Index

Absolute Immunity

Constitutional provisions, 196-197 Executive functions, 204-205 Judicial immunity, 197-202 Legislative functions, 203-204 Prosecutorial immunity, 201-202 Quasi-judicial functions, 204 Theory of, 194-196

Access to Justice

Constitutional provisions, 37 *Human Rights Act*, 37 Recourse to courts, 38-39

Actionable Per Se. See Presumption of Damage.

Affirmative Duties. See Failure to Act.

Aggravated Damages. See Non-pecuniary Loss.

Africa

Case law overview, 14-15

America. See United States.

Anguilla

Unconstitutional search, 14 Vindicatory damages, 257

Antigua and Barbuda

Good faith, lack of, 150 Property expropriation, 124 Trial delay, 14

Apportionment. See Contribution between Defendants; Contributory Negligence.

Appropriate Plaintiff

Corporations, 84-85 Dependents of victim, 90-92 Fatal accident cases, 90-92 Foreign nationals, 84

Insurers, 85 Mental suffering by third party, 93-94 Mischief rule, 83-86 Persons indirectly affected, 85-86 Primary and secondary victims, 83 Proximity of plaintiff, 86-90 Relatives of victim, actions by, 90-92 Standing and, 85-86 Summary, 83 Survival actions, 90-92

Asia

Case law overview, 15

Assumption of Risk, 211-212

Avoidable Consequences. See Duty to Mitigate.

Azerbaijan

Environmental protection, 124

Bahamas

Vindicatory damages, 13, 257

Barbados

Government liability, 133 Malicious arrest, 2

Belize

Judicial immunity, 196 Property expropriation, 124 Unconstitutional dismissal, 14

Bill of Rights. See New Zealand.

Botswana

Constitutional access, 38 Importance to disadvantaged, 36 Trial delay, 15

Bona fides, lack of

Qualified immunity and, 206-209 State of mind and, 149-154

Canada

Absolute immunity Executive immunity, 204

Judicial immunity, 198-199 Apportionment, 219 Appropriate plaintiff Corporations, 84-85 Dependents of victim, 92 Foreign nationals, 84 Indirect affect, 86 Plaintiff proximity, 88-89 Common law government liability, 132 Countervailing considerations, 67-68, 112, 117-118, 121, 140, 208-209 Early decisions, 18-19 Exemplary damages, 261-262 Factual Causation But-for causation, 162-163 Material contribution, 167-168 Probabilistic cause, 176 Reverse onus, 166-167 Failure to act Categories of, 102-103 Constitutional provisions, 100-101 Control of danger, 104-105 Creation of hazard, 103-104 Reliance, 108-110 Supervisory duties, 107 Failure to warn, 19 Immunities generally, 195-196 Jurisdiction, 19 Labour arbitrators, 19 Limitation periods, 216-217 Non-pecuniary loss, 250-251 Overview, 18-19 Presumption of damage, 234 Proportionality and rights, 68-69 Qualified immunity, 208-209 Remoteness of damage, 179-180, 183 State action, 73, 80-83 State of mind Gross negligence, 145 Malice, 153 Negligence standard, 139-140 Qualified immunity and, 208-209 Strict liability, 127 Threshold misconduct, 114-115, 116 Variation of requirement, 16 Vindicatory damages, 255, 256-257

Caribbean

Case law overview, 13-14 Common law liability, 133

Causation. See Factual Causation; Remoteness of Damage.

Claim of Right

Canada, 209-210 Common law and, 210-211 European Court of Justice, 210-211 Nature of defence, 209-210

Collateral Benefits

Deduction of, 30-31

Columbia

Superior orders, 215-216

Comparative Law

Caution with respect to, 43 Use of, 42

Compensatory Principle

Acceptance of, 228-230 Canada, 229, 244 Declaration sufficient for, 230-231 European Court, 228-229 Expenses and, 243 Canada, 244 European Court, 243-244 Reasonableness of, 243 Failure to act and, 228 Human Rights Act, 228-229 India, 229-230 Limitations to, 230 Privy Council, 229-230 Procedural deficiency and, 231-232 Restitutio in integrum, 239, 243 United States, 228

Conceptualization of Claims

Constitutional tort, 24-25 *Human Rights Act*, 26-27 Public law right, 24-26 Significance, 25

Congo

Environmental protection, 124

Conscience, Freedom of. See Human Rights.

Consent

Canada, 212 European Court, 211-212 Generally, 211-212 United States, 212

Constitutional Clauses

Damages specified, 7-8 Generally, 7-9 Interpretation, 10 Qualification, 10. *See also* **Proportionality.** Remedies clauses, 7-9

Constitutional Torts. See United States.

