

---

# Contents

---

Preface	xvii
About the Author	xxi
Listing of Cases	xxiii

## *Section I*

### RISK MANAGEMENT

<b>1</b>	<b>Fundamentals of Risk Management</b>	<b>3</b>
	Introduction to Torts	3
	Fundamentals of Risk Management	3
	Procedures for Initiating a Civil Action	5
	Frivolous Lawsuits	5
	Types of Civil Actions	6
	Classification by Nature of the Relationship Between the Parties: Tort and Contract	6
	Classification by Nature of the Defendant's Wrongdoing: Intentional Torts, Negligence, and Strict Liability	6
	Classification by Type of Injury: Personal Injury, Property Damage, etc.	7
	Standardization and Best Practices	7
	Sample Risk Management Plan	9
	Risk Management Strategy: (Minnesota Example)	10

## *Section II*

### TORTS

<b>2</b>	<b>Intentional Torts</b>	<b>19</b>
	Intentional Torts	19
	Prima Facie Case	20
	Act	20
	Intent of Consequences	20

Causation	20
Damage	21
Torts Against Persons	21
Assault	21
Battery	21
False Imprisonment (and False Arrest)	22
Intentional Infliction of Emotional Distress	25
Torts Against Property	27
Seizure of and Interference With Property	27
Trespass to Land	27
Trespass to Chattel	28
Conversion	29
Defenses and Privileges	29
Consent	29
Self-Defense	30
Defense of Others	30
Defense and Recovery of Property	30
Necessity	31
Authority of Law	31
Discipline	31
Justification	32

### **3 Negligence 33**

Definition and Elements of Prima Facie Case of Negligence	33
Duty (Legal Duty)	34
Breach of Duty	34
Causation	35
Damage or Injury	35
Negligence Formula	35
Standard of Care	36
The Reasonable and Prudent Person	36
The Professional	37
Aggravated Negligence	38
Rules of Law	38
Violation of Statute: Applicability and Effect of Statute	38
Proof of Negligence	39
Reasonable Care, Constructive Notice, and Circumstantial Evidence	39
Res Ipsa Loquitur	40

<b>4</b>	<b>Duty of Care</b>	<b>41</b>
	Owners and Occupiers of Land: Duty to Take Precautions for	
	Unreasonably Dangerous Conditions	41
	Liability Outside of the Premises	41
	Liability on the Premises: Invitees, Licensees, and	
	Trespassers	41
	Invitee	41
	Licensee	42
	Trespasser	42
	Lessor and Lessee	42
	Exceptions: Attractive Nuisance Doctrine, Privilege, etc.	43
	Limitations on the Duty of Care	44
	Privity of Contract	44
	Failure to Act	44
	Emotional Distress	44
	Unborn Children	45
	Defenses	45
	Sovereign Immunity Doctrine	45
	Public Duty Doctrine	46
	Contributory Negligence	48
	Comparative Negligence (Objective Standard)	49
	Assumption of Risk (Subjective Standard)	50
	Sudden Peril	51
	Statutes of Limitation and Repose	51
	Immunities	51
	Families	51
	Charities	52
	Employer Immunity	52
	State and Local Governments	52
	United States	53
	Public Officials	53
	Causation	53
	Cause in Fact	53
	Sine Qua Non	53
	Proof of Causation	54
	Concurrent Causes	55
	Res Ipsa Loquitur: Which Party Caused the Harm	56
	Joint Tortfeasors: Which Party Caused the Harm	56
	Proximate (Legal) Cause	58
	Damages	60

<b>5</b>	<b>Nuisance</b>	<b>61</b>
	Introduction	61
	Public Nuisance	61
	Private Nuisance	61
	Remedies	61
	Defenses	62
<b>6</b>	<b>Defamation</b>	<b>63</b>
	Nature of a Defamatory Communication	63
	Libel and Slander	63
	Publication	64
	Basis of Liability	64
	Actual Malice, Burdens of Proof, and the Press	64
	Private Plaintiffs	65
	Speech of Private Concern	65
	Falsity	65
	Public Figures and Public Officials	65
	Opinion	66
	Privileges: Absolute and Conditional or Qualified	66
	Interference With Advantageous Relationships	66
	Business Relations	67
	Injurious Falsehood	67
	Interference With Existing or Prospective Contractual Relations	67
	Family Relations	68
<b>7</b>	<b>Invasion of Privacy</b>	<b>69</b>
	Citizen Ride-Along and Privacy	70
	Invasion of Privacy and False Light	70
	Privacy Interest of Public Employees	72
<b>8</b>	<b>Misrepresentation</b>	<b>79</b>
	Concealment and Nondisclosure	79
	Basis of Liability: To the Recipient and to Third Persons	80
	Reliance and Opinion	81
	Law	81
	Prediction and Intention	82
	Damages	82

