

THE INDIAN LAW INSTITUTE

Seminar

on

The Problems of Law of Torts

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PROBLEM OF IDENTIFICATION

by

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Since the Law of Torts is not a codified law the first problem which confronts us is the problem of identification of areas of law of Torts i.e. what kinds of Civil wrongs precisely, can be included under law of torts.

To attain this end one is required to examine how historically the English Law of Torts has gradually developed and how the areas of English Law of Torts has gradually widened.

It may be observed that originally Law of Torts was concerned with only limited kinds of wrongs and by gradual process of developments other wrongs were included within the scope of Tort.

It may also be observed that this branch of law governs actions for damages for injuries to certain kinds of rights viz. rights to personal security, property and reputation.

Therefore Law of Torts has assumed considerable importance and has attracted the attention of the Bar and the Bench and a large amount of litigation has been developed around this branch of law both in England and in the U.S.A. though not in India.

II. Definition and Nature of Tort

Tort is a french word which etymologically means 'twisting out' and in a popular sense, a crooked act, a transgression from straight or right conduct, a wrong.¹

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1 It is an interesting coincidence that the sanskrit word 'jimha' which means 'crooked' was used in an ancient Hindu Law Text in the sense of 'tortious conduct'.

No precise or scientific definition of Tort is available.² It has been defined for illustration as a 'a wrong independent' of Contract for which the appropriate remedy is a common law action. It is submitted that this hardly explains the term 'tort' and hence cannot claim to be a definition of a legal concept.

After critical examination of many definitions of 'tort' Dr. Winfield defines it as "Tortious liability arises from breach of a duty primarily fixed by the law: such duty is towards persons generally and its breach is redressible by an action for unliquidated damages".³ The definition certainly is informative but lacks the necessary precision, the fact which the learned author himself recognises.

III. History of English Law of Torts.

It is interesting to trace the history of the Law of Torts as it has been developed in England. In the formative stage of common Law the early Law of torts was concerned with protection of property in land. It is dominated by trespass to land.

Urbanisation, industrialisation, development of fast moving traffic etc. were responsible for widening the area of Law of torts from merely property interests to reparation for personal injury etc.

In the early beginnings the law of torts was a part of the common Law. The English law of torts is mainly the case-law of the Courts suitably supplemented by some statutes and acts passed by the Parliament.

Law of Torts as a distinct branch of law commenced in 1860 when the first treatise on the subject was published.⁴ With the expansion of industrialisation, urbanisation and extensive use of mechanical inventions in England and in U.S.A., Law of torts has assumed comparatively considerable importance both in England and U.S.A. It is still in the process of expansion to meet the needs of the changing social order of the modern world.

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2. Addison Torts P.1. Harry Street - Law of Torts 1955 P.3.
 3. Winfield Law of Torts P.5.
 4. Addison - Law of Torts
Sir Fredrick Pollock's Law of torts 1886.

IV Changes in tort Law.

We live in an age of change and revolution in several spheres of our life, thought and activity and law is no exception to them.

A gradual and constant process of change is going on in the field of Law of Torts (1) by statutes : viz. several Law Reform Acts passed by the Parliament and (2) by means of decisions of the Courts.

Irrational ~~of~~ unjust rules which are either relics of history or products of out-dated ideas of an older social order are eliminated. Some of the most important decisions and acts testify the truth of the above statement.

I. The decisions of the House of Lords in Donoghue v. Stevenson (1932) got rid of theory of Privity which denied justice in many deserving cases.

II. The Fatal Accidents Acts cancelled the old rule in Baker v. Bolton.

III. Employers - Vicarious liability for their servant's torts have been greatly extended.

It may be observed that "The entire history of development of Tort Law shows a continuous tendency to recognise as worthy of legal protection interests which previously were not protected at all.⁵

Recent trends in Law of Torts:

As an illustration of the above observation of the 'American Law Institute Restatement on Law of Torts' it would be interesting to note the recent trends in Law of Torts.

It is obvious that Law of Torts must strongly reflect changing social conditions. It reflects the change in law as under:-

A) The early Law of tort was mainly concerned with protection of property in land, as land was the main economic asset at that time.

5. American Law Institute Restatement on Law of Torts Vol.1 P.4.

Urbanisation, industrialisations and other ever growing developments in society now shift the emphasis gradually from injury to land to interests in other properties and to personal injury.

