CONTENTS

VOLUME 1

Acknowledgments

Introduction

PART I
THEORIES OF LIABILITY

Chapter 1
REPRESENTATIONAL BACKGROUNDS

§1.01 Product Portrayals

§1.02 Linkage of Representational and Nonrepresentational Theories

Chapter 2
THE CULPABILITY SPECTRUM ON REPRESENTATIONS

§2.01 Overview

§2.02 Fraud or Deceit

§2.03 Negligent Misrepresentation

§2.04 Representational Liability Without “Fault”

§2.05 Mistake

Chapter 3
EXPRESS WARRANTY

§3.01 General Concepts of Express Warranty

§3.02 U.C.C. Definitions

§3.03 Liability Without Privity

§3.04 Advertising Techniques and Contexts

§3.05 Puffs

§3.06 Specialized Meanings

§3.07 Suits Against Professionals

§3.08 Evidence of Breach

§3.09 Reliance

§3.10 Related Theories

Chapter 4
TORT THEORY OF NON-FAULT MISREPRESENTATION

§4.01 Definitions of Theory

§4.02 Requirements of Specificity

§4.03 Liberal Construction

§4.04 Non-Fault Aspect
CONTENTS

§4.05 Analogies and Distinctions 4–10
§4.06 “Proximate Cause” 4–13
§4.07 Relation to Section 402A 4–14

Chapter 5
NEGLIGENCE AND INTENTIONAL TORTS 5–1
§5.01 Definition 5–1
§5.02 General Standard 5–2
§5.03 Privity Eliminated 5–9
§5.04 Classic Formulas 5–10
§5.05 Specificity of Application 5–20
§5.06 Foreseeability 5–20
§5.07 Judge and Jury 5–25
§5.08 Factors in Judgment 5–27
§5.09 Assessment and Doctrinal Comparisons 5–38
§5.10 Intentional Infliction of Emotional Distress 5–38
§5.11 Battery 5–40
§5.12 Other Types of Culpability 5–40
§5.13 Intentionality in the Insurance Context 5–42

Chapter 6
IMPLIED WARRANTY 6–1
§6.01 Historical Review 6–1
§6.02 Merchantability 6–4
§6.03 Fitness 6–18
§6.04 Doctrinal Comparisons and Overlaps 6–28

Chapter 7
STRICT LIABILITY 7–1
§7.01 Historical Development 7–1
§7.02 Section 402A: Seller's Special Liability 7–6
§7.03 The Product Issue 7–11
§7.04 Doctrinal Comparisons 7–31
§7.05 Rationales for Strict Liability 7–39
§7.06 Assessment and Forecast 7–48

PART II
THE DEFECT

Chapter 8
GENERAL DEFINITIONS OF DEFECT 8–1
§8.01 Significance of Defect 8–4
§8.02 Design and Manufacturing Defects 8–6
§8.03 Policy Considerations 8–10
# CONTENTS

| §8.04 | Specific Manifestations of the Concept | 8–11 |
| §8.05 | The “Unreasonably Dangerous” Requirement | 8–14 |
| §8.06 | Consumer Expectations | 8–44 |
| §8.07 | “Risk-Utility” Standard | 8–118 |
| §8.08 | Overlap of Consumer Expectations and Risk-Benefit Standards | 8–129 |
| §8.09 | Variations of Verbal Standard | 8–140 |
| §8.10 | Salient Issues in Defect Jurisprudence | 8–155 |
| §8.11 | Overlapping Concepts: Defect and Defenses | 8–171 |
| §8.12 | Nondefective Products | 8–178 |
| §8.13 | Conclusion | 8–179 |

