

Origin and Development of Law of Torts

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Abstract

This article discusses about the origin and development of law of torts. A tort is “a private or civil wrong or injury, including an action for bad faith and breach of contract, for which the court will provide a remedy in the form of an action for damages.” This article also seeks to highlight of the long history of Law of Torts, it is existing prior to 1066 in the society. Often, academicians and scholars of legal history contend that the law of torts long ago lost its mooring. Although legal scholars believes that the development of law of torts is often misunderstood. While other group of people believes that the law of torts developed from the brute recognition of strict liability for imposing more and more refined and moral and ethical standard of negligence, but many scholars consider it as partial true. Therefore, over the time, law of torts got a various theories and fundamental issues and challenges. And due to non-codification of law of torts, Court has very vast area for its interpretation and have to use high approach to decide the liability in tortious act.

Keywords: Tort, Legal Injury, Compensation, Damages, Origin of Law of Torts, Development of Law of Torts, History of Torts, Tortious Liability, Uncodified, Negligence.

INTRODUCTION

Law in society's instrument to regulate the behaviour of people. While some laws provide a nearly comprehensive structure for regulation, other areas of law merely truncate the behaviour at the margin, dividing what society deems as acceptable from that deemed undesirable. The law of torts is one such branch of law. Law of Torts is a body of law that addresses and provides remedies for non-contractual civil act of wrong doings by judicial interpretation or decision. A person suffering legal damage may be able to use Law of Tort to obtain compensation for those injuries from someone who is legally responsible or liable. In very simple words, Law of Tort defines what constitutes a legal injury and sets out the circumstances under which one person may be held responsible for the injury of another. Tort extents such acts that are intentional and negligent.

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There are three objectives of the Law of Tort:

- The 1st is reimbursing the victim,
- The 2nd is punishing the wrongdoer and
- The 3rd is deterring harmful activities.

Thus, the law of torts therefore, protects the rights of the individuals, their property and reputation. The rights and duties of individuals have been developed by the Hon'ble courts through cases (for eg. duty of care has been developed by *Lord Atkins* in the case of *Donoghue vs Stevenson (1932)*). However, Parliament has also enacted acts and rules which also set out rights and duties for people (for eg. Consumer Protection Act, 1986).

Law of Torts is built on the idea that everyone in society has certain unspecified rights, along with rights, everyone has the duty to respect the right of others also. The basic object of the law of tort is to shift the burden of losses from the person affected to the person who caused the loss. The purpose of the torts law is to enforce those rights and duties to accommodate the losses and to afford compensation for damages or injuries sustained by one person as a result of the conduct of another. However, torts law does not attempt to compensate for all the losses there are some exceptions of it also, for example: Vis Major, Inevitable Accident, Act of Necessity, etc.

SIGNIFICANCE OF RESEARCH

1. To know the origin of Law of Torts.
2. To analyse the development of Law of Torts.
3. To analyse whether there is any Statute for Law of Torts.

RESEARCH METHODOLOGY

1. In this Article an attempt has been made to do **Theoretical or Doctrinal research**.
2. **Secondary Source** have been used in this Article.
3. **Reference Books and E-Sources such as websites, e-journal, e-books etc.** are considered for the research purpose of this Article.

LITERATURE REVIEW

After reading various books on Law of Torts to know about the origin and development of Law of Torts so, I got motivated to write this article.

Law is growing and developing, adapting itself to the changing needs- social, economic, and so on, the law of Torts is also dynamic law and it needs change from time to time as per the circumstances. How the Tort comes into existence and its development. How the concept of Law of Torts came to India. And the role played by the Courts in dealing with the Tortious dispute in which there was no law but as the time goes and development and disputes were arise in torts too. And various jurist and legal scholars have given various theories and doctrines.

After I have gone through R.K. Bangia; Law of Torts, Ed. 24th, Allahabad Law Agency, Faridabad (Haryana), 2017, Ratanlal and Dhirajlal; Law of Tort, Ed. 28th, Universal Publication, Calcutta, 2019, B. M. Gandhi; Law of Torts, Ed. 4th, Eastern Book Company, Lucknow, 2011. I come to know what the word Tort means and how the judiciary developed by judicial precedents and it became a law through which people may claim remedy in form of compensation in the civil wrongs for which no codified law is in existence.

