
TABLE OF CONTENTS

<i>Foreword to the Fifth Edition</i>	vii
<i>Foreword to the Fourth Edition</i>	xi
<i>Foreword to the Fourth Edition</i>	xiii
<i>Foreword to the Third Edition</i>	xv
<i>Foreword to the Second Edition</i>	xvii
<i>Foreword to the First Edition</i>	xix
<i>Abbreviations</i>	xxix
<i>Books Cited by Names of their Authors</i>	xxxv
<i>List of Cases Reproduced in this Book and their Translators</i>	xxxvii
<i>Table of Cases</i>	xliii
<i>Table of Legislation</i>	lxix
1. Introduction.....	1
I. A Bird's Eye View of the Organisation of the German Courts in Civil Matters.....	1
<i>Bibliography</i>	6
II. Style, Form and Content of Argument in the Judgments of the German Supreme Court.....	6
A. History.....	10
B. Legal Education.....	11
C. The Codal Background.....	12
III. Some Preliminary Observations on the BGB in General and the Delict Provisions in Particular.....	13
<i>Bibliography</i>	18
IV. The Constitutionalisation of Private Law.....	19
V. Amending the Civil Code.....	24
VI. Bibliographical Survey.....	25
2. Breach of Protected Interests (§ 823 I BGB).....	29
I. Introductory Remarks.....	29
II. The Rights and Interests Protected by § 823 I BGB.....	30
A. Life.....	30
B. Body and Health.....	31
<i>Bibliography</i>	34
C. Freedom.....	35
D. Property.....	35
i. Ownership.....	35
ii. Possession.....	37

E.	Other Rights	38
i.	Generally	38
ii.	Delictual Protection of Family Relationships	39
iii.	The Right of an Established and Operating Business	39
iv.	The General Right to One's Personality	43
III.	Unlawfulness and Fault	49
A.	Unlawfulness	49
B.	Fault	53
	<i>Bibliography</i>	55
IV.	The Duties of Care	55
A.	Generally	55
B.	Traffic Safety on Highways and Places Open to the Public Including Dangerous Premises	56
C.	Good Samaritans	60
V.	Causation	60
A.	Conditions and Causes	60
B.	Legal Cause	64
C.	Some Special Problem Areas	67
i.	Fault of the Injured Party	67
ii.	Rescue Cases	68
iii.	Predispositions	68
D.	Comparative Conclusions	70
3.	Breach of Legislative Protective Norm (§ 823 II BGB) and Intentional Harm (§ 826 BGB)	72
I.	Liability for Breach of a Legislative Protective Norm (§ 823 II BGB)	72
	<i>Bibliography</i>	72
A.	Is this Liability Based on Fault?	73
B.	Is a Norm Protective of Individual Interests?	74
C.	Personal Scope	74
D.	Material Scope	76
E.	Modal Scope	77
II.	Intentional Harm (§ 826 BGB)	78
	<i>Bibliography</i>	78
A.	Introduction	78
B.	Good Morals	80
C.	Intention	81
D.	Causation	82
E.	Comparison	82
i.	Fraud	82
ii.	Abuse of Legal Process	84
iii.	Causing Loss by Unlawful Means and Pursuing Unlawful Ends	84
a.	Unlawful Means	84
b.	Unlawful Ends	85
iv.	Abuse of Rights or Power	85

4. Specific Areas of Liability Under the Code: Economic Loss and Products.....	87
I. Economic Loss	87
<i>Bibliography</i>	87
A. Introduction	88
B. Arguments against Liability for Pure Economic Loss	89
i. Indeterminate Liability	89
ii. Free Self-Determination	89
iii. The Internal Logic of the Code.....	90
iv. Insurance Considerations	90
v. The Role of Contract.....	91
C. The Specificity of German Law	91
i. History of German Law	91
ii. German Alternatives to Delictual Liability for Economic Loss	91
D. Categories of Liability for Economic Loss.....	93
i. Interference with an Established and Operating Business.....	93
ii. Cable Cases	93
iii. Loss of Use.....	94
iv. Damage Caused to the Product.....	94
v. Economic Loss as a Result of Negligent Misstatements.....	94
vi. Negligent Performance of Professional Services	96
E. Economic Loss at the Borderline of Contract and Tort	97
II. Liability for Untrue Statements Under § 824 BGB.....	105
III. Delictual Liability for Products.....	106
<i>Bibliography</i>	106
A. Introduction	106
B. History	107
C. Contractual or Quasi-Contractual Solutions to the Problem?.....	108
IV. Strict Liability?	110
V. The <i>Fowl Pest</i> Decision of 1968 and the Move from Contract to Delict.....	111
VI. The Various Forms of Product Liability.....	113
A. The Producer's Liability for Defects in Manufacture	113
B. The Producer's Liability for Defective Design	113
C. The Producer's Liability for Defective Instructions	115
D. The Producer's Liability for Development Risks	115
5. Liability for Others.....	117
<i>Bibliography</i>	117
I. The Tortious Liability for 'Employees': §§ 831, 278 BGB	117
A. General Observations	117
B. Employer–Employee Relationship	119
C. The Damage Must have been Inflicted by the Employee 'in the Exercise of the Function Assigned to Him'	121
D. 'Unlawful' Damage	123
E. The Employer's Exculpatory Proof.....	125
F. Methods Developed in Order to Avoid the Effect of § 831 BGB	126
II. The Escape into Contract: § 278 BGB.....	128