Contribution between Defendants

Generally, 221 India, 221 Joint and several liability and, 221 Lichtenstein, 221 United States, 222

Contributory Negligence

Canada, 219 Common law and, 219 Constitutional cases, 219 Contextual appraisal, 219-220 Generally, 219 *Human Rights Act*, 219 Intervening cause and, 220-221 New Zealand, 219-220 Subjective-objective dilemma and, 220 Thin skull rule and, 220

Corporations, Right to Sue, 84

Corrective Justice

Causation and, 155 Distributive justice and, 34-35 Negligence and, 130

Countervailing Considerations

Onus of proof and, 117-118 Qualified immunity and, 196, 208-209 State of mind and, 112, 114-115, 117-118, 127, 140

Croatia

Superior orders, 215

Crumbling Skull Doctrine, 182

Cultural Susceptibility, 181-182

Deduction

Canada, 225 India, 226 New Zealand, 225 No-fault compensation, 226 Parallel compensation, 225-226

Defence of Third Parties, 217

Defences

Absolute immunity. See Absolute Immunity Assumption of risk, 211-212 Claim of right. See Claim of Right. Common law defences, 192 Consent. See Consent. Contractual exclusion, 211 Contribution between defendants. See Contribution between Wrongdoers. Contributory negligence. See Contributory Negligence. Defence of third parties, 215 Emergency, 216 Executive immunity. See Executive Immunity. Illegality, 213-214 Immunities. See also Absolute Immunity; Qualified Immunity. Conceptualization of claims and, 194-196 Good governance and, 196 History of, 193 Public policy and, 194-195 Separation of powers and, 194 Theory of, 194-196 Three-tiered structure and, 195-196 Judicial immunity. See Judicial Immunity. Legislative immunity. See Legislative Immunity. Limitation periods, 216-217 Onus of proof, 191-192 Overview, 191-192

Procedural delay, 217-218 Qualified Immunity. *See* Qualified Immunity. Self defence, 215 State of mind and, 192 Statutory immunities, 193-194 Canada, 193-194 India, 194 New Zealand, 193 Substantive rights, relationship to, 191 Superior orders, 215-216 *Volenti non fit inuria*, 211-212

Deliberate Indifference

Arbitrariness as, 148-149 Constitutional clauses, 144 Critique of, 144 Generally, 141 Micronesia, 6 Rationale for, 141 Shocks the conscience standard, 148-149 United States, 144-149

Dependents' Right to Sue, 90-92

Deterrance

Generally, 5, 53, 116-117 Holism and, 35 Specific remedies and, 37-38 Functional approach and, 5, 40 Distributive justice and, 34 Strict liability and, 127 Intentional conduct and, 149 Causation and, 157 Qualified immunity and, 208 Vindicatory damages and, 258 Exemplary damages and, 259, 261

Dignity, Loss of

Canada, 244-247 Generally, 245-247 New Zealand, 237, 246 Underpinning for damages, 245-246 Universal Declaration and, 245-246

Directness Test, 182 Canada, 183 European community law, 182-183

European Court, 182-183 India, 183 Intervening cause and, 183 New Zealand, 183

Discrimination. See Equality.

Distributive Justice. See also Jurisprudence.

Causation and, 155 Non-pecuniary claims and, 34-35 Property expropriation and, 35-36 Proportionality and, 34 Scope of rights and, 53 Socialization of risks, 35-36, 122 Strict liability and, 35-36, 122

Duties of Affirmative Action. See Failure to Act.

Duty to Mitigate, 187-189 European Court, 188 European Court of Justice, 188 New Zealand, 188-189 Procedural delay and, 188 Religious beliefs and, 187 Simple probability reasoning, 187 Subjective-objective dilemma, 187

Economic Rights, 64-66

Eggshell Skull. See Thin Skull Doctrine.

Elements of a Claim, 32-33

Embarrassment. See Interests Protected.

Emergency Powers

Defence, 214 Overview, 69-71 Proportionality and, 69-70

Employment, Right to, 64-65

Emotional Susceptibility, 181

England. See Human Rights Act.

Entitlement to Sue. See Appropriate Plaintiff.

Environmental Protection Strict liability and, 124

Environmental Susceptibility, 181

Equal Pay, Right to, 65

Estonia Dignity, 56 Wrongful conviction, 20

Europe

Case law overview, 20-22

European Convention. See European Court of Human Rights.

