Abuse of Process and Malicious Prosecution Distinguished | 463 |
| 3. “Outrage” — Intentional Infliction of Emotional Distress..... | 464 |
| a. Elements of the Cause of Action | 464 |
| b. Defenses..... | 471 |
| (1) Good Faith, Reasonableness, and Privilege | 471 |
| (2) Preemption..... | 472 |
| (3) Statute of Limitations..... | 472 |
| c. Damages..... | 472 |

| | |
|--|------------|
| 4. Federal “Civil Rights” Torts | 473 |
| 5. Civil Conspiracy | 474 |
| B. Interference with Property..... | 475 |
| 1. Trespass to Land | 475 |
| a. Elements of the Cause of Action | 475 |
| b. Defenses..... | 479 |
| (1) Consent or Permission | 479 |
| (2) Authorization..... | 479 |
| (3) Sovereign Immunity | 480 |
| (4) Statute of Limitations..... | 481 |
| c. Remedy — Damages, Injunctive Relief, and Self-Help | 481 |
| 2. Conversion and Other Types of Interference with Chattels..... | 483 |
| a. Elements of the Cause of Action | 485 |
| b. Defenses..... | 488 |
| (1) Consent..... | 488 |
| (2) Authorization or Privilege | 488 |
| (3) Protection Against Trespassing Animals..... | 490 |
| (4) Statute of Limitations..... | 490 |
| (5) Preemption..... | 491 |
| c. Remedies | 491 |
| C. Misuse of Legal Proceedings | 496 |
| 1. Malicious Prosecution | 496 |
| a. Institution of Proceedings..... | 496 |
| b. Want of Probable Cause..... | 497 |
| c. Malice..... | 499 |
| d. Favorable Termination of Proceedings..... | 499 |
| e. Actions Against Attorneys..... | 500 |
| f. Federal Preemption | 501 |
| 2. Abuse of Process | 501 |
| a. Ulterior Purpose..... | 502 |
| b. Use of Process | 503 |
| c. Malicious Prosecution and Abuse of Process Compared | 503 |
| 3. Defenses | 504 |
| 4. Damages | 505 |
| 5. Other Sanctions | 506 |

| | |
|--|------------|
| CHAPTER 7 INTERFERENCE WITH REPUTATION, PRIVACY, AND FAMILY RELATIONSHIPS | 513 |
| A. Defamation | 513 |
| 1. Introduction | 513 |
| 2. Common Law Defamation..... | 515 |
| a. The Elements of Common Law Defamation..... | 515 |
| (1) Defamatory Meaning | 516 |
| (2) Malice | 520 |

| | |
|---|-----|
| (3) Falsity | 522 |
| (4) Publication | 522 |
| (5) Reference to Plaintiff..... | 524 |
| (6) Legally Presumed and Special Damages | 525 |
| b. Damages..... | 525 |
| (1) General Damages and Special Damages | 525 |
| (2) Libel..... | 527 |
| (3) Slander per se | 529 |
| (a) Crime | 529 |
| (b) Loathsome Disease..... | 530 |
| (c) Unfitness for Business, Trade, Profession, or Office..... | 530 |
| (d) Unchastity and Adultery | 530 |
| (4) Punitive Damages | 531 |
| (5) Mitigation of Damages | 532 |
| c. Defenses..... | 532 |
| 3. The Constitutional Requirements of “Fault,” Falsity, and “Actual” Damages | 535 |
| a. Development of the Doctrine..... | 535 |
| (1) “Public Officials” — <i>New York Times Co. v. Sullivan</i> | 535 |
| (2) “Public Figures” — <i>Butts and Walker</i> | 538 |
| b. Private Figures — <i>Gertz and Dun & Bradstreet</i> | 540 |
| c. Particular Issues..... | 544 |
| (1) Who Is a Public Official? | 544 |
| (2) Who Is a Public Figure? | 545 |
| (3) “Fault” — “Constitutional Malice” or Negligence..... | 546 |
| (4) Burden of Proof of Truth or Falsity | 550 |
| (5) “Neutral Reportage” | 553 |
| (6) Satire, Opinion, and Hyperbole | 553 |
| 4. Common Law Privileges | 555 |
| a. Absolute Privilege — Official Proceedings and Records | 556 |
| b. Qualified or Conditional Privileges | 557 |
| (1) Publication of Judicial Proceedings and Public Records..... | 560 |
| (2) Fair Comment..... | 561 |
| (3) Pre-Trial Negotiations..... | 561 |
| (4) Business or Professional Interests..... | 562 |
| (5) Self Defense/Defense of Others..... | 564 |
| (6) Public Duty..... | 564 |
| (7) Family Duty | 565 |
| B. Privacy | 566 |
| 1. Introduction | 566 |
| 2. The Privacy Actions | 569 |
| a. Intrusion | 569 |