B) Meaning of Negligence was completely transformed. For instance, the question which exercised Salmond 'whether negligence is a state of mind or a standard of conduct' is not a serious issue in modern context. Today innumerable cases arising from traffic, factory accidents and the like are not concerned with state of mind of the defendant. The new meaning given to Negligence now is standard of conduct judged by that of a "reasonable man".

C) With further progress of industrialisation, civil liability was immediately shifted from immediate tort-feasor to a third party. The glaring illustration of this change is found in the acceptance of the principle of vicarious liability. Seen from the stand point of master, this is an example of strict liability. Viewed from the relation between the injured and the wrong-doer, vicarious liability amounts to transfer of primary responsibility from tort-feasor to third party.

In India since the law regarding the liability of the Union and the states for tortious acts committed by its employees was in a state of uncertainty, Law Commission of India in its first Report recommended at length principles on which legislation should proceed in the subject of liability of State in Tort.

The Law Commission of India observes.⁶ "In the context of a Welfare State it is necessary to establish a just relation between the rights of the individual and the responsibilities of the state. While the responsibilities of the State have increased, the increase in its activities has led to a greater impact on the citizen."

In the context of the welfare state, as mentioned in the observation above, the question of the relationship of the citizens with the State seems too important to be left undefined and undetermined. The problem of identification, in this sphere, therefore may concern itself with determining the area of the liability of the State in tort, so as to enable the citizens to have definite and speedy remedy for the wrongs.

6. Law Commission of India First Report (Liability of the State in Tort) P. 30.

It will be interesting to observe how this question has been treated judicially in this country.

To illustrate the above observation the first question which may be discussed is what constitutes an 'Act of State' which ousts the jurisdiction of the courts to entertain the suit. Two divergent views were expressed by the courts after the decision in the Peninsular case in the matter of what constitutes an 'Act of State'.

"The Calcutta High Court in an earlier decision in Nobinchandra's case had taken the view that in respect of acts done in the exercise of its sovereign functions by the East India Company, no suit could be entertained against the company."⁷

"This position was examined by the learned judges of the Madras High Court and it was held that the immunity of the East India Company extended only to what are known as "Acts of State" strictly so called and the distinction based on sovereign and non-sovereign functions of the East India Company was not well founded."⁸

"In the case of Forrester v. Secretary of State of India, the judicial committee of the Privy Council did not consider that the exercise of sovereign power against a subject could not be questioned in a court of Law".⁹

"The Madras judges in Hari Bhanji's case held that as it was an act, the justification for which was sought under the municipal law, the municipal courts had undoubted jurisdiction. That decision is note-worthy as laying down a test which can be applied with certainty".¹⁰

The second question which may be taken up is to what extent, if any, the Union and the States should be made liable for the tortious acts of their servants or agents.

7. Law Commission of India First Report (Liability of State in Tort) P.5.

8. Ibid P.5.

9-10. Law Commission of India First Report (Liability of the State in Tort) P.6.

In this context Law Commission of India observes "the liberalisation of the Law in England and other countries should not be ignored in framing the law in this behalf. Our country also must formulate the law suitably having regard to the changed conditions and the provisions of our Constitution"¹¹.

As Professor Freedman¹² observes "It is now increasingly necessary to abandon the lingering fiction of a legally indivisible state, and of a feudal conception of the crown, and to substitute for it the principle of legal liability where the state either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental functions but the nature and form of the activity in question."

V Law of Torts in India

The first noteworthy feature of law of torts in India is that though the English Law of torts is adopted in India as mentioned above, the Indian courts follow English law of Torts in regard to suits for damages for torts provided it is in harmony with justice equity & good conscience. But they depart from it when any of its rules appear unreasonable & unsuitable to Indian conditions.¹³

VI Contents of Tort-Law

Law of Torts protects the most important rights of a person; viz security of his person, domestic relations, Property & reputation. These rights have been recognised and protected from early times.

11. Law Commission of India First Report (Liability of the State in Tort) P.31.

12. Law and social change, Page 273.

13. S.Ramaswamy Iyer 'The Law of Torts' P.35.

With the growing and gradual development of multi-centered modern society, other rights which have no pecuniary value but are highly prized, are recognised viz. Right to vote, right to worship, right to enjoy privileges of a membership of a club, profession or calling.