The concept of tort under Hindu law and Muslim law was very narrow in comparison to the law of torts in English law. In these systems the punishment of crimes occupied a more prominent place than the compensation for wrongs. The torts law in India is predominantly English law which itself is based on the principles of the common law of England. It was designed to suit Indian conditions pleasing the principles of equality, justice and good conscience and as revised by Acts framed by legislature. Its source is associated with the establishment of British courts in India.

Various Articles and websites help me to understand and to get a deep knowledge about the topic to write this article. Foundation of Torts Law in Britain and India” by Sangram Singh, legalservicesindia.com. “What is Torts and its Origin?” by Diva Rai, blog.ipleaders, 2019. Come to the development and English court how deals with the tortious acts and other events which lead to the development of the Law of Torts.

Case laws help me to understand how the judges developed and framed principles to punish the wrongdoer and to provide compensation to the victims. Also, courts framed various exemptions or defences against tortious liability.

In *Chester v Afshar* [1] **Lord Steyn** said “The result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision...reflects the reasonable expectations of the public in contemporary society”.

In *Nova-Mink v Trans-Canada Airline* [2] **Justice MacDonald** stated that “There determination of the duty problem always involves a substantial element of judicial policy and social expediency, however it may be obscured by the traditional formulae”.

2 quotes from **Lord Mansfield** (Chief Justice of the King’s Bench, 1756-88), which shows the role or importance of judges in “law making”:

“The purpose and spirit of cases makes law; not a letters of any precedent” In the case of *Fisher v Prince* [3];

“Practice matters should not to be learned from books. What passes in the judge’s chambers is a traditional thing: it rests in memory” In the case of *R v Wilkes* [4].

Policy is process for making law and according to it decisions must be taken on the basis of formal conceptualism (As referred to “black letter law”) or there is a political motive behind the decision?

How long does the fear of open “floodgates” effected judicial decision-making?

“Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the defendant”: *Spartan Steel v Martin and Co.* [5] as per **Lord Denning, M.R.**

In the case of hazardous and inherently dangerous industry, the principle of absolute liability has been recognized and court further stated that we can and should develop the law of strict liability de hors statutory provisions [6].

However, the main study in this article will revolve around two aspects of the origin and development of law of torts, first, before proceeding to the basic topic, it will be necessary to fully understand the meaning of the word tort in the context of law and the definition of Law by the eminent jurist and thinkers.

Meaning

The word ‘tort’ has been derived from Latin word ‘*tortum*’ that means ‘to twist’. The term ‘Tort’ is French word it is equivalent of the English word wrong.

In German ‘Tort’ is termed as unlawful acts and under the Roman law term *delict* and quasi-delits. In France the tort law is entirely codified, and Article 1382 of Civil Code simply states that:

“Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred to make compensation.”

Thus, “tort is a conduct of any person that is not straight or lawful, but on contrary the conduct is twisted, crooked or unlawful.”

The term tort is seen in Common Law systems for a civilly actionable harm or wrong, and for the breach of law dealing with legal responsibility for such harms or wrongs. Critically, the law of torts is a breach of the law of duties, where the legal duties to refrain from harm to another person and, if harm is done, to repair that harm or compensate for that harm.

A breach of some obligation independent of contract between citizens giving rise to a civil cause of action and for which compensation is recoverable.

Definitions

- “Tort is a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.”-*Salmond*
- “Tort means a civil wrong which is not exclusively a breach of contract or breach of trust.” - *S.2(m), The Limitation Act, 1963*
- “Tortious Liability arises from the breach of a duty primarily fixed by the law: this duty is toward persons generally and it’s breach is redressable by an action for unliquidated damages.” -*Winfield*
- “It is an infringement of a right in rem of a private individual giving a right of compensation at the suit of the injured party.”-*Fraser*

The basic idea which is indicated by these definitions is-firstly, torts is a civil wrong and secondly, every civil wrong is not tort at all there are other civil wrong also, the important of which are breach of trust and breach of contract.

ORIGIN AND DEVELOPMENT OF LAW OF TORTS

Prior to 1066, the French William the Conquerors of Norman conquest of England, the legal system was slightly disorganised carried out on case-by-case basis. After 1066, to assimilate the village law developed over two centuries, eminent judges were delegated to travel around given region. These judges, benefiting from this information, noted and applied the precepts that they believed to be most fair in their own court’s findings. In time, these cases became what are now called legal precedents when referenced often enough.

