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## The South Carolina Law of Torts

Jean H. Toal

*South Carolina Supreme Court*

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## BOOK REVIEW<sup>1</sup>

THE SOUTH CAROLINA LAW OF TORTS. By F. Patrick Hubbard and Robert L. Felix. Columbia: The South Carolina Bar—Continuing Legal Education Division, Second Edition, 1997. Pp. xviii, 662. \$130.00.

*Reviewed by The Honorable Jean H. Toal<sup>2</sup>*

### I. INTRODUCTION

In their second edition of *The South Carolina Law of Torts*,<sup>3</sup> Hubbard and Felix add to what was in their first edition a preeminent work of tort scholarship. Their first edition, which was published in 1990, introduced the bench and bar of this state to what has since become the most significant authority on tort law in South Carolina. The second edition represents an updated continuation of this invaluable resource.

In considering a modern treatise on torts, one must first pay homage to Oliver Wendell Holmes, Jr., and his truly “original”<sup>4</sup> work, *The Common Law*.<sup>5</sup> In *The Common Law*, Holmes sought to construct rationally the theoretical infrastructure of the common law “through the association of ‘empirical’ historical inquiry with ‘scientific’ classification.”<sup>6</sup> However, Holmes’s belief that legal doctrines should be molded by the fire of contemporary efficacy modified his empiricism.<sup>7</sup> Holmes’s approach was especially profound in his treatment of torts. The result was the precursor to modern tort law in this country.

Clearly, Hubbard and Felix’s mission in their treatise on South Carolina tort law is profoundly different from that of Holmes’s in *The Common Law*. Nevertheless, their work reflects the continuing impact of Holmes’s ground-breaking scholarship. Like the botanist Linneaus, Holmes created the framework within which future legal scholars would operate. The challenge for contemporary authors like Hubbard and Felix is to assess and effectively present the law as it has developed over the years. This is a daunting task for any treatise writer.

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1. The author’s profound gratitude is extended to her law clerk Robert A. Muckenfuss, a 1997 graduate of the University of South Carolina School of Law, who assisted greatly in the preparation of this Article.

2. Associate Justice, South Carolina Supreme Court.

3. F. PATRICK HUBBARD & ROBERT L. FELIX, *THE SOUTH CAROLINA LAW OF TORTS* (2d ed. 1997).

4. See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 3 (1993) (stating that *The Common Law* was “arguably the most original work of legal scholarship by an American.”).

5. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

6. WHITE, *supra* note 4, at 113.

7. See *id.*

By definition, a “treatise” is a work “that provides in a systematic manner and for an expository or argumentive purpose a methodical discussion of the facts and principles involved and conclusions reached.”<sup>8</sup> This definition suggests only the minimal components required of a treatise. However, much more is needed for a treatise to enjoy the accolade of being *ideal*.<sup>9</sup> I propose seven factors one should consider when assessing the effectiveness of a treatise.

The ideal treatise must first and foremost be comprehensive of the subject-matter covered. Second, it must be thoughtfully organized and presented to provide the reader with an easy reference to specific topics. Third, it should be fully informative and concise without oversimplifying the law. Fourth, it should provide a critical analysis of inconsistent or anomalous authority. Fifth, it must be insightful as to the possible future flow of the law. Sixth, it needs to be reflective of relevant social policy and its impact on the law. Finally, the ideal treatise must be up-to-date with the pertinent authority.

Such a list presents an almost paralyzing task for authors, especially in the area of tort law. However, Hubbard and Felix provide in the second edition of their book a superior example of how each of these components can effectively be incorporated into a single volume treatise. I will discuss each factor below.

## II. ANALYSIS OF HUBBARD AND FELIX’S TREATISE

First, Hubbard and Felix provide a truly comprehensive survey of South Carolina tort law. On a macro level, their treatise covers all of the major branches of tort law, ranging from simple negligence to wrongful death actions. On a micro level, their treatise systematically addresses the major issues arising under each subject. In covering such a wide range of topics, authors are faced with the danger that their treatise will be superficial in its coverage and have a lack of cohesiveness in its structure. Hubbard and Felix skillfully avoid such pitfalls. Structurally the book is composed of ten chapters. The first chapter takes a broad perspective and gives the reader a sense of the major themes underlying the subject matter. The treatise then methodically addresses each major area of tort law. Each chapter is thoughtfully outlined and is broken down into discrete sections allowing the reader to hone in quickly on a particular topic. The reader immediately knows the terrain of a chapter and can therefore proceed more intelligently.