<b>9</b>	<b>Liabilities and Common Claims</b>	<b>83</b>
	Failure to Train	83
	Deliberate Indifference	83
	Punitive and Compensatory Damages: Immunity and Good Faith	85
	Failure to Protect	85
	Negligent Failure to Arrest	87
	Negligent Failure to Render Assistance	89
	Negligent Selection, Hiring, and Retention	89
	Negligent Entrustment, Assignment, and Supervision and Direction	90
	Negligent Failure to Investigate and Discipline Misconduct	91
	Failure to Prevent Detainee Suicide	91
	Misuse of Legal Procedure: Malicious Prosecution and Abuse of Process	92
<b>10</b>	<b>Products Liability</b>	<b>95</b>
	Products Liability	95
	Theories of Recovery	95
	Negligence	95
	Warranty (Expressed and Implied)	95
	Strict Liability in Tort	96
	Product Defects	96
	Manufacturing Defect	96
	Design Defect	96
	Warnings Defect	97
	Proof	97
	Defenses	97
	Plaintiff's Conduct	97
	Preemption and Other Government Actions	97
	Defendants Other Than Principal Manufacturers/Harm Other Than Personal Injury	98
	Other Suppliers of Chattels	98
	Services	98
	Police Products and Liability (Case Examples)	98
<b>11</b>	<b>Strict Liability</b>	<b>123</b>
	Strict Liability Tort	123
	Traditional Strict Liability Issues	124
	Animals	124

Abnormally Dangerous Activities	125
Limitations on Strict Liability	126
<b>12 Common Claims: Negligent Operation of Emergency Vehicles and Pursuits</b>	<b>127</b>
Negligent Operation of Emergency Vehicles and Pursuits	127
Operating Motor Vehicles Under Routine Conditions	127
Operating Motor Vehicles in Emergency Situations	128
Ministerial/Discretionary Functions	130
Principles of Negligence and Police Pursuits	130
Duty of Care (Duty)	131
Breaches of Reasonableness (Breach of Duty)	131
Justifications for Pursuit	133
Was the Officer Familiar With the Area? ( <i>Ogburn v. City of Wiggins</i> , 2005) (p. 150) Actual Vehicle Operation	134
Circumstances of Operation	134
External Factors	135
Judicial Constructions of Causation (Proximate Cause)	136
Proximate Cause as a Doctrinal Barrier to Findings of Police Liability	136
Proximate Cause as a Function of Police Conduct in a Particular Situation	137
Foreseeability	138
Defenses to Negligent Operation	139
Recapitulation	140
 <b>Section III</b>	
<b>CIVIL RIGHTS</b>	
<b>13 Civil Rights</b>	<b>143</b>
Scope of the Civil Rights Act	143
Federal Civil Rights Liability	146
Excessive Force and Severity	146
Intent as an Element	147
Meaning of “Person” Under Section 1983	147
Acting Under Color of Law	149
Public Function Test	152
State Compulsion Test	153
Symbiotic Relationship (Nexus) Test	154
Duty Status	154