The law of Tort so originated in India, through England. After the Norman Conquest, French became the spoken language in the judiciary of England and thus many English laws, technical terms originated from French and torts is one of them. The word ‘tort’ is based on the idea that every person in society has certain rights. The object of Law of Torts to enforce rights and duties of every individual.

The Sessions during which these judges conducted trials were termed ‘*assizes*’ or ‘*sittings*’ in modern terms. The place from which a judge pronounces judgement and delivers sentences is still called ‘the bench’. Once these precedents were set, they were intended to apply equally to all member of laity, from a lord to a serf, resulting in the term common law, *Article 141* of The Constitution of India give power to the Court that their decision is binding on the subordinate courts and applicable as the precedent on the society as a law.

Bradford Pickles [7] Plaintiff and defendant have neighbouring pieces of land, with the defendant upstream while the plaintiff is downstream. The plaintiff had a reservoir on his land; Despite the plaintiff, the defendant did not release water from his land for the plaintiff. The House of Lords held that, since the defendant had not taken water from the plaintiff's land and had the liberty to do as he wished on his land, there was no trespass of property notwithstanding malicious intent.

"Intentional", can be an objective and not subjective. In *Wilkinson v. Downton* [8], the defendant falsely represented to the plaintiff that her husband had been grievously injured, causing a panic attack. Even if the defendant did not feel like a joke, the court held that such conduct was intentionally illegal. The lie was that it was not "intentionally" negligent and that the defendant should have reasonably anticipated that it would cause harm to the plaintiff.

In the 14th century, the word ‘negligenter’ seemed in writs of trespass to represent neglectful conduct.

In the case of *Coke v Durant* [9], No reference to an undertaking, but London’s custom required everyone to keep his fire safe so that his neighbour was not injured. Note the use of the word “neighbour”: in the torts of negligence has a particular resonance.

In the case of *Beaulieu v Finglam* [10], First context of the “real custom.” Note that the use of the word “custom”: ideas of custom, tradition, and precedent are all necessary to common law ideology and practice.

Negligence is considered the most significant tort in 20th and 21st centuries; “Reckless” behaviour also describes behaviours that attract liability in other torts.

AN APPROACH TOWARDS LAW OF TORT IN INDIA

In present day Law of Torts in India is a fraction of English common law and modelled on the basis of morality that acts legally between individuals to perform their duties towards each other and if any breach of duty arises then there is a remedy to the victim in the form of compensation or damages by the wrongdoer/tortfeasor. The Sanskrit word '*Jimha*', which points to its meaning crooked was used in pristine Hindu law text in the tortious of fraudulent conduct. In India the philosophical approach to the law of torts was initiated during ancient India through the *Liability of State*.

During the initial split between church and state, Becket courts would first be called as chancery court, later the equity court, and currently the civil courts. Despite Henry II Fury, Becket took his stance as to the validity of any claim retained, which also included a common clergy being entitled to judgment in his church courts.

In addition, chancery courts may order an offender to do or refrain from taking any action that would cause trouble to the plaintiff.

Thus, the equity law was intended to make a forum where emotional pain, as well as pecuniary loss, were considered when reaching a decision. In addition, claims brought in the courts of equity were heard the case in English overlooked the traditional pattern i.e. Latin. This meant that the words were read and voiced in equity court, equally understandable to all those involved in the vocal sword play. The law of equity has been defined as Gloss on the common law". This gloss proved especially true when a court of equity ruled the opposite of a common law court.

The Equity Court developed its principles, as embodied in the maxim: “he who comes into equity must have clean hands” which means that he seeks equitable help. He must be able to show up to the satisfaction of the court. He has behaved ethically in his dealing with the respondent. “Delay defeats equity” which means, waiting too long to bring claim would make it invalid. In modern terms, it is understood as a statute of limitations.

Thus in 1681 case, a judge determined: The law is not so much concerned with the intention of the actor as with the loss and damage of the party. This indicates that intention had come to be seen as a force that, if not yet central, could no longer be dismissed, as it lacked the slightest. On the other hand, punitive damages can be found by a judge or jury, where the intention or negligent intentions are intended to reach the edge of intent.