The book’s superb organization is complemented by its depth of discussion. Hubbard and Felix do not simply recite the law; they identify patterns and synthesize the law to provide an insightful and practical guide. The book is heavy with references to a wide array of authorities addressing the various legal principles under discussion. Additionally, Hubbard and Felix are

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8. WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 2435 (1965).

9. See Frederick Davis, Book Review, 46 MD. L. REV. 886 (1987) (reviewing FOWLER V. HARPER ET. AL., THE LAW OF TORTS (2d ed. 1986)).

quick to highlight inconsistent or anomalous areas of the law. This allows the reader to engage (more actively) the particular topic being presented. Moreover, the treatise is generous with cross-references to other sources which permit the reader to probe more fully an inconsistency and its effect on the law.

Although the ideal treatise must be comprehensive and fully informative, it must resist the temptation to overload the reader with excess discussion. Authors of such treatises must find a way to convey concisely critical information while alerting the reader to more in-depth discussions related to a topic. Hubbard and Felix are ever mindful of this mission and skillfully balance the requirement for specificity against the danger of losing the reader in too much detail. Their effort in this regard is exemplified by their coverage of comparative negligence.<sup>10</sup>

Prior to the publication of their second edition, Hubbard and Felix produced a law review article on comparative negligence and the implementation of *Nelson v. Concrete Supply Co.*<sup>11</sup> in South Carolina.<sup>12</sup> This article explores the impact of comparative fault in almost every conceivable area of tort law. In areas where South Carolina courts have not yet ruled, the article sifts through the law in other jurisdictions to determine the most likely development in this state. The article also includes tables showing the status of comparative negligence and various common law defenses in other jurisdictions.<sup>13</sup> Clearly, such detail would be inappropriate for a treatise comprehending all of torts. However, as a reference tool, it provides Hubbard and Felix with a unique and unparalleled resource with which to support their book. The article also illustrates the intense dedication that they have consistently brought to first-quality tort scholarship in South Carolina.

Their coverage of comparative negligence is also emblematic of their insight into the future development of the law in this state. For example, observing that no South Carolina court has yet to address the impact of comparative negligence on express assumption of risk, Hubbard and Felix go further to state that express assumption of risk generally remains an absolute bar to recovery even under comparative fault.<sup>14</sup> In support of this statement, they provide a detailed discussion of express assumption of risk<sup>15</sup> and make reference to their law review article on comparative fault.<sup>16</sup> The net result is an

10. See HUBBARD & FELIX, *supra* note 3, at 174-90.

11. 303 S.C. 243, 399 S.E.2d 783 (1991) (stating that the South Carolina Supreme Court adopts the doctrine of comparative negligence).

12. See F. Patrick Hubbard & Robert L. Felix, *Comparative Negligence in South Carolina: Implementing Nelson v. Concrete Supply Co.*, 43 S.C. L. REV. 273 (1992).

13. *Id.* at 329-43.

14. HUBBARD & FELIX, *supra* note 3, at 188. Recently, in *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, No. 24850, Shearouse Adv. Sh. No. 35 at 8, 14 (S.C. Nov. 9, 1998), the South Carolina Supreme Court held that express assumption of risk would remain an absolute bar to recovery under comparative fault.

15. *Id.* at 189-90.

16. *Id.* at 188.

analysis that provides the reader with a solid foundation on which to predict how a South Carolina court might rule on this issue.

Next, an effective treatise on torts must, where appropriate, reflect upon the relevant policies that frequently drive trends in tort law. Oliver Wendell Holmes, Jr. recognized the centrality of social policy in tort law when he wrote,

The philosophical habit of the day, the frequency of legislation, and the case with which the law may be changed to meet the opinions and wishes of the public, all make it natural and unavoidable that judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy . . . .<sup>17</sup>

Hubbard and Felix address this influence in a section devoted completely to policies of tort law.<sup>18</sup> Moreover, they cover policy throughout the book as it relates to specific topics. For example, in discussing claims for emotional distress, their treatise balances the strict proof requirements for establishing duty of care against the modern trend generally supporting liability for injuries caused by negligence.<sup>19</sup> In doing so, the treatise canvasses a wide spectrum of authority to distill three general rules for determining liability for mental distress not resulting from physical injury.<sup>20</sup> This type of legal synthesis gives the reader a sense of direction and equilibrium. The reader is better able to understand the universe in which a court might decide a particular issue.