European Court of Human Rights

Affirmative duties, 96-97, 105 Appropriate plaintiff, 87-88 Consent, 211-212 Duty to mitigate, 188 Factual causation But-for causation, 160-161 Loss of opportunity, 173-174 Overview, 20-21 Presumption of damage, 234-235 Proportionality, 69 Quantification Expenses, 243-244 Interests protected, 238 Loss of earnings, 241-242 Non-pecuniary loss, 251-252 Vindicatory damages, 258-259 Remoteness of damage, 182-183 State of mind, Intent, 153-154 Negligence standard, 137 Strict liability and, 137 Third party mental suffering, 94

European Court of Justice

Appropriate plaintiff, 87-88 Duty to mitigate, 188 Overview, 21-22 Quantification, 238 Serious breach, 144-145 State of mind, 116, 137-138, 144-145

Eusdem Generis Rule, 4

Executive Immunity

Canada, 204-205, 208-209 Generally, 204-205, 205-209 *Human Rights Act*, 205 United States, 206, 206-209

Exemplary Damages

Canada, 261 Common law, 259 Generally, 259-262 *Human Rights Act*, 260 Malaysia, 260 New Zealand, 259 Privy Council, 259 Reluctance to award, 260-261 Summary, 262 United States, 261

Expenses

Canada, 244 European Court, 243-244 Invalidated proceedings, 244 Reasonableness of, 243

Expropriation of Property

Common law and, 124-125 Generally, 9 Strict liability and, 124

Ex Turpi Causa. See Illegality.

Factual Causation

But-for causation Canada, 162-163 European Court and, 160-161 Generally, 158-170 *Human Rights Act*, 164-165 Hypothetical facts, 160, 163, 166 New Zealand, 164 Procedural violations and, 161-162 United States, 163-164 Constitutional provisions, 158 Failure to act and, 159 Introduction to, 155-156 Loss and, 159

Loss of opportunity Common law and, 171-172 Constitutional cases, 172 European Court, 173-174 Fear of risk, 173 Human Rights Act, 174, 175 Knowledge of lost chance, 173 New Zealand, 175-176 Probabilistic cause, theory of, 170-171 Summary of, 177 United States, 172, 176 Material contribution, 167-168 Multiple sufficient causes, 168-170 But-for inapplicable, 168 Common law, 169 Constitutional context, 169-170 Omissions and, 159 Quantification and, 159 Reverse onus Common law, 166-167 Deliberate indifference and, 159 United States, 166 Systemic cause, 120, 176

Failure to Act

Act or omission, 98-99 Affirmative duty and, 59 Autonomy and, 96 Combined activities, 99 Common law and, 95 Component of action, 98-99 Constitutional provisions, 99-102 Affirmative duty examples, 100-101 Ambiguity, 99-102 Negative right examples, 101-102 Positive right examples, 100-101 Positive right qualification, 102 Transitive verbs, 99, 101 Categories of, 102-103 Control of danger, 104-107 General reliance, 109-110 Prior creation of hazard, 103-104 State created danger, 103-104 Supervisory duties, 107-108 Undertaking and reliance, 108-109 European Court and, 96-97 Life, liberty and security, 58-59 Micronesia, 6-7

Philosophical underpinning, 95 Positive rights, 94-95 Restrictive scope, 96-97 Special relationships, 102-103 State action and, 72

Fatal Accidents, 90-92

Fault. See State of Mind.

Federated States Purpose of damages, 6-7

Fiji

Airport detention, 18 Importance of constitutional claim emphasized, 18 Wrongful medical examination, 18

Foreseeability Test

Generally, 179-181 Extent of harm, 179-180 Time limitation, 179-180 United States, 178

Germany

Public officials, liability of, 20

Ghana

Conceptualization of claims, 24-25 Exemplary damages, 261 Procedural deficiency, 14-15, 231 Property expropriation, 123-124 Redress, interpretation of, 4 Tort law, guidance from, 28 Vindicatory damages, 259

Global Recognition, 1-4

Good Faith Immunity. See Qualified Immunity.

Gross Negligence

Constitutional clauses, 144 Critique of, 144 European Court of Justice, 144 Generally, 141-149 Meaning of, 143 Objective and subjective standards, 142-143 Rationale for, 143

Guyana

Non-justiciable rights, 9 Property expropriation, 13

Heads of Damages

Common law, 236 Damage morale, 238 Expenses and cost of care, 243-244 Exemplary damages, 259-262 Loss of earnings, 240, 241-243 Loss of homemaking capacity, 240-241 Moral damage, 238 Non-pecuniary loss, 244-254 Summary, 238-239 Vindicatory damages, 254-259

Health, Right to, 66

Heightened Negligence, 141. See also Gross Negligence.

