

Table of Contents

Dedication	iii
Preface	v
Summary Table of Contents	vii
Table of Cases	xv

Chapter 1 Introduction

1. Worldwide Constitutional Damages	1
(a) Global Recognition	1
(b) Potential Value	5
2. Constitutional Provisions	7
(a) Remedies Clauses	7
(b) Qualification and Interpretation	10
3. The Developing International Jurisprudence	11
(a) United States	11
(b) Caribbean	13
(c) Africa	14
(d) Asia	15
(e) New Zealand	17
(f) South Pacific	18
(g) Canada	18
(h) Ireland	19
(i) Continental Europe	20
(j) United Kingdom	22
4. Nature of Constitutional Damages Claims	24
(a) Conceptualization	24
(b) Use of Tort Principles	27
(c) Tort Law and Human Rights	28
(d) Elements of a Claim	32
5. Jurisprudential Foundation and Purpose	33
(a) Corrective and Distributive Justice	34
(b) Pragmatic Concerns	36
(c) Hierarchy of Remedies	39
(d) Gap Filling	40
6. Comparative and International Law	42
(a) Comparative Law	42
(b) International Law	43
(c) Domestic Law Implementation	46
7. Rights and Remedies	46
(a) Rights Maximization	47
(b) Functional View	48

(c) Integrative View	48
Chapter 2 Scope of Rights	
1. Introduction	51
(a) Threshold Question	51
(b) Nature of Issue	52
2. Categories of Rights	54
(a) Dignity and Equality	55
(b) Life, Liberty and Security	58
(c) Freedoms	61
(d) Privacy and Reputation	62
(e) Economic Rights	64
(f) Social Rights	66
3. Proportionality	67
(a) Generalized Proportionality	67
(b) Particular Provisions	69
(c) Emergency Powers	69
4. State Action and Vicarious Liability	71
(a) Introduction	71
(b) The Human Rights Act	74
(c) The United States	78
(d) Other Jurisdictions	80
5. Appropriate Plaintiff	83
(a) Primary Victims: The Mischief of the Substantive Provision	83
(b) Primary Victims: Plaintiff Proximity	86
(c) Secondary Victims: Fatal Accidents	90
(d) Secondary Victims: Mental Suffering	93
6. Liability for Failure to Act	94
(a) Background	94
(b) Act or Omission	98
(c) Wording of the Constitutional Provision	99
(d) Categories of Affirmative Duty	102
(e) Prior Creation of Hazard	103
(f) Control of Danger	104
(g) Paternalistic Supervision	107
(h) Relied-upon Undertakings	108
(i) General Reliance	109
(j) Summary	110
Chapter 3 State of Mind	
1. Introduction	111
(a) Substantive Constitutional Law	112
(b) Constitutional Remedial Law	114

TABLE OF CONTENTS xi

(c) Onus of Proof	117
2. Types of Official Misconduct	118
(a) Failure of Comprehension	118
(b) Failure of Capacity	119
(c) Failure of Motivation	119
(d) Failure Through Negligence	119
(e) Systemic Failure	120
3. Strict Liability	121
(a) Rationale for Strict Liability	121
(b) Property Expropriation	123
(c) Other Cases	125
4. Negligence or Unreasonableness	128
(a) The Unreasonableness Standard	128
(b) Rationale for Unreasonableness Standard	129
(c) Government Liability in the Tort of Negligence	131
(d) Specific Constitutional Provisions	134
(e) General Qualifying Clauses	135
(f) Constitutional Remedies Clauses	136
(g) International Jurisprudence	137
5. Gross Negligence or Deliberate Indifference	141
(a) Definition of Intermediate Standards	142
(b) Rationale for Intermediate Standards	143
(c) Constitutional Clauses	144
(d) International Jurisprudence	144
6. Intent or Malice	149
(a) Definitions of Intent and Malice	149
(b) International Jurisprudence	150
(c) Summary	154

Chapter 4 Causation and Remoteness of Damage

1. Introduction	155
(a) Factual Causation	155
(b) Remoteness of Damage	156
2. Factual Causation Generally	158
(a) Introduction	158
(b) But-for Causation	159
(c) Reverse Onus	166
(d) Material Contribution	167
(e) Multiple Sufficient Causes	168
3. Loss of Opportunity and Probabilistic Cause	170
(a) Theory of Probabilistic Cause	170
(b) Background Case Authority	171
(c) Constitutional Cases	172
(d) Systemic Cause	176

(e) Summary	177
4. Remoteness of Damage	177
(a) Introduction	177
(b) The Foreseeability Test	179
(c) Thin Skull Doctrine	181
(d) The Directness Test	182
5. Intervening Cause and the Duty to Mitigate	184
(a) Intervening Cause	184
(b) The Post-Injury Sequence of Events	186
(c) The Duty to Mitigate	187

Chapter 5 Defences and Apportionment

1. Introduction	191
2. Immunities Generally	193
(a) History	193
(b) Statutory Immunities	193
(c) Theory of Immunities	194
3. Absolute Immunity	196
(a) Constitutional Provisions	196
(b) Judicial and Quasi-judicial Functions	197
(c) Legislative Functions	203
(d) Executive Functions	204
4. Qualified Immunity	205
(a) “Good Faith” Qualified Immunity	206
(b) Claim of Right and Mistake of Law	209
5. Other Substantive Defences	211
(a) Consent and Assumption of Risk	211
(b) Illegality	213
(c) Self Defence and Defence of Third Parties	215
(d) Superior Orders	215
(e) Emergency	216
6. Limitation Periods and Procedural Delay	216
(a) Statutory Limitation Periods	216
(b) Procedural Delay Generally	217
7. Contributory Negligence and Contribution	218
(a) Contributory Plaintiff Fault	219
(b) Apportionment Between Defendants	221

Chapter 6 Quantification of Damages

1. Introduction	223
(a) Underlying Principles	223
(b) Parallel Domestic Remedies	225

TABLE OF CONTENTS xiii

(c) Standard of Proof	226
2. The Compensatory Principle	228
(a) Acceptance of Principle	228
(b) Qualification and Limitation	230
3. Presumption of Damage	232
(a) Common Law	232
(b) Constitutional Cases	233
(c) Summary	235
4. Interests Protected and Heads of Damages	236
(a) Common Law Heads of Damage	236
(b) Broader Constitutional Interests	236
(c) Summary	238
5. Pecuniary Loss	239
(a) Lost Earnings and Profits	240
(b) Loss of Homemaking Capacity and Shared Income	240
(c) Constitutional Cases	241
(d) Expenses and Cost of Care	243
6. Non-Pecuniary Loss	244
(a) Loss of Dignity	245
(b) Jurisdictional Context	247
(c) Level of Awards Generally	249
(d) Moderation	252
(e) Summary	254
7. Vindictory Damages	254
(a) Definition and Purpose	255
(b) Relationship to Other Heads of Damages	255
(c) Acceptance of Vindictory Damages	256
8. Exemplary Damages	259
(a) Background	259
(b) Reluctance to Award	260
(c) Acceptance in Some Jurisdictions	261
(d) Summary	262
Index	263