## Chapter 9

### DESIGN DEFECTS

| §9.01 | The Design Problem | 9–2 |
| §9.02 | Conceptual Approaches | 9–10 |
| §9.03 | Complex Economic Relationships and Information | 9–20 |
| §9.04 | Pleading | 9–21 |
| §9.05 | Overlap with the Causation Issue | 9–23 |
| §9.06 | Elements of Verbal Formulas | 9–24 |
| §9.07 | Strictness of Strict Liability | 9–34 |
| §9.08 | Liability for Function as Designed | 9–35 |
| §9.09 | Manufacturer’s Basic Responsibility: Safety Devices | 9–36 |
| §9.10 | The Polycentricity Argument | 9–41 |
| §9.11 | Product Continuums | 9–44 |
| §9.12 | Effects of Product Complexity | 9–49 |
| §9.13 | Conditions of Use | 9–51 |
| §9.14 | Crashworthiness | 9–88 |
| §9.15 | Enhanced Injury Generally | 9–111 |
| §9.16 | Objective Expectations | 9–111 |
| §9.17 | Obviousness of Risk | 9–113 |
| §9.18 | Judge and Jury | 9–127 |
| §9.19 | Availability of Technology | 9–170 |
| §9.20 | Overlapping Concepts: Duty to Warn and Defect | 9–173 |

## Chapter 10

### STATE OF THE ART

| §10.01 | Definitions and Rationales | 10–1 |
| §10.02 | Admissibility of Evidence | 10–6 |
| §10.03 | Evidence Excluded | 10–11 |
| §10.04 | Cost-Benefit Test | 10–12 |
| §10.05 | Later Alternative Design | 10–13 |
| §10.06 | Strict Liability | 10–13 |
# Chapter 11

**SOURCES OF STANDARDS FOR PRODUCT DESIGN AND PERFORMANCE**

- §11.01 Role of Standards
- §11.02 Industry Standards
- §11.03 Statutes as Standard Setters

## VOLUME II

## PART III

**ECONOMIC RELATIONSHIPS IN PRODUCTS LIABILITY**

# Chapter 12

**ROLES OF SELLERS AND PROVIDERS**

- §12.01 Overview
- §12.02 Inventors
- §12.03 Manufacturers
- §12.04 Retailers
- §12.05 Wholesalers
- §12.06 Varieties of Distributors
- §12.07 Product Demonstration and Testing
- §12.08 Manufacturer's Control
- §12.09 Manufacturers as Consumers
- §12.10 Leasing and Other Supply Arrangements
- §12.11 Designers
- §12.12 Following Specifications of Others
- §12.13 Installation
- §12.14 Repairers
- §12.15 Processing
- §12.16 "Services"
- §12.17 Brokers and Other Middlemen
- §12.18 Providing Ideas or Information
- §12.19 Testers and Certifiers
- §12.20 Real Estate
- §12.21 Government as Defendant
- §12.22 Federal Common Law
- §12.23 Joint Liability: Traditional Applications
- §12.24 Industrywide Liability and Related Issues
- §12.25 Class Actions: Commonality
- §12.26 Sellers and Providers: Conclusion
## Chapter 13
**SUCCESSOR CORPORATIONS**

- §13.01 General Rule and Principal Exceptions
- §13.02 Assumption of Liabilities
- §13.03 De Facto Mergers
- §13.04 Stripping Subsidiaries: “Dual Capacity”
- §13.05 Continuation Exception
- §13.06 Successor's Duty to Warn
- §13.07 “Product-Line” Exception
- §13.08 Focal Elements of Recovery Illustrated
- §13.09 Policy Arguments
- §13.10 Further Theoretical Development
- §13.11 Particularized Issues in Liability Extensions
- §13.12 Loss-Avoidance Strategies

## Chapter 14
**ADJUSTING LIABILITIES AMONG DISTRIBUTORS: CONTRIBUTION, INDEMNITY, AND COMPARATIVE APPORTIONMENT**

- §14.01 Contribution
- §14.02 Effects of Theories on Apportionment Remedies
- §14.03 Settlements
- §14.04 Indemnity
- §14.05 Written Agreements
- §14.06 Implied Indemnity
- §14.07 Legal and Practical Consequences of Indemnity
- §14.08 Comparative Apportionment