Further the Constitution of India guarantees certain fundamental rights and declares that the State shall not make any law which takes away or abridges them.

The Indian law of torts should now not only recognise these rights but protect them. The categories of rights are not closed and may expand with new needs and changing conditions of the society.

It is hardly necessary to mention that while adopting broad principles and theories of English Law of Torts, we have to make alterations and adaptations of them which are proper and necessary for the needs and requirements of the present and changing social conditions prevailing in India.

VII Now to the problem of identification of areas of law of torts. History of distinction between tort and crime.

It is interesting to observe that the laws of primitive communities allowed private composition for even great crimes like homicide, serious bodily injury by allowing pecuniary compensation to be injured.

'The penal law of primitive communities was not the law of crimes but the law of wrongs or torts.'¹⁴ Hence the distinction between tort and crime belongs to comparatively mature stage of civilization and social order.

In modern times tort differs from crime both as regards principle and procedure. Yet watertight compartments of both tort and crime have not been feasible so far and hence even today there are certain injuries which fall under categories of both tort and a crime e.g. assault, libel, theft etc.

14. Henry Maine Ancient Law P.379.

It is assumed rather than distinctly asserted or established that actions maintainable in a court of common Law must be either actions for contract or actions for tort.¹⁵

It may be noted that breach of trust, adultery, refusal to pay salvage claims are all wrongs but they are not torts. The administration of trusts in particular belongs to law, formerly peculiar to Chancellor's Court; the settlement of matrimonial causes between husband and wife to the law peculiar to Kings Ecclesiastical courts and the adjustment of salvage claims to the law formerly peculiar to the Admiral's court.¹⁶

Hence these wrongs lie entirely outside common Law forms of actions and therefore are not torts. In fact these wrongs were unknown to the common Law and hence there is no question of their being torts in technical sense.

Thus a breach of trust or other equitable obligations may resemble a tort in that it is a breach of duty imposed by law and redressed by award of damages but it still continues to be outside the sphere and scope of a tort as discussed above.

Similarly it is interesting to observe that injury to a breach of marital obligations e.g. Adultery - is not a tort but an injury to parental relation e.g. seduction of a daughter is a tort. The reason therefor is that in the former case the relief granted is Divorce and not the damages and in the latter the relief granted is an action for damages.

Damages: The plaintiff has a right to recover unliquidated damages i.e. not a predetermined damage in an action for a tort. In fact, the right to recover unliquidated damages is an essential and distinctive characteristic of a tort. Where that remedy is not available the wrong complained of is not a tort.

History of Concepts of Tort and breach of contract.

Another civil concept which is outside the sphere of tort is breach of contract. Till 16th century, the ancient common law did not recognise distinction between legal concepts of tort and breach of contract.

15. Pollock on Law of Torts P.5.

16. Ibid P.6.

By about 17th century the distinction between a tort and a breach of contract became evident which to a modern lawyer is obvious and fundamental.

Implied contract and quasi - contract

Two other civil wrongs which are outside the area of tort are implied and quasi-contracts.

In both, duty is fixed under law and not by consent of "parties of by contract".¹⁷ Thus they are similar to tort then to a contract. But they differ from tort in two respects - first they may arise independently of commission of any tort and second the claim therein is usually liquidated damages.

Tort and moral offences.

A tort is a wrong but every wrong is not a tort.

A tort is a breach of legal duty and not a breach of moral duty. Just as some moral offences may not be torts in the same way some torts may not be considered moral offences.

The Law of Torts as observed in this Essay, has been subject to certain historical and procedural incidents in the course of its development. For instance the civil wrongs for which the common law remedies were available have been regarded as torts while those for which remedies were available in Chancellor's and other courts were kept outside the province of the law of torts. This distinction when applied in India may seem to be arbitrary in view of the judicial system prevalent here and also in view of the welfare State under the written Constitution.

The problem of identification, therefore, assumes added relevance in this context and should be studied systematically so as to include all torts, irrespective of the incidents of the past development. An effort should be made to delimit the areas of torts and to demarcate its boundaries clearly so as to enable the citizen to know the position clearly and definitely.

17. Dr. Winfield Province of Tort P.188.