Ancient Era

The individuals of ancient India believed that the State and the King were the basic tools for the peaceful propagation of their lives. There are many literatures that also defines the law and the legal

institutions, liability and immunity of the King, the concepts of origin of the State, the nature of the society, duties of the sovereign towards its people and equitable remedy to the affected persons (victim) through the process of trial system etc.

The most significant among the various manuscripts are the *Vedas*, *Sutras*, *Smritis*, *Kautilya Arthashastra* and the writings of foreign travellers. They also stated about the duties of the State to compensate the affected person, as the person is affected by the representatives of the King in ancient period.

The idea of vicarious liability in India was established in Vedic period, where it was the duty of King to protect the life and property of their citizens. If any wrong happens to affect the citizens, it was the duty of the King to compensate them from the King's khana. According to *Manu* where common man will be fined with *Karshapana*, King will impose a fine of one thousand, which is the established Law. *Brihaspati* says that where the committal of any improper act by a servant appointed by his master and the act is for profit of its owner, the latter will be held responsible for the same. Thus once, it is settled that the act of servant is for the benefit of the master in the employment course, hence the master becomes liable for that act. *Henry Maine* stated that "The Penal law of ancient communities is not the law of crimes". It is the law for the wrongs, or for the use of technical word of torts". But it is observed that in ancient period tortious liability acts as a protection to the king and the state for their criminal acts.

Medieval Era

It was seemed that there was very less growth of law of torts in India as compared to the criminal law during Islamic monarchy system (e.g. Delhi Sultanate, Mughal empire) it was for the reason that in their opinion of An eye for an eye and tooth for a tooth.

Modern Era

The English Common Law & Evolution of Law of Tort in India during 18th & 19th century: - Presently, Indian law of torts is primarily the English Law of Torts which itself is created on the values of the Common English Law. British Empire taken Common Law and formal Law of Tort to India through the three presidency courts by the efforts of *Sir Henry Maine* and *Sir James Stephens* made efforts for codification in 1886 by *Sir Frederick Pollock* on the name of Civil Wrongs Bill but it was not passed.

During British period, courts in India were instructed by Acts made by Parliament of UK and by Indian enactments to act as a justice, equity and good conscience if there were no definite rules of enacted law applicable to the dispute in a suit. Regarding the suits for compensation for damages, courts follow the English common law approach as it was in harmony with equity, justice and good conscience. Britishers departed from it when any of its rules seemed unreasonable and unsuitable to the Indian conditions. An English statute relating to the torts law not by its not by its own force applicable to India, but to be followed here unless it is not accepted here the reason is stated below.

In the case of *M.C. Mehta V/s. Union of India* [11], Justice P. N. Bhagwati said, we have to develop new principles and create new norms that will effectively deal with new problems that is arising in a vastly industrialized economy. We cannot allow our judicial thinking to be formed in the context of the law prevailing in the Britain or in any other foreign country. We are positively prepared to receive light from any source but we must create our own jurisprudence.

It was held that Section 9 of *The Code of Civil Procedure*, enables the civil court to try each and every suit of a civil nature, impliedly confers power/jurisdiction to apply the Law of Tort as principles of justice, equity and good conscience. Thus, the Courts can derive the powers vested under Section 9 to develop this area of liability.

Similarly, in the verdict of *Jay Laxmi Salt Works Ltd. V/s. State of Gujarat* [12], Justice Sahai, observed that: truly saying the entire law of torts is instituted and structured on the concept morality. Therefore, it would be primitive to strictly or eventually close the ever-expanding and expanding horizon of tortious liability for the societal development, systematic development of the society and cultural refinedness.

The case of *Rajkot Municipal Corporation V/s Manjulben Jayantilal Nakum* [13], the Court has strictly stated that “In the absence of statutory law regarding the tortious liability in India, the common law principles developed in England may be applied in India to the scope of suitability and applicability in the circumstances of India”.

Some notable points:

- The term Tort was used firstly in the case of *Boulton V/s. Hardy* (1597, cro. Eliz. 547).
- From German Civil Code the Concept of vicarious liability emerged.
- In *GORDON V/s. LEE*, 1935, the term tortfeasor was firstly used.
- Damages were first awarded to foetus in US in 1946, in Australia 1972, Canada 1973 and in England 1976.