## Chapter 15
**THE ROLE OF WORKERS' COMPENSATION**

- §15.01 Tort vs. Workers' Compensation
- §15.02 Employee Suits
- §15.03 Manufacturers and Employers
- §15.04 Insurer Reimbursement
- §15.05 Third-Party Recoveries Permitted
- §15.06 Reform Proposals

## Chapter 16
**THE CONSUMER CHAIN**

- §16.01 Purchasers, Users, and Consumers
- §16.02 Bystanders
## CONTENTS

PART IV
RISK ALLOCATION THROUGH BARGAINING AND PROVISION OF INFORMATION

### Chapter 17
DISCLAIMERS

<table>
<thead>
<tr>
<th>§</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§17.01</td>
<td>Contract Perspective</td>
<td>17–4</td>
</tr>
<tr>
<td>§17.02</td>
<td>U.C.C. Section 2–316</td>
<td>17–5</td>
</tr>
<tr>
<td>§17.03</td>
<td>U.C.C. Section 2–719: Limitation of Remedies</td>
<td>17–7</td>
</tr>
<tr>
<td>§17.04</td>
<td>Drafting Advice</td>
<td>17–19</td>
</tr>
<tr>
<td>§17.05</td>
<td>Consumer Obligations</td>
<td>17–21</td>
</tr>
<tr>
<td>§17.06</td>
<td>Construction Issues and Policy Questions</td>
<td>17–21</td>
</tr>
<tr>
<td>§17.07</td>
<td>Legislative Prohibitions of Disclaimers</td>
<td>17–23</td>
</tr>
<tr>
<td>§17.08</td>
<td>Express Warranty</td>
<td>17–24</td>
</tr>
<tr>
<td>§17.09</td>
<td>Disclaiming Negligence</td>
<td>17–24</td>
</tr>
<tr>
<td>§17.10</td>
<td>Strict Liability</td>
<td>17–28</td>
</tr>
<tr>
<td>§17.11</td>
<td>Third Parties</td>
<td>17–34</td>
</tr>
<tr>
<td>§17.12</td>
<td>Conspicuousness</td>
<td>17–35</td>
</tr>
<tr>
<td>§17.13</td>
<td>General Advice for Drafters</td>
<td>17–39</td>
</tr>
</tbody>
</table>

### Chapter 18
USED PRODUCTS

<table>
<thead>
<tr>
<th>§</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§18.01</td>
<td>Introduction</td>
<td>18–1</td>
</tr>
<tr>
<td>§18.02</td>
<td>Commercial Law</td>
<td>18–2</td>
</tr>
<tr>
<td>§18.03</td>
<td>Negligence and “As Is” Clauses</td>
<td>18–4</td>
</tr>
<tr>
<td>§18.04</td>
<td>Third Parties as Plaintiffs</td>
<td>18–5</td>
</tr>
<tr>
<td>§18.05</td>
<td>Strict Liability</td>
<td>18–7</td>
</tr>
</tbody>
</table>

### Chapter 19
DUTY TO WARN

<table>
<thead>
<tr>
<th>§</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§19.01</td>
<td>Introduction and Definitions</td>
<td>19–3</td>
</tr>
<tr>
<td>§19.02</td>
<td>Standard of Care</td>
<td>19–17</td>
</tr>
<tr>
<td>§19.03</td>
<td>Ordinary Products</td>
<td>19–25</td>
</tr>
<tr>
<td>§19.04</td>
<td>Warning Alternatives</td>
<td>19–27</td>
</tr>
<tr>
<td>§19.05</td>
<td>Layered Risks</td>
<td>19–28</td>
</tr>
<tr>
<td>§19.06</td>
<td>Technology Oriented Products</td>
<td>19–28</td>
</tr>
<tr>
<td>§19.07</td>
<td>Distinctions Among Distributors</td>
<td>19–62</td>
</tr>
<tr>
<td>§19.08</td>
<td>Information Costs</td>
<td>19–121</td>
</tr>
<tr>
<td>§19.09</td>
<td>Role of Doctrine</td>
<td>19–132</td>
</tr>
<tr>
<td>§19.10</td>
<td>Consumer Information</td>
<td>19–157</td>
</tr>
<tr>
<td>§19.11</td>
<td>Conceptual Overlaps</td>
<td>19–170</td>
</tr>
<tr>
<td>§19.12</td>
<td>Adequacy of Warnings</td>
<td>19–238</td>
</tr>
<tr>
<td>§19.13</td>
<td>Materiality and Causation</td>
<td>19–277</td>
</tr>
</tbody>
</table>
§19.14 Long-Term Hazards 19–329
§19.15 Publishers’ Liability 19–348