III. Liability Regimes in Labour Law	131
IV. Liability for those in Need of Supervision, Especially Children: § 832 BGB	133
6. Medical Liability.....	136
Colm McGrath	
<i>Bibliography</i>	136
I. Introduction	136
II. The Doctrinal Basis of Medical Liability Claims	137
III. Types of Claim.....	138
A. Treatment Malpractice.....	138
i. The Primacy of the <i>Behandlungsfehler</i>	138
ii. Expert Evidence and the Role of Professional Guidelines	139
iii. The Normative Assessment of Medical Behaviour	139
iv. Setting an Objective Standard	140
v. Alternative Medicine	141
B. Disclosure Malpractice	141
i. The Importance of the Patient's Consent	142
ii. The Burden of Proof and 'Hypothetical Consent'	142
iii. What Must be Disclosed?	142
iv. A Subjective Standard for Risk Disclosure.....	143
v. Disclosing Alternative Available Treatments.....	144
vi. Implementing Disclosure in Practice	144
IV. Procedural Indulgences.....	145
A. Fully Controllable Risks.....	145
B. Gross Treatment Errors	145
V. Extra-Judicial Alternatives.....	146
7. No-Fault Liability.....	147
<i>Bibliography</i>	147
I. German Approaches to No-Fault Liability	147
A. General Observations	147
B. The German Approach to Strict Liability.....	149
C. Some General Characteristics Shared by All or Most Strict Liability	
Enactments.....	150
i. Similar or Analogous Clauses.....	150
ii. Monetary Maxima Imposed on Compensation Paid Under	
these Statutes.....	151
iii. The Courts' Role in Defining the Precise Ambit of the Statutes	153
iv. Is Analogical Extension of the Statutory Rules Possible?.....	156
v. A Critical Epilogue.....	156
II. Five Specific Areas of Strict Liability.....	157
A. The Strict Liability Act 1978.....	157
B. Accidents at Work and Social Security Legislation in Modern	
German Law.....	159
C. The Road Traffic Act 1952	162
i. General Observations	162

ii.	Increasing Protection Through Statutory Interventions	163
iii.	The Salient Features of the Road Traffic Act 1952	166
a.	Motor Vehicle.....	166
b.	Keeper	166
c.	Damage Caused in the Course of the Operation (Running) of the Car	167
iv.	A Comparative Epilogue	169
D.	Statutory Liability for Products	170
	<i>Bibliography</i>	170
E.	Other Statutory Provisions for Products	173
8.	The Liability of Public Authorities.....	174
	<i>Bibliography</i>	174
I.	Liability Under § 839 BGB and Article 34 GG	175
A.	The Principles of Liability of Public Bodies and Liability of Officials.....	176
i.	An Official	177
ii.	Culpability	178
iii.	Official Duty.....	179
iv.	Duty Owed to the Claimant as a Third Party	179
B.	Liability of Court Experts.....	183
C.	In What Way is this Different from English Law?.....	184
II.	No-Fault Liability of the Administration: Expropriation and Sacrificial Encroachment	185
A.	Introduction	185
B.	The Elements of the Right to Compensation	187
C.	Compensation.....	188
D.	Quasi-Expropriation (<i>enteignungsgleicher Eingriff</i>)	188
E.	Sacrificial Encroachment (<i>Aufopferungsanspruch</i>)	189
9.	The Law of Damages.....	191
	<i>Bibliography</i>	191
I.	Preliminary Observations.....	191
II.	Personal Injury (Pecuniary Losses)	194
	<i>Bibliography</i>	198
III.	Personal Injury (Non-Pecuniary Losses).....	198
	<i>Bibliography</i>	199
IV.	Ricochet Damage in the Context of Accidents	199
	<i>Bibliography</i>	201
V.	Interference with the General Right to One's Personality	201
VI.	Damage to Property.....	201
	<i>Bibliography</i>	204
	<i>Appendix 1 (Codes and Statutes)</i>	205
	<i>Appendix 2 (Translated Cases)</i>	224
	<i>Index</i>	625