Finally, a very basic and vital component of a tort treatise is that its coverage be as current as possible. In tort law, the landscape frequently changes as courts struggle to keep up with social and legislative developments. In such a volatile environment, a premium for a single, comprehensive authority that presents the law in a coherent and pragmatic fashion exists. Hubbard and Felix's treatise exemplifies such a resource. With the same masterful discernment that marked their first edition, Hubbard and Felix produce, in their second edition, a truly comprehensive and up-to-date work that will be made current in the future by an annual, cumulative supplement. Any judge or attorney confronting tort law issues in South Carolina should have this treatise close at hand as a reference. Below is a sampling of some of the more recent developments in South Carolina tort law covered in their second edition.

Certainly one of the biggest, though not most recent, developments in South Carolina tort law came in 1991 when the South Carolina Supreme Court

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17. HOLMES, *supra* note 5, at 78.

18. HUBBARD & FELIX, *supra* note 3, at 4-26.

19. *Id.* at 41-42.

20. *Id.* at 42-44.

adopted comparative negligence. In *Nelson v. Concrete Supply Co.*<sup>21</sup> the court held that for all causes of action arising on or after July 1, 1991, a plaintiff in a negligence action may recover damages if his negligence is not greater than that of the defendant.<sup>22</sup> *Nelson* made clear that a plaintiff's contributory negligence would no longer bar recovery unless such negligence exceeded that of the defendant. However, not so clear was what effect *Nelson* would have on other common law defenses.

In *Davenport v. Cotton Hope Plantation Horizontal Property Regime*<sup>23</sup> the South Carolina Court of Appeals addressed the impact of *Nelson* on the defense of assumption of risk. Under the traditional common law doctrine of assumption of risk, if a plaintiff assumed the risk of injury, then he was completely barred from recovery.<sup>24</sup> In *Davenport*, the court held that implied assumption of risk had been subsumed by comparative negligence.<sup>25</sup> In other words, implied assumption of risk was simply another factor to consider in comparing the parties' negligence, rather than an absolute bar to recovery. Hubbard and Felix provide the reader with a thorough discussion in this area by going beyond the holding of *Davenport* and explaining the difference between implied and express assumption of risk.<sup>26</sup>

In the area of governmental and official immunity, several developments relating to monetary limits on liability occurred. In *Southeastern Freight Lines v. City of Hartsville*<sup>27</sup> the South Carolina Supreme Court held that the legislature's enactment of the Uniform Contribution Among Tortfeasors Act<sup>28</sup> impliedly repealed sections 15-78-100(c) and 15-78-120(a)(1) of the South Carolina Tort Claims Act.<sup>29</sup> Section 15-78-100(c) requires the trier of fact in any tort action against a government entity to "return a special verdict

21. 303 S.C. 243, 399 S.E.2d 783 (1991).

22. *Id.* at 245, 399 S.E.2d at 784.

23. 325 S.C. 507, 482 S.E.2d 569 (Ct. App. 1997), *aff'd*, *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, No. 24850, Shearouse Adv. Sh. No. 35 at 8, 14 (S.C. Nov. 9, 1998).

24. HUBBARD & FELIX, *supra* note 3, at 186.

25. *Davenport*, 325 S.C. at 512, 482 S.E.2d at 574.

26. HUBBARD & FELIX, *supra* note 3, at 187-90. In *Davenport v. Hope Plantation Horizontal Property Regime*, No. 24850, Shearouse Adv. Sh. No. 35 at 8, 14 (S.C. Nov. 9, 1998), the South Carolina Supreme Court affirmed the court of appeals's opinion with some important modifications. Notably, the court specifically distinguished implied and expressed assumption of risk. The court held that primary implied assumption of risk and expressed assumption of risk would remain unaffected by comparative negligence while secondary implied assumption of risk, as a complete defense, was effectively abrogated by the adoption of comparative negligence. The court concluded that a plaintiff would not be barred from recovery by secondary implied assumption of risk unless the degree of fault arising therefrom is greater than the negligence of the defendant. The court ruled that it would apply its decision to the case *sub judice* and to all causes of action that arise or accrue after the date of its opinion. Hubbard and Felix will undoubtedly discuss the court's holding in their next supplement.

27. 313 S.C. 466, 443 S.E.2d 395 (1994).