Homemaking Capacity, Loss of, 240-241

Honour, Protection of, 62-64

Housekeeping Capacity, Loss of, 240-241

Human Rights

Categorization of, 8, 54-57 Conscience, freedom of, 61 Dignity, 55-56 Economic rights, 64-66 Employment, right to, 64-65 Equality, 55-57 Equal pay, 65 Health, right to, 66 Honour, 62-63 Liberty, 58-59 Life, 58-59 Marriage, right to, 66-67 Movement, freedom of, 61-62 Non-justiciable, 9, 66-67 Privacy, 62-63 Procedural rights, 60-61 Proportionality and. See Proportionality.

Religion, freedom of, 61-62 Reputation, 62, 64 Search and seizure, 60-61, 62-63 Security of the person, 58-61 Slavery, freedom from, 59-60 Speech, freedom of, 61-62 Social rights, 66-67 Subsistence, right to, 65, 66-67 Thought, freedom of, 61-62 Tort law and, 28-32 Trade union, right to join, 65 Universal Declaration. *See* Universal Declaration. Western perspective, 55 Work, right to, 64-65

Human Rights Act

Apportionment, 219 Appropriate plaintiff Dependents of victim, 91-92 Conceptualization of claim, 26-27 Early position, 22-24 Factual causation But-for causation, 164-166 Loss of opportunity, 173-175 Failure to act Control of danger, 105 Prior creation of hazard, 103-104 Reliance, 108-109 Restricted duty, 96-97 Supervisory duties, 107-108 Government liability at common law Development of, 131-134 Operational and policy decisions, 131-132 Immunities Executive immunity, 205 Legislative immunity, 203 Leading cases, 22-24 Overview, 22-24 Quantification Exemplary damages, 260 Homemaking capacity, loss of, 240-241 Non-pecuniary loss, 251-252, 255 Pecuniary loss, 230-231, 245-246 Vindicatory damages, 258-259 Recent cases, 23-24 State action and, 74-78 Public authority, 74-75 Public function, 74-75

Remoteness of damage Foreseeability test, 179-180 Intentional harm and, 179 State of mind Gross negligence, 144-145 Negligence standard, 138-139 Serious breach, 144-145

Humiliation. See Interests Protected; Loss of Dignity.

Illegality

European Court, 214 Generally, 213-214 India, 213-214 United States, 214

Immunities. See also Absolute Immunity; Qualified

Immunity; Claim of Right. Conceptualization of claims and, 194-196 History of, 193 Public policy and, 194-195 Separation of powers and, 194 Theory of, 194-196

India

Appropriate plaintiff Foreign nationals, 84 Mental suffering by third party, 93 Proximity of plaintiff, 89-90 Affirmation of claims, 15-16 Affirmative duties, 97 Apportionment, 221-222 Asbestos contamination, 15-16 Failure to act, 97, 107 Intervening cause, 186 Limitation periods, 217 Proportionality and rights, 69 Quantification Loss of earnings, 242-243 Non-pecuniary loss, 250 Remoteness of damage, 183 Restriction of claims, 15-16 Riot prevention, 15 State action requirement, 73-74 State of mind Strict liability, 126-127 Negligence standard, 140-141

Insurers, Right to Sue, 85

Interests Protected

Common law, 236 Constitutional cases, 236-238 European Court, 238 European Court of Justice, 238 Substantive breach and, 237-238 Summary, 238 United States, 237

International Law

Deficiency of, 6 Influence on domestic law, 43-45 International Covenant, 43-44 Requirement of remedy, 43 Use of, 44-45

Intervening Cause

Contributory negligence and, 220-221 Definition of, 184 Generally, 184-186 India, 186 Post-injury events and, 186-187 State action and, 186 United States, 184-186

Ireland

Judicial immunity, 199 Leading case, 19 Overview, 19-20 Proximity of plaintiff, 90 Sovereign immunity, 19

Judicial Immunity

Canada, 198 Critique of, 201 Ireland, 199 New Zealand, 199-201 Quasi-judicial functions, 202 Rationale for, 200-201 Summary of, 202-203 United States, 197-198

Jurisdiction

Labour arbitrators, 19

Jurisprudence Affirmative duties and, 94-96 Corrective justice Causation and, 155 Distributive justice and, 34-36 Negligence and, 129-130 Distributive justice Negligence and, 129-130 Non-pecuniary claims and, 34-35 Proportionality and, 34 Property expropriation, 35-36 Socialization of risks, 35-36 Failure to act and, 94-96 Hohfeld, 49-50 Holistic approach, 35 Intrusiveness of remedy, 37-38 Neutrality, 130 Pragmatic concerns, 36-39 Rule systems, combination of, 33 Socialization of risks, 35-36, 122 Unjust enrichment, 35-36

Labour Arbitrators

Jurisdiction, 18-19

Laches, 217-218

Legislative Immunity

Canada, 203-204 European Convention, 203 *Human Rights Act*, 203 United States, 203

Lichtenstein

Apportionment, 221

Life, Liberty and Security. See Human Rights.