Display of State Authority	154
Officer's Motivation (Motive)	154
Violation of a Federally Protected Right	155
Constitutional Level	156
Municipal Liability and Defenses to Section 1983 Lawsuits	157
Municipal and Supervisory Liability	157
Qualified Immunity	158
Administrative Negligence and Deliberate Indifference	160
Personal Liability and Official Immunities	160
Actionable Conduct Under the Federal Civil Rights Acts (Common Claims)	163
Use of Force and Deadly Force	163
Force While in Custody	166
Illegal Search and Seizure and the Right to Privacy	166
Searches of Persons and Property	167
Obtaining Search and Arrest Warrants	171
Investigative Tactics or Techniques	171
Denial of First Amendment Rights	173
Fifth Amendment: Illegal Interrogation	173
Fifth and Sixth Amendments: Denial of Counsel and Fair Trial	174
Denial of Medical Attention	174
Verbal Abuse and Harassment	175
Conspiracies to Violate Civil Rights	176
High-Risk Drug Enforcement	176
False Arrest	178
Malicious Prosecution	182
Failure to Protect in Noncustodial Situations	185
Police Pursuit	187
Pleading and Forum Selection	187
Effect of Criminal Conviction	189
Attorney's Fees	189

## **14 Use of Force 191**

Wrongful Death	191
Excessive Force	192
Use of Force Continuum	193
Threat Control Matrix	193
Deadly and Nondeadly Force	194
Constitutional Deprivation	197
Meaningful Injuries	198
Handcuffing and Other Restraints	199

Pepper Spray (Chemical Agents) and Less-Lethal Munitions	201
Seizure at Gunpoint	203
Use of Canine Force	204
Standards for the Use of Deadly Force	204
Immediate and Serious Danger	205
Serious Danger	205
Immediate Danger	206
Past Dangerousness: Previous Use or Threatened Use of Force	206
Shooting at Moving Vehicles That Pose a Danger	208
Standards for the Use of Nondeadly Force ( <i>Graham v. Connor</i> )	208
Objective Standard	208
Reasonableness Standard	209
Summary of <i>Graham</i>	212
Liability for Indirect Excessive Force	212
Misdemeanor Arrests	212
Roadblocks and Pursuits: Fourth Amendment and Fourteenth Amendment	213
Failure to Intervene	215
Vicarious Liability (Supervisor Liability)	217
Respondeat Superior	217
Independent Contractors	217
Joint Enterprise	218
Bailments	218
Imputed Contributory Negligence	218

## ***Section IV***

### **EMPLOYMENT AND LABOR LAW**

<b>15</b>	<b>Employment Law</b>	<b>221</b>
	Introduction	221
	Employee Searches and Privacy Issues	221
	Procedural Due Process: The Right to Be Heard	224
	Public Employment	224
	Process Due: The Goldberg and Mathews Tests	226
	Liberty and Property Interests	228
	Irrebuttable Presumptions and Equal Protection	229
	Employment Standards	229
	Physical and Mental Requirements	229
	Employer References and Blacklisting	230



Disclosure of Information After Employee’s Discharge (Employer Liability for References)	230
Criminal History Information Reported in Background Checks	236
Veteran Preference	247
Promotion and Assignment	247
At-Will Employment	248
Workplace Harassment (Hostile Environment)	251
Discipline and Termination	253
First Amendment Rights	257
<b>16 Labor Law</b>	<b>259</b>
Unions, Collective Bargaining, and Police Rights	259

***Section V***

**MANAGING RISK: WHAT TO DO NOW**

<b>17 Risk Management: Recapitulation and Retrospective</b>	<b>263</b>
Policy, Training, and Decision Making	263
Policy on Critical Tasks	263
Training for Recurring Tasks	264
Best Practices	264
Committee Recommendations	264
Establish an Effective Recruitment and Selection Process	265
Develop Effective Training for Officers and Supervisors	265
Monitor Behavior and Utilize Preventative Practices and Corrective Measures	265
Confront Poor Performance	266
Create a Positive, Supportive Organizational Culture With a Bias for Positive Action	266
Develop and Maintain Positive Community Relations	267
Retain and Support the Good Employees, Discharge the Poor Employees	267
Gordon Graham’s Rules	267
Gordon Graham and the Five Concurrent Themes for Success	267
The Five Pillars of Success:	268

GRIBI: Graham's Rules for the Improvement of Background Investigations	269
GRIBI: #1-#10	269
GRIPE: #1-#10	272
GRIID: #1-#10	274
Shifting Concepts	277
<b>Appendix A</b>	<b>279</b>
<b>Appendix B</b>	<b>285</b>
<b>References</b>	<b>287</b>