28. S.C. CODE ANN. § 15-38-10 (Law. Co-op. Supp. 1997).

29. *Southeastern Freight Lines*, 313 S.C. at 469, 443 S.E.2d at 397.

specifying the proportion of monetary liability of each defendant against whom liability is determined.”<sup>30</sup> Section 15-78-120(a)(1) limits the total monetary liability of all government entities to \$250,000 per claimant for any one occurrence.<sup>31</sup> The Uniform Contribution Among Tortfeasors Act, enacted after the Tort Claims Act, allows unlimited, pro rata liability for tortfeasors.<sup>32</sup> The court held that the statutes were inconsistent with each other, and therefore, the later statute repealed the earlier one.<sup>33</sup>

In response to *Southeastern*, the legislature reenacted section 15-78-120(a)(1) and made it retroactive to April 5, 1988, except for causes of action filed before July 1, 1994.<sup>34</sup> In construing this reenactment language, the court in *McClain v. South Carolina Department of Education*<sup>35</sup> held that the General Assembly clearly regarded the Uniform Contribution Act, prior to its 1994 amendment, as repealing section 15-78-120(a)(1) under all circumstances.<sup>36</sup> In other words, the \$250,000 cap is inapplicable to all cases filed before July 1, 1994. The court later extended the holdings of *Southeastern* and *McClain* to the \$500,000 per occurrence cap found in section 15-78-120(a)(2)<sup>37</sup> of the Tort Claims Act.<sup>38</sup>

Hubbard and Felix also address the recent developments under the South Carolina Unfair Trade Practices Act (“UTPA”), S.C. Code Ann. § 39-5-20 (1985).<sup>39</sup> In *Daisy Outdoor Advertising Co. v. Abbott*<sup>40</sup> the South Carolina Supreme Court clarified the proof required to satisfy the public interest element of private causes of action under UTPA. The court found that plaintiffs fulfill the UTPA’s public interest requirement by alleging and proving that unfair or deceptive conduct has the potential for repetition; no additional proof of public impact is necessary beyond proof of the potential for repetition of the kind of actions at issue.<sup>41</sup> Prior to the supreme court’s decision in *Daisy*, the court of appeals was narrowing the scope of the private cause of action by requiring ever greater degrees of proof to satisfy the UTPA’s public interest prong.<sup>42</sup> *Daisy* should resolve longstanding confusion about the interaction between the potential for repetition of an unfair or deceptive act and the public interest requirement itself.

*Daisy* concerned a dispute between two outdoor advertisers. Both

30. S.C. CODE ANN. § 15-78-100(c) (Law. Co-op. Supp. 1997).

31. *Id.* § 15-78-120(a)(1).

32. *See id.* § 15-38-20(B).

33. *Southeastern Freight Lines*, 313 S.C. at 469, 443 S.E.2d at 397.

34. *See* 1994 S.C. Acts 497.

35. 323 S.C. 132, 473 S.E.2d 799 (1996).

36. *Id.* at 136, 473 S.E.2d at 801.

37. S.C. CODE ANN. § 15-78-120(a)(2) (Law. Co-op. Supp. 1997).

38. *Knoke v. South Carolina Dep’t of Parks, Recreation, & Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996).

39. HUBBARD & FELIX, *supra* note 3, at 374.

40. 322 S.C. 489, 473 S.E.2d 47 (1996).

41. *Id.* at 496, 473 S.E.2d at 51.

42. *See id.* at 493-95, 473 S.E.2d at 49-50.

Daisy Outdoor Advertising and Abbott Company Outdoor Advertising leased billboard space to advertisers.<sup>43</sup> When Abbott leased a billboard located on Interstate 85 to an advertiser, Daisy erected a large “for sale” sign in front of Abbott’s billboard, obstructing drivers’ views of the advertisement.<sup>44</sup> This sign forced Abbott to find an alternate location for the advertiser. Abbott leased another billboard to Hamrick’s of Gaffney.<sup>45</sup> Daisy once again erected a large “for sale” sign in front of Abbott’s billboard, and Hamrick’s quit paying rent for use of the billboard.<sup>46</sup> Daisy sued Abbott for interference with Daisy’s contractual relations with a third party, and Abbott counterclaimed alleging unfair competition under the UTPA based on Daisy’s blocking Abbott’s billboards.<sup>47</sup> After a non-jury trial, the circuit court ruled Daisy had violated the UTPA.<sup>48</sup>