Limitation Periods, 216-218 Canada, 216-217 India, 217 New Zealand, 216-217 Privy Council, 216-217 Statutory limitation periods, 216-217 United States, 217

Loss of Chance. See Loss of Opportunity.

Loss of Dignity

Canada, 246-247 Generally, 245-247 New Zealand, 246 Underpinning for damages, 245-246 Universal Declaration and, 245-246

Loss of Homemaking Capacity, 240-241

Loss of Housekeeping Capacity, 240-241

Loss of Opportunity

Common law and, 171-172 Constitutional cases, 172-176 Damages assessment and, 226-228 European Court, 173-175 Fear of risk, 173 *Human Rights Act*, 174, 175 Knowledge of lost chance, 173-174 New Zealand, 175-176 Theory of, 170-171 United States, 172, 176

Loss of Self Esteem. See Interests Protected.

Malaysia

Comparative law, use of, 45 Exemplary damages, 260 House demolition, 15 Procedural rights, 15 Presumption of damage, 235

Margin of Appreciation, 32

Marriage, Right to, 66

Material Contribution

Causation, test for, 167-169

Mental Suffering. See also Non-Pecuniary Loss. By third parties, 93-94

Micronesia

Deliberate indifference, 6-7 Failure to act, 6-7, 107 Prisoner abuse, 15

Mistake of Law. See Claim of Right.

Mitigation. See Duty to Mitigate.

Movement, Freedom of, 60

Multiple Sufficient Causes, 168-170

Nature of Claims. See also Jurisprudence.

Conceptualization, 71-74 Constitutional tort theory, 24-25 *Human Rights Act*, 26-27 Public law right, 24-26 Significance, 25

Negligence

Canada, 139-140 Common law, 131-133 Constitutional provisions, 134-135 Critique of, 131 European Court of Justice, 137-138 Generally, 128-141 Human Rights Act, 138-139 India, 140-141 Qualifying clauses and, 135-136 Rationale for, 128, 131 Reasonable government official, 128, 130-132 Reasonableness equation, 128-129 Remedies clauses and, 136 Resources available, relevance of, 128-129 Social utility and, 129 United States, 137

New Zealand

Apportionment, 219-220 Bill of Rights Act, 17 Common law liability, 132-133 Conceptualization of claim, 25-26 Dignity emphasized, 17, 246 Duty to mitigate, 188-189 Exemplary damages, 260 Factual causation But-for causation, 164 Loss of opportunity, 175-176 Judicial immunity, 17-18, 199-201 Laches, 218

Leading case, 17 Limitation periods, 216 Overview, 17-18 Presumption of damage, 235 Proportionality and rights, 67-69 Quantification Loss of Earnings, 242 Non-pecuniary loss, 249-250 Vindicatory damages, 257-258 Remoteness of damage, 185 Search and seizure, 134-135 State action requirement, 71-74 State of mind Cruel punishment and, 112-113

Non-justiciable Rights

Generally, 9 Social rights, 67

Non-Pecuniary Loss

Aggravated damages, 224, 238-239 Deference to European Court, 247-249, 254-255 Human Rights Act and, 247-249 Jurisdictional context, 247-249 Level of awards, 249-252 Canada, 250-251 European Court, 251-252 India, 250 New Zealand, 249-250 Loss of Dignity, 245-247 Moderation, 252-255 Common law, 252-253 Human Rights Act, 253-254, 254-255 Social and political context, 247 Summary, 254 Tort claims analogy, 247-248

Northern Ireland. See Human Rights Act.

Novus Actus Interveniens. See Intervening Cause.

Omissions. See Failure to Act.