The principles of Torts have also been applied in newer legislations such as the Environment Protection Act, 1986, the Consumer Protection Act 1986, the Protection of Human Rights Act, 1993 and the Motor Vehicles Act, 1988 etc. However, it is still observed that the branch of Torts is still growing and developing in India as compared to the development of Torts in countries like UK and USA.

Change over from blind application of outmoded common law. New concepts of tortious liability being determined- state liability, parental torts, constitutional torts, master torts, environmental torts. Flexibility of application, creativity in interpretation wider scope for legal conceptualisation due to its non-codification it is of interpretational nature.

New fields are opening for development of torts MNC liability, family torts, congenital torts etc. External lacunae must be dealt with for development of torts litigation- red tapism in courts, absence of trustworthy testimony, lack of legal aid and awareness, development of standards of care accessibility of justice.

Winfield Theory of Law of Torts

Winfield is the chief exponent of this theory. As he said that all damages/injury done to any other person are tort, unless there is any legal justification. Thus, according to this theory, torts consist not just those torts which have got specific names but also included within the broad theory that all unjustifiable harms is tortious wrong. It enables the judiciary to formulate new torts. Winfield supports this theory and concludes that the law of torts is growing and from time-to-time courts have created new torts.

Theory of Winfield has been favoured by many eminent Jurists both ancient and modern. Following are some examples: Holt, C.J. clearly favoured Winfield theory, by recognises the principle of *ubi jus ibi remedium* (where there is a right, there is a remedy). He said that, if man will multiply damages/injuries, actions must be grew too; for each individual who is injured must have to recompense [In the case- *Ashby v. White* (1703) 2 Ld. Raym. 938].

Winfield Theory and Indian Judiciary

The judicial system of India also supports Winfield Theory of Law of Torts. Justice P.N. Bhagwati, in support of Winfield Theory in the landmark case of *M.C. Mehta v. UOI* [14] stated that- We have to evolve new philosophies and lay down new norms which will effectively deal with new problems

which arises in industrialized economy. We cannot permit our judicial thought to be created in terms of law as it prevails in England or in any foreign country for that matter. We are of course ready to receive light from any source, but we have to create our own jurisprudence. In the same case Supreme Court of India instituted a new idea of Absolute Liability in place of Strict Liability.

Pigeon Hole Theory of Salmond

According to Salmond's Pigeon hole theory there is no general principle of liability and if the wrong done with the plaintiff arise in the already present torts, he will succeed. The liability under the Law of Tort arises only when the wrong is fall under one or other recommended torts.

If there is no pigeonhole in which the plaintiff's case could fit in, the defendant has committed no torts.

CONCLUSION

Each individual in India is competent for appropriate legal right. Law enforces an obligation on each one to regard the lawful right accessible on others and any individual interfering with the pleasure of another person of his legitimate rights is alleged to have committed a tort. The ultimate rule of the law of torts is that each and every individual has certain interests which are recognised by law. Any demonstration of excommunication or commission which harms the legally ensured enthusiasm of any individual will be deemed to be a tort, the result for which is an activity for unliquidated damages. Torts is, for the most part is a break of obligation. In India, the law of torts is uncodified even after so much development. Winfield had made a modification in his stance regarding his own theory. He concluded that both his and Sir Salmond thoughts were correct, his theory from the wider point of view and the theory propounded by the Salmond is from the narrower point of view. Its thus a question of approach and looking at the things from a certain angle. Each theory is accurate in its own point of view.

The law of torts in India simply indulges authorization to make it more ascertainable. The dissatisfaction of abusers to substantiate their legitimate rights can be attributed not only to lack of appraisal of such rights, but also to various reasons for e.g., troubles in performing claims and getting a dependable pronouncement, high court expenses, and delay of courts. The disposal tasks which block distressed assemblies in looking for or acquiring remedies which the law provide them in a matter which is deserving thought. On the probability that these lacunae are corrected, India could be the same witness of development in tortious litigations.

In spite of the circumstance that there are differences in assessment among the different legal scholars with respect to the risk in tort, the law has been produced and has made stable roots in the legitimate showground. There are all around characterised components and states of risk in Law of Tort. This branch of law authorises the citizens of a state to secure redressal for the minor or real damage caused to them. Accordingly, the law has increased and have much certainty among the laymen in modern era.

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