The court of appeals reversed the circuit court, holding no evidence supported the assertion Daisy’s actions had an adverse effect on the public interest.<sup>49</sup> According to the court, a party could not show that an action adversely affected the public interest merely by showing the action had the potential for repetition.<sup>50</sup> The opinion of the court of appeals also suggested that a UTPA plaintiff must prove at least two separate torts—one against the plaintiff and one against some third party—in order to show any adverse effect on the public interest.<sup>51</sup>

The supreme court strongly disagreed with the analysis of the court of appeals. First, the court surveyed past precedents and concluded that, “Prior case law makes very clear that evidence of a potential for repetition, generally speaking, in and of itself establishes the required public impact.”<sup>52</sup> The court also noted that proof of a tort against a third party was not an element of a cause of action under the UTPA.<sup>53</sup> The supreme court then described what kinds of evidence will indicate that an act has the potential for repetition, thus satisfying the UTPA’s public interest requirement. Usually, plaintiffs will show potential for repetition in one of two ways: (1) by showing “the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence,” and (2) by showing that “the company’s procedures create

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43. *Id.* at 491, 473 S.E.2d at 48.

44. *Id.* at 492, 473 S.E.2d at 48.

45. *Id.* at 492, 473 S.E.2d at 49.

46. *Id.*

47. *Id.*

48. *Id.*

49. Daisy Outdoor Adver. Co. v. Abbott, 317 S.C. 14, 18-19, 451 S.E.2d 394, 397 (Ct. App. 1994).

50. *Id.*

51. *See id.*

52. Daisy Outdoor Adver. Co. v. Abbott, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996).

53. *Id.*



a potential for repetition of the unfair and deceptive acts.”<sup>54</sup> The court declined to hold that these two ways were “the only means for showing potential for repetition/public impact.”<sup>55</sup> Instead, South Carolina courts should evaluate cases on their own merits.<sup>56</sup> Furthermore, proof of potential for repetition is not always necessary to satisfy the UTPA’s public interest requirement, because some single acts may, in and of themselves, adversely affect the public interest.<sup>57</sup> In fact, in *York v. Conway Ford, Inc.*,<sup>58</sup> the South Carolina Supreme Court found the potential for repetition based solely on the fact that Conway Ford was in the business of selling cars.<sup>59</sup>

As noted above, these cases represent only a small sampling of the developments that have occurred in South Carolina tort law in recent years. The variety and complexity of such cases demonstrate the monumental effort required to organize and to present concisely South Carolina tort law in one book. Hubbard and Felix have achieved this with amazing precision and without compromising the substance of the law itself.

### III. CONCLUSION

As recognized by another reviewer of a well-known treatise on torts, “the writing of a full-length treatise on torts is a considerably more complex task today than it was a generation ago.”<sup>60</sup> Today, treatise writers must not only grapple with the ideological foundations of tort law, but also with the many layers added by courts and legislatures since Holmes’s exposition many years ago. Such a task is fraught with peril and requires panoramic vision. Hubbard and Felix have engaged this challenge with incredible ease and wisdom. The end result is a treatise that stands alone in its superb coverage of South Carolina tort law.

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54. *Id.* The court cited *Barnes v. Jones Chevrolet Co.*, 292 S.C. 607, 358 S.E.2d 156 (Ct. App. 1987), to illustrate the first way to prove potential for repetition. In *Barnes* the court of appeals found that past instances of bill padding, the same practice complained of in the instant case, were relevant to establish a potential for repetition and, therefore, to satisfy the public interest requirement. The court cited *Haley Nursery Co. v. Forrest*, 298 S.C. 520, 381 S.E.2d 906 (1989), and *Dowd v. Imperial Chrysler-Plymouth, Inc.*, 298 S.C. 439, 381 S.E.2d 212 (Ct. App. 1989), to show the second way to prove potential for repetition. In those cases, evidence showed that the defendants’ procedures were such that the kind of unfair or deceptive act complained of was likely to recur.

55. *Daisy Outdoor Adver. Co.*, 322 S.C. at 497, 473 S.E.2d at 51.

56. *Id.*

57. *Id.* at 496, 473 S.E.2d at 51 (“Sometimes, the potential for repetition or other adverse impact on the public interest will be apparent.”) (emphasis added).

58. 325 S.C. 170, 480 S.E.2d 726 (1997).

59. *Id.* at 173, 480 S.E.2d at 728.

60. Davis, *supra* note 9, at 889 (quoting Dix Noel, Book Review, 25 TENN. L. REV. 321, 324 (1957)).