Onus of Proof

Causation, reverse onus, 166-167 Common law, 166-167

Deliberate indifference and, 158-159 United States, 166 Defences, 191-192 Qualified immunity and, 117 Qualifying clauses and, 134-135 State of mind, fault, 117-118

Overview by Region, 11-24

Africa, 14-15 Asia, 15-16 Canada, 18-19 Caribbean, 13-14 Continental Europe, 20-22 Ireland, 19-20 New Zealand, 17-18 South Pacific, 18 United Kingdom, 22-24 United States, 11-13

Papua New Guinea

Malicious prosecution, 16 Parliamentary immunity, 196-197 Police raids, 16 Search and seizure, 16

Pecuniary Loss

Earnings, loss of, 240, 241-243 Computation of, 240 Constitutional cases, 241-243 European Court, 241-242 India, 242-243 Items of, 241-243 New Zealand, 242 Expenses, 243-244 Canada, 244 European Court, 243-244 Impugned proceedings, cost of, 244 Reasonableness of, 243 Homemaking capacity, loss of, 240-241 Profits, loss of, 239-240 Restitutio in integrum, 239, 242-243 Shared family income, loss of, 239-241 Summary, 239-240

Philippines

Enforced disappearance, 16 Privacy, right to, 63 Relatives of victim, recovery by, 93-94

Plaintiff Proximity, 86-90

Plaintiff Right to Sue. See Appropriate Plaintiff.

Positive Rights. *See also* **Failure to Act.** Negative rights, and, 94-95

Post-injury Events. See Remoteness of Damage.

Pragmatic Concerns

Access to justice, 37 Empowerment of disadvantaged, 36-37 Intrusiveness, 37-38 Procedural difficulty, 36-37 Specific remedy, substitution for, 37-38

Presumption of Damage

Canada, 234 Common law, 232-233, 235 Constitutional cases, 233-235 European Court, 234-235 New Zealand, 235 Summary, 235-236 United States, 235

Primary and Secondary Victims

Primary victims Mischief of constitutional provision, 83-86 Plaintiff proximity, 86-90 Secondary victims Dependents, 90-92 Mental suffering of, 93-94

Privacy, Protection of, 62-64

Probabilistic Cause. See Loss of Opportunity.

Procedural Delay Doctrine of laches, 217-218

Procedural Rights, 60-61

Profits, Loss of. See Pecuniary Loss.

Property Expropriation

Common law and, 123-124 Generally, 9, 123-124 Strict liability and, 123-124

Proportionality

Canada and, 68-69 Generally, 7-8, 67-71 International law and, 69 Qualification of rights generally, 67-68 Specific rights qualification, 69 United States and, 68-69

Proximity. See Proximate Plaintiff; Remoteness of Damage.

Purpose of Constitutional Claims. See also Jurisprudence.

Compensation, 5 Deterrence, 5 Gap-Filling, 40-42 Generally, 5-7, 33-36 Pragmatic Concerns, 36-39 Vindication, 5

Qualification of Rights. See Proportionality.

Qualified Immunity. See also Claim of Right.

Canada, 208-209 Categories of, 205 Generally, 205-211 New Zealand, 209 Theory of, 194-196 United States, 206-208 Critique, 208i Range of, 206-208 State of mind and, 207-208

Quantification

Aggravated damages, 223-225, 238-239, 245 Compensatory principle. *See* **Compensatory Principle**. Deduction of other compensation. *See* **Deduction**. Domestic law reference, 223 Exemplary damages. *See* **Exemplary Damages**. Heads of damages. *See* **Heads of Damages**. Interests protected, 236-239 Loss of profits, 239-240 Non-pecuniary Loss. *See* **Non-Pecuniary Loss**. Parallel remedies and, 225-226

Pecuniary loss. See also Pecuniary Loss. Presumption of damage Common law, 232-233 Constitutional cases, 233-235 Purposive approach to, 223 Restitutio in integrum, 239, 243 Shared family income, loss of, 241 Standard of proof Generally, 226-228 Loss of chance. See Loss of Opportunity. Simple probability, 226-227 Tort law influence on, 224 Vindicatory damages, 254-259 Acceptance of, 256-259 Definition of, 256

Quasi-constitutional Claims, 3

Quasi-judicial Functions Immunity for, 202

Recklessness, 142-143

Relatives, Right to Sue, 90-92

Reliance Duties. See Failure to Act.