Chapter 20
CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK 20–1
§20.01 Contributory Negligence 20–2
§20.02 Comparison of Contributory Negligence and Assumption of Risk 20–41
§20.03 Assumption of Risk 20–43
§20.04 Functional Environment: Industrial Machines 20–84
§20.05 Obviousness 20–88
§20.06 Conceptual Linkages 20–93

VOLUME III

PART V
CONSUMER CONDUCT

Chapter 21
MISUSE 21–3
§21.01 Doctrine and Terminology 21–4
§21.02 Conceptual and Functional Boundaries 21–4
§21.03 Intended Use 21–27
§21.04 Instructions and Warnings 21–33
§21.05 Functional Classifications 21–36
§21.06 Counseling Notes 21–43
§21.07 Boundaries of Permissible Use 21–44
§21.08 Conceptual and Doctrinal Relationships 21–45
§21.09 Overuse 21–65
§21.10 Third-Party Misuse and Jury Instructions 21–65
§21.11 Chain of Distribution 21–66
§21.12 Burden of Proof 21–67
§21.13 Implications for Intimate Inquiries 21–68

Chapter 22
COMPARATIVE DOCTRINES: FAULT, CAUSATION, AND LIABILITY 22–1
§22.01 Defining the Problem 22–2
§22.02 Negligence 22–3
§22.03 Strict Liability 22–3
§22.04 Comparative Principles and Warranty 22–13
§22.05 Comparative Principles Favoring Defendant 22–15
§22.06 Policy Arguments Concerning Comparison in Strict Liability 22–17
§22.07 Principles of Apportionment 22–19
PART VI
PROBLEMS OF PROOF AND CAUSATION

Chapter 23
GENERAL LEGAL PRINCIPLES OF PROOF AND CAUSATION 23–3
§23.01 Semantics and Doctrine 23–4
§23.02 Theories of Liability 23–5
§23.03 Basic Elements of Proof 23–5
§23.04 Sufficiency of Evidence 23–89
§23.05 The Role of Presumptions 23–202
§23.06 Previous and Subsequent Occurrences 23–202
§23.07 Experts 23–229
§23.08 Proper Inferences 23–294
§23.09 Defect, Causation, and Materiality 23–300
§23.10 Warranty Claims 23–305
§23.11 Consumer Information: “Lemon” Vehicles 23–305
§23.12 Circumstantial Evidence 23–306
§23.13 Demonstrative Evidence; Tests After Accident 23–383
§23.14 Agency Reports 23–385
§23.15 Proof Burdens 23–388

Chapter 24
RES IPSA LOQUITUR AND RELATED DOCTRINES OF INFERENCE 24–1
§24.01 Doctrine and Function 24–1
§24.02 Definitions of Res Ipsa Loquitur 24–2
§24.03 Control 24–3
§24.04 Procedural Conceptualization of Res Ipsi 24–7
§24.05 Occurrence of Accident Insufficient Evidence 24–9
§24.06 “Ordinarily Does Not Occur” and Experience 24–12
§24.07 Flexibility of Doctrinal Elements 24–14
§24.08 Causation 24–16
§24.09 Significant Matters in Res Ipsi Analysis 24–16
§24.10 Defect and Proof of Defect 24–34
§24.11 Theories of Liability 24–37
§24.12 Clusters of Uncertain Facts: Illustrative Cases 24–38