| | | |
|--------------------------------|--|-----|
| b. | Appropriation | 572 |
| c. | Public Disclosure of Private Facts | 574 |
| | (1) Publicity | 574 |
| | (2) Disclosure of Private Matter that is Offensive to a Reasonable Person | 575 |
| | (3) Legitimate Public Interest | 576 |
| | (4) Duty of Confidentiality | 580 |
| d. | False Light | 581 |
| 3. | Damages | 583 |
| 4. | Defenses | 584 |
| C. | Interference with Family Relationships | 586 |
| CHAPTER 8 DAMAGES | | 589 |
| A. | Damages Generally | 589 |
| 1. | The Three Types of Damages | 590 |
| 2. | Judicial Supervision of the Amount of Verdicts | 591 |
| | a. New Trial <i>Nisi</i> | 593 |
| | b. New Trial Absolute | 595 |
| | (1) Based on Excessiveness or Inadequacy of Damages | 595 |
| | (2) Based on “Thirteenth Juror” Doctrine | 596 |
| | c. Guidelines and Examples | 597 |
| | d. New Trial on Damages Alone | 600 |
| 3. | Legislative Limits on Amount of Verdicts | 601 |
| 4. | The “Benefits Rule” | 601 |
| 5. | The “Collateral Source Rule” | 602 |
| 6. | Duty to Mitigate Damages | 604 |
| 7. | Attorney’s Fees | 606 |
| 8. | Interest Before and After Judgment | 608 |
| | a. Prejudgment Interest | 608 |
| | b. Postjudgment Interest | 611 |
| B. | Compensatory Damages for Personal Injury and Death | 613 |
| 1. | Intangible Losses | 613 |
| | a. Disfigurement and Disability | 614 |
| | b. Pain and Suffering | 614 |
| | c. Emotional Distress | 616 |
| 2. | Tangible Losses | 619 |
| | a. Medical Expenses | 619 |
| | b. Lost Income | 620 |
| | c. Computing Future Losses | 623 |
| | (1) Present Value of Pecuniary Losses | 623 |
| | (2) Taxation | 625 |
| | (a) Computation of award | 625 |
| | (b) Taxation of the award | 627 |
| 3. | Loss of Consortium | 628 |

| | |
|--|------------|
| 4. Wrongful Death and Survival | 631 |
| C. Property Loss | 632 |
| 1. Physical Damage and Loss..... | 632 |
| 2. Consequential Damages | 635 |
| 3. Mitigation of Damages | 637 |
| 4. Other Relief..... | 638 |
| a. Recovery of Property..... | 638 |
| b. Injunction | 639 |
| D. “Pure Economic Loss” and the “Economic Loss Doctrine”..... | 640 |
| E. Punitive Damages..... | 641 |
| 1. Purposes of Punitive Award | 641 |
| 2. Requirements for Award | 644 |
| 3. Determining the Amount of the Award..... | 649 |
| a. Statutes..... | 649 |
| (1) Multiplication of Damages..... | 649 |
| (2) Prohibition of Punitive Awards..... | 650 |
| (3) The Fairness in Justice Act..... | 650 |
| (a) Process for punitive damages..... | 650 |
| (b) Limits on punitive damages | 652 |
| b. Constitutional Requirements — United States Supreme Court | 653 |
| (1) Substantive standard for punitive damages awards | 654 |
| (a) Conduct for imposing award of any punitive award | 654 |
| (b) The amount of punitive damages..... | 654 |
| 1) The degree of reprehensibility..... | 654 |
| 2) Ratio of punitive award to actual and potential harm | 659 |
| 3) Sanctions for comparable misconduct..... | 661 |
| 4) Other factors | 662 |
| (2) Out-of-state conduct..... | 665 |
| (3) The procedure for determining damages | 665 |
| (a) The Trial Court..... | 665 |
| (b) Appellate review..... | 666 |
| c. The South Carolina Scheme..... | 668 |
| (1) Due process | 668 |
| (2) Common law judicial review of punitive damages award verdict | 670 |
| (3) <i>Mitchell v. Fortis Insurance Co.</i> | 671 |
| (4) Some Evidence Issues..... | 672 |
| (a) Culpability | 672 |
| (b) Ability to pay | 673 |
| (c) Bifurcation..... | 674 |
| (5) Comparative Negligence | 674 |