Religion, Freedom of, 61, 88

Religious Susceptibility, 181-182

Remedies

Constitutional clauses, 7-10 Gap-filling, 40-41 Hierarchy of, 29-40 Rights and, Functional view, 48 Integrative view, 48-49 Rights-maximizing, 47-48

Reputation, Protection of, 62-64

Remoteness of Damage, 177-184 Concepts, 177-179 Crumbling skull doctrine, 182 Directness test, 182-184 Canada, 183

European community law, 182-183 European Court, 182-183 India, 183 Intervening cause and, 183 New Zealand, 183 Domestic law application, 179 Duty to mitigate, 187-189 European Court, 188 European Court of Justice, 188 New Zealand, 188-189 Procedural delay and, 188 Religious beliefs and, 187 Simple probability reasoning, 187 Subjective-objective dilemma, 187 Foreseeability test Generally, 179-181 Extent of harm, 179-180 Time limitation, 179-180 United States, 178 Intentional harm and, 179 Intervening cause Contributory negligence and, 220-221 Definition of, 184 Generally, 184-186 India, 186 Post-injury events and, 186-187 State action and, 186 United States, 184-186 Post-injury events, 186-187 Apportionment and, 186 Suicide, 187 Scope of the risk, 183-184 Thin Skull Doctrine Constitutional cases, 182 Contributory negligence and, 220 Crumbling skull doctrine, 181-182 Cultural susceptibility, 181-182 Emotional susceptibility, 181-182 Environmental susceptibility, 181-182 Generally, 181-182 Religious susceptibility, 181-182

Res Judicata

Tort law actions and, 29

Restitutio in Integrum. See Compensatory Principle.

Rights. See also Human Rights.

Categorization of, 8-9, 54-67 Cultural context, 52, 55 Non-justiciable, 9, 67 Overview, 8-9 Qualification. *See* **Proportionality.** Remedies and Functional view, 67 Integrative view, 48-49 Rights-maximizing, 47-48 Threshold question, 51-52

Risk as Damage, 227

Samoa

Village banishment, 18

Scotland. See Human Rights Act.

Search and Seizure, 59, 62

Self Defence, 215

Separation of Powers Immunities and, 194

Serious Breach

European Court of Justice, 141, 144-145

Simple Probability

All-or-nothing compared, 227 Quantification and, 226 Risk as damage, 227

Slavery, Protection from, 59

Socialization of Risks, 35-36, 122

Social Rights, 66-67

South Africa

Leading authority, 14 Proportionality and rights, 68, 69 Vindicatory damages, 255

South Pacific

Case law overview, 18

Speech, Freedom of. See Human Rights.

Sri Lanka

Exemplary damages, 260-261 Prison assault, 15

Standing, 85-86. See also Appropriate Plaintiff.

Stare Decisis

Discretion and, 31-32

State Action

Canada, 73, 80-81 Conceptual approach and, 74 Examples, 72-73 *Human Rights Act* and, 74-78 India, 82 Intervening cause and, 186 Necessity for, 71 Positive rights and, 71 Uncertainty concerning, 72 United States, 78-80 Vicarious liability and, 82

State Created Danger. See Failure to Act.

State of Mind

Alternatives for, 111 Appropriate and just and, 114 Bona fides, lack of, 149-150, 153 Constitutional provisions and, 111-117 Examples, 112-113 Variation of requirement, 115 Defences and, 192 Deliberate indifference standard Arbitrariness as, 148-149 Constitutional clauses, 144 Critique of, 144 Generally, 141 Micronesia, 6 Rationale for, 141 Shocks the conscience standard, 148-149 United States, 144-149 Freedoms and, 114 Fundamental policy question, 116

Gross negligence standard Constitutional clauses, 144 Critique of, 144 European Court of Justice, 144 Generally, 141-149 Meaning of, 143 Objective and subjective standards, 142-143 Rationale for, 143 Heightened negligence, 141. See also Gross Negligence. Intent Definition of, 149 Deliberate indifference and, 151-152 Generally, 149-154 Malice Constitutional clauses, 150 Definition of, 149 Generally, 149-154 Negligence standard Canada, 139-140 Common law, 131-133 Constitutional provisions, 134-135 Critique of, 131 European Court of Justice, 137-138 Generally, 128-141 Human Rights Act, 138-139 India, 140-141 Qualifying clauses and, 135-136 Rationale for, 128, 131 Reasonable government official, 128, 130-132 Reasonableness equation, 128-129 Remedies clauses and, 136 Resources available, relevance of, 128-129 Social utility and, 129 United States, 137 Onus of Proof Generally, 117-118 Qualified immunity and, 117 Qualifying clauses and, 135-136 Reverse onus, 117-118 Recklessness, 146 Remedial law and, 114 Serious breach European Court of Justice, 141, 144 Socialization of risks, 121-122 Strict liability, 121-127 Common law and, 121 Property expropriation, 123

Rationale for, 121-123 Summary, 127 Substantive constitutional law and, 112 Summary, 111 Threshold misconduct and, 114 Types of misconduct, 118-121 Failure of capacity, 119 Failure of comprehension, 118-119 Failure of motivation, 119 Failure through negligence, 119-120 Systemic Failure, 120-121

St. Kitts and Nevis Unconstitutional dismissal, 13

St. Lucia

Property confiscation, 124

Strict Liability, 121-127

Common law and, 121 Property expropriation, 123 Rationale for, 121-123 Socialization of risks, 121-122 Summary, 127

Structure of Claim, 32-33

St. Vincent and the Grenadines Qualified immunity, 205

Subsistence, Right to, 65-66

Suicide

Intervening cause and, 187

Superior Orders

Columbia, 215 Croatia, 215 Generally, 215-216 St. Vincent and the Grenadines, 215-216

Supervisory Duties. See Failure to Act.