Chapter 25
REMEDIAL CHANGES 25–1
§25.01 General Rule of Inadmissibility 25–1
§25.02 Exceptions 25–5
§25.03 Substantive-Procedural Distinction 25–20
§25.04 Focus on Strict Liability 25–21
§25.05 Explaining Remedial Measures 25–32
§25.06 Recalls 25–33
§25.07 Postmanufacture, Preaccident Modifications 25–36

VOLUME IV

PART VII
SPECIAL PROBLEMS OF CHARACTERIZATION

Chapter 26
THEORIES OF LIABILITY IN CONFLICT 26–3
§26.01 Representational vs. Nonrepresentational Theories 26–4
§26.02 Use of Multiple Doctrines 26–7
§26.03 Tort vs. Contract: Strict Liability and Warranty 26–8
§26.04 Strict Liability and Negligence 26–27
§26.05 Warranty and Negligence 26–46
§26.06 State Products Liability Statutes 26–50
§26.07 Consumer Protection Statutes 26–53
§26.08 Special Problems of Characterization 26–54
§26.09 Reillustration of Doctrinal Richness 26–55
§26.10 Various Species of Theories 26–56

Chapter 27
THE ECONOMIC LOSS PROBLEM 27–1
§27.01 An Overview of the Problem 27–2
§27.02 Foundations of Modern Controversy 27–3
§27.03 Commercial Plaintiffs 27–12
§27.04 Other Doctrinal Applications 27–27
§27.05 “Property Damage” 27–36
§27.06 Paradigm of Theoretical Difficulties: A Texas Trilogy 27–107
§27.07 Conceptual and Policy Arguments 27–109
§27.08 Suits by Governmental Entities for Expenses Attributing to Products 27–113
§27.09 Need for Flexibility 27–114
§27.10 The Puzzle Restated 27–119
Chapter 28
CHARACTERIZATION AND STATUTES OF LIMITATIONS 28–1
§28.00 Substance or Procedure 28–1
§28.01 Tort Over Contract 28–2
§28.02 Choice Among Limitations 28–9
§28.03 Time of Accrual 28–10
§28.04 Preference for “Contract” 28–11
§28.05 Negligence/“Products Liability”: Statutory Language 28–14
§28.06 “Contract” vs. “Implied Warranty” 28–16
§28.07 Relationship to Other Statutes of Limitations 28–17
§28.08 Products Liability Statutes and the Common Law 28–18
§28.09 Prior Pleadings: Notice Standard 28–18

PART VIII
REMEDIES AND PROCEDURES

Chapter 29
PUNITIVE DAMAGES 29–3
§29.01 Identifying the Issues 29–4
§29.02 Doctrinal Controversy Over Strict Liability 29–9
§29.03 Verbal Threshold 29–14
§29.04 Significant Elements of Judicial Concern 29–28
§29.05 Proposed Refinements 29–64
§29.06 Pleading and Summary Judgment 29–66
§29.07 Issues Impinging on Other Legal Categories 29–67
§29.08 Rehearsal of Rationales 29–73
§29.09 Amount of Award 29–76
§29.10 Assessing Punitive Damages 29–81

Chapter 30
STATUTES OF LIMITATIONS AND REPOSE 30–1
§30.01 Defining the Problem 30–3
§30.02 Uniform Commercial Code 30–3
§30.03 Time of Injurious Occurrence 30–12
§30.04 “Continuing Events” Rule 30–14
§30.05 Discovery: The Basic Dispute 30–19
§30.06 Discovery Principle Amplified and Opposed 30–33
§30.07 Significant Factors in Discovery Issues 30–112
§30.08 Functional Battlegrounds of Discovery Principle 30–125
§30.09 Issues Related to Discovery Principles 30–132
§30.10 Economic Loss 30–143
§30.11 Particularized Limitations Statutes: Patent Deficiency 30–143
| § 30.12 | Statutes of Repose | 30–144 |
| § 30.13 | Statutes Extending Limitations Periods | 30–222 |