| | |
|--|------------|
| (6) Some awards | 675 |
| d. Federal Courts..... | 676 |
| 4. Taxation of Punitive Awards..... | 676 |
| 5. Insurability of Punitive Damages..... | 677 |
| CHAPTER 9 WRONGFUL DEATH AND SURVIVAL ACTIONS | 679 |
| A. Wrongful Death..... | 681 |
| 1. Parties | 681 |
| a. The Administrator of the Estate | 681 |
| b. The Statutory Beneficiaries..... | 682 |
| 2. The Cause of Action | 684 |
| 3. Compromise and Settlement | 685 |
| 4. Defenses | 687 |
| a. Conduct of the Decedent | 687 |
| b. Conduct of the Beneficiaries | 688 |
| c. Statute of Limitations | 689 |
| d. Counterclaims | 690 |
| 5. Miscellaneous | 691 |
| a. Conflict of Laws | 691 |
| b. Diversity Jurisdiction | 692 |
| c. Statutory Lien Against Motor Vehicle | 692 |
| d. Injury to Body of Deceased | 692 |
| 6. Damages | 693 |
| a. Tangible, Pecuniary Loss | 695 |
| b. Intangible Loss | 698 |
| c. Punitive Damages..... | 699 |
| B. Survival Actions | 700 |
| 1. Limitations on Actions that Survive | 701 |
| 2. Specific Examples | 702 |
| a. Right to Work Act..... | 702 |
| b. Infants | 702 |
| c. Insurance | 703 |
| d. Actions Under Federal Law | 703 |
| 3. Suits Against State Government | 704 |
| 4. Defenses | 704 |
| 5. Damages | 705 |
| 6. Assignability of Actions..... | 707 |
| 7. Punitive Damages | 708 |
| CHAPTER 10 ALLOCATING LIABILITY | 709 |
| A. Joint Tortfeasors | 709 |
| 1. Joint and Several Liability..... | 709 |
| a. Common Law | 709 |
| b. Statutory Scheme | 711 |

| | |
|--|------------|
| c. Apportionment of Damages Based Upon Causation-in-Fact..... | 714 |
| 2. Contribution Among Joint Tortfeasors..... | 714 |
| 3. Settlements | 717 |
| 4. Indemnification..... | 719 |
| B. Vicarious Liability | 722 |
| 1. Agent-Principal Relationships..... | 723 |
| a. Terminology | 723 |
| b. Basic Doctrine | 724 |
| c. Policy Basis of Doctrine | 725 |
| d. Master-Servant Relationships..... | 728 |
| (1) Was the Wrongdoer a Servant? | 729 |
| (a) Control of Manner of Performance—The Essential Criterion | 729 |
| (b) Determining Whether Control Exists | 733 |
| (c) Estoppel and Apparent Employment..... | 735 |
| (2) Was the Servant Acting within the Scope of Employment? | 738 |
| (a) Intentional Torts | 739 |
| (b) Motor Vehicles | 740 |
| (c) Estoppel and Apparent Authority..... | 741 |
| e. Other Situations Where Principal is Vicariously Liable | 742 |
| (1) Estoppel..... | 742 |
| (2) Ratification..... | 743 |
| (3) Nondelegable Duties..... | 743 |
| 2. Other Relationships Involving Vicarious Liability | 745 |
| a. Parents and Spouses | 746 |
| b. Partnerships, Businesses, and Unincorporated Associations | 747 |
| c. Joint Enterprise..... | 748 |
| d. “Captain of the Ship” Doctrine | 748 |
| e. Attorney and Client | 749 |
| f. Conspiracy/Aiding and Abetting | 749 |
| g. Statute | 749 |
| 3. Punitive Damages | 750 |
| 4. Equitable Relief | 753 |
| INDEX | 755 |