Survival Actions, 90-92

Systemic Failure

Factual causation and, 176-177 Generally, 120-121 Intermediate standard and, 142-144 Negligence standard and, 128, 130 Onus of proof and, 117

Talem Qualem Rule. See Thin Skull Doctrine.

Theory of Claims. See Jurisprudence.

Thin Skull Doctrine

Constitutional cases, 182 Contributory negligence and, 220 Crumbling skull doctrine, 181-182 Cultural susceptibility, 181-182 Emotional susceptibility, 181-182 Environmental susceptibility, 181-182 Generally, 181-182 Religious susceptibility, 181-182

Thought, Freedom of. See Human Rights.

Threshold Question, 51-52

Tonga

Free expression, 18

Tort Law

Cocktail effect on, 133 Early influence of, 54 Human rights, overlap with, 28-32 Influence of, 29 Use of principles, 27-28 Canada, 28 Ireland, 28 United States, 27

Trade Union, Right to Join, 65

Trinidad and Tobago

Abuse of claims, 41 Conceptualization of claim, 24 Contempt committal, 13 Contributory fault, 219 Judicial immunity, 195 Limitation periods, 216-217 Origins of constitutional claims, 13 *Res judicata*, 29 Tort measure of damages, 230 Vindicatory damages, 257

Types of Misconduct, 118-121

Failure of capacity, 119 Failure of comprehension, 118-119 Failure of motivation, 119 Failure through negligence, 119-120 Systemic failure, 120-121

Under Color of State Law

Case law, 78-80 History, 78 United States and, 73, 78-80

United Kingdom. See Human Rights Act.

United States

Affirmative duties, 97-98 Apportionment, 221 Appropriate plaintiff, Dependents of victim, 90 Indirect effect, 85-86 Proximity of plaintiff, 86-87 Mental suffering by third party, 93-94 Arbitrariness standard, 152 Conceptualization of claim, 24-27 Consent, 211 Deliberate indifference, 141-142, 144, 145-149 Factual causation But-for test, 163 Reverse onus, 160, 166-168 Failure to act, 97-98 Control of danger, 104, 106-107 Reliance, 108, 109 State created danger, 103-104 Supervisory duties, 107 History, 11-13 Immunities Executive Immunity, 204, 206-208 Immunity of States, 204 Judicial immunity, 197-198 Legislative immunity, 203 Prosecutorial immunity, 201-202 Intent as state of mind, 151

Limitation periods, 217 Origins of constitutional torts, 11 Overview, 11-13 Presumption of damage, 233 Proportionality, 68-69 Qualified immunity State of mind and, 117 Quantification Exemplary damages, 262 Interests protected, 237 Vindicatory damages, 258 Remoteness of damage Foreseeability test, 180-181 Intervening cause, 184-185 Shifted responsibility, 185-186 State action and, 184 Thin skull doctrine, 182 Retreat of liability, 11-12 State action requirement, 71-73, 186 State of mind Negligence standard, 137 Reverse onus, 117 Shocks the conscience standard, 148-149, 151-152 Strict liability, 125-126 Takings cases, 123 Variation of requirement, 115 Under color of state law, 71-73, 186

Universal Declaration

Dignity and Equality, 55 Proportionality in, 67 Rights foundation, 54

Unjust Enrichment

Property appropriation, 123 Socialization of risks, 36

Vicarious Liability

Close connection test, 82 State action and, 82

Vindicatory Damages

Acceptance of, 256 Canada, 255, 256-257 Compensation and, 256 Definition, 255 Exemplary damages and, 256

Ghana, 257 *Human Rights Act*, 258-259 New Zealand, 255-256, 257-258 Privy Council, 255, 257 Purpose of, 255 South Africa, 255 Summary, 259 United States, 258

Volenti Non Fit Inuria, 211-212

Women, Losses by

Homemaking capacity, loss of, 240-241 Pecuniary loss by, 240 Shared family income, loss of, 241

Work, Right to, 64