Chapter 31  
**JURISDICTION AND PROCEDURE**  
§ 31.01 | Jurisdiction | 31–1 |
| § 31.02 | Collateral Estoppel | 31–44 |

**PART IX**  
**GENERAL LEGAL ISSUES**  
Chapter 32  
**EXTENDED CONSEQUENCES: DUTY AND PROXIMATE CAUSE**  
§ 32.01 | Introduction | 32–3 |
| § 32.02 | Unusual Consequences | 32–6 |
| § 32.03 | Activities Under Pressure of Events | 32–18 |
| § 32.04 | Independent Response to Defect | 32–19 |
| § 32.05 | Intervening Modifications | 32–25 |
| § 32.06 | Intervening Conduct of Plaintiffs | 32–66 |
| § 32.07 | Replacement Products | 32–71 |
| § 32.08 | Third-Party Conduct | 32–71 |
| § 32.09 | User's Emotional Distress | 32–91 |
| § 32.10 | Medical Monitoring | 32–99 |
| § 32.11 | Plaintiff Sensitivity | 32–104 |
| § 32.12 | Third-Party Emotional Distress | 32–105 |

**PART X**  
**LEGISLATION**  
Chapter 33  
**STATE STATUTES**  
§ 33 | Generally | 33–3 |

**PART XI**  
**COMPARING PRODUCTS LIABILITY: CONCEPTS IN EUROPEAN AND AMERICAN LAW**  
Chapter E1  
**OVERVIEW**  
§ E1 | Comparisons of Legal Doctrines and Systems of Law | E1–3 |

Chapter E2  
**PRODUCTS AND CONSUMERS**  
§ E2.01 | Products | E2–1 |
| § E2.02 | Consumers | E2–3 |
Chapter E3
PRODUCERS
§E3.01 Generally
§E3.02 Components and Raw Materials
§E3.03 Trademarks and Trade Names
§E3.04 Importers
§E3.05 Leasing
§E3.06 Suppliers

Chapter E4
DAMAGES
§E4.01 Generally
§E4.02 Economic Loss

Chapter E5
THEORY OF LIABILITY: STRICT LIABILITY
§E5 Generally

Chapter E6
DEFECT
§E6.01 General Definition
§E6.02 Consumer Expectations
§E6.03 Potential Issues
§E6.04 Impact of Technological Improvement

Chapter E7
WARNINGS
§E7.01 Definitional Questions
§E7.02 Potential Issues
§E7.03 Modes of Argument: The Uses of Power and Information Costs

Chapter E8
DEFENSES
§E8.01 Product Not Put in Circulation
§E8.02 Defect Not Existing When Product Marketed
§E8.03 Not Manufactured for Sale or Distribution
§E8.04 Compliance with Public Regulations
§E8.05 Defect and Defenses: Competing Values

Chapter E9
PROOF
§E9.01 Causation
Chapter E10
APPORTIONMENT OF LIABILITIES E10–1
§E10.01 With Plaintiffs E10–1
§E10.02 Among Third Parties E10–3

Chapter E11
REPOSE AND LIMITATIONS E11–1
§E11.01 Limitations: Discovery Rule E11–1
§E11.02 Repose Period E11–3

Chapter E12
CONTRACTING OUT: PROHIBITION OF EXCLUSIONS E12–1
§E12 Disclaimers and Limitations of Liability E12–1

Chapter E13
REMEDIES E13–1
§E13.01 Directive’s Preservation of Remedies E13–1
§E13.02 Damages Limitations E13–2

Chapter E14
ASSESSMENT E14–1
§E14.01 A Law Being Born E14–1
§E14.02 Policy Goals: Balancing and Thrust E14–2
§E14.03 Consumer Protection: Definitional Issues and Basic Commitments E14–4

Table of cases TC-1
Index IN-1