

DEFINITION AND NATURE OF A TORT

Meaning – The term ‘**tort**’ is an old French word derived from Latin term ‘**tortum**’ which means ‘**to twist**’. It includes that conduct which is not straight or lawful, but which is twisted, crooked or unlawful.

Definition

1. Tortious Liability arises from -
 - (i) the breach of a duty
 - (a) primarily fixed by the law;
 - (b) this duty is towards persons generally and
 - (ii) its breach is redressable by an action for unliquidated damages.

Winfield

2. (i) It is a civil wrong
 - (ii) for which the remedy is a common law action for unliquidated damages and
 - (iii) which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.

Salmond

3. 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

4. It is a wrong independent of contract for which the appropriate remedy is a common law action.

- Clerk and

Lindsell

5. Tort means a civil wrong which is not exclusively a breach of contract or breach of trust. - **Sec. 2(m), Limitation Act, 1963.**

Conclusion – Tort is a wrong consisting of a violation of a right recognized and enforced by law for which the appropriate remedy is an action for unliquidated damages.

Elements of definition of tort -

1. Tort is a civil wrong.
2. This civil wrong is other than a mere breach of contract or breach of trust.
3. It is redressable by an action for unliquidated damages.

Liquidated = pre-fixed.

Unliquidated = not pre-fixed.

Difference between tort, breach of contract, crime and breach of trust

S. No.	Tort	Breach of Contract	Crime	Breach of Trust
1.	Duty primarily fixed by law.	Duty fixed by parties.	Duty fixed by the State.	Duty fixed by the Settler by trust deed.
2.	Duty towards person generally.	Duty towards parties.	Duty towards whole community.	Duty towards the trust.
3.	Right <i>in rem</i>	Right <i>in personum</i>	Breach of public rights.	Right <i>in personum</i> .
4.	Remedy is action for unliquidated damages.	Damages are liquidated.	Prosecution for punishment of wrongdoer.	Liquidated damages.
5.	Civil suit is filed by the victim.	Civil suit is filed by the suffered party.	Ordinarily prosecution is launched by the state.	Suit is filed by the affected party.

- The same act may be a tort as well as a crime, e.g. defamation.
- Tort is a civil wrong but all civil wrongs are not torts. Only those civil wrongs are torts which satisfy the above three elements of the definition of tort.

Is it law of tort or law of torts: two theories

1. **A law of tort** – Every wrongful act, for which there is no justification, is a tort.
 - Winfield is the chief supporter of this theory.
 - According to this theory tort consists not merely of all those torts which have acquired specific names but also includes the wider principle that all unjustifiable harm is tortious.
 - This theory enables the courts to create new torts.

Ashby vs. White, 1703 >> *ubi jus ibi remedium*.

Pasley vs. Freeman, 1789 >> originated tort of deceit.

Lumley vs. Gye, 1853 >> inducement of breach of contract.

Rylands vs. Fletcher, 1868 >> rule of strict liability.

Rookes vs. Barnard, 1964 >> intimidation.

2. A law of torts (The pigeon-hole Theory) – There is only a definite number of torts and beyond which no liability can arise. A plaintiff has no remedy unless he brings his case under one of the nominate torts.

- Salmond and Dr. Jenks are the chief supporters of this theory.
- According to this theory only that harm which falls within one of the specified categories of wrongs, entitle the aggrieved person to a legal remedy.
- Every plaintiff must bring his case under one of the recognized heads of torts.
- There is no general principle of liability and if the plaintiff can place his wrong in anyone of the pigeon-hole, each containing a labeled tort, he will succeed. Hence, this theory also known as ‘pigeon-hole theory.’
- According to Dr. Jenks the court can create new torts but such torts cannot be created unless they are substantially similar to already existing torts.
- Later on Winfield modified his theory saying that both the theories were correct.

From a narrow and practical point of view, the second theory will suffice, but from a broader outlook, the first is valid.

If we concentrate attention on the law of tort at the moment, entirely excluding the development of law, past and future, then it corresponds to the second theory.

If we take the wider view that the law of tort has grown for centuries and is still growing, then the first theory seems to be at the back of it.

Conclusion – According to Professor Glanville Williams, the pigeon holes may be capacious and capable of being added to.

Jay Laxmi Salt Work (P) Ltd. vs. State of Gujrat, 1994 SC - Law of torts, being a developing law, its frontiers cannot be strictly barricaded.

CHARACTERISTICS OF TORT

Three general conditions for liability in torts:

1. There must be a **wrongful act** (act or omission) on the part of the defendant,
2. The wrongful act must result in a **legal damage**, (*injuria*), and
3. The wrongful act must give rise to a **legal remedy** in the form of action for damages.

Legal damage: Two maxims

A. *Injuria sine damnum*

- Violation of legal right without causing harm.

Injuria = injury i.e. violation of right

sine = without

damnum = actual physical loss

- If the right of the plaintiff has been violated, he will have an action, even if there is no physical damage.
- In such cases the plaintiff has to prove only violation of his legal right and no consequential harm.
- Legal right – a right recognized and protected by the State.

Ashby vs. White, 1703(refusal to register vote) – The plaintiff was a qualified voter at a parliamentary election, but the defendant, a returning officer wrongfully refused to register plaintiff's vote. No loss was caused to plaintiff because his candidate won the election. It was held that the violation of plaintiff's statutory right was an injury for which he must have a remedy and was actionable without proof of actual damage.

Bhim Singh vs. State of J & K, AIR 1986 SC 494 – An MLA was wrongfully detained by the police while he was going to attend the Assembly session. He was not produced before the concerning Magistrate within requisite period and as a consequence he was deprived of his consequential right to attend the Assembly session. The SC awarded exemplary damages of Rs. 50,000/- to Bhim Singh, the petitioner.

B. *Damnum sine injuria*

- Actual damage without injury i.e. violation of right.
- Damage without injury is not actionable.

Gloucester Grammar School Case, 1410 – The defendant, a school master, setup a rival school to door next to the plaintiff's. Because of the competition, the plaintiff's had to reduce their school fees per student and thus loss was suffered by them. It was held that as there was no actual damage caused to the plaintiff in the exercise of the right of the defendant, no action would lie.

Chasemore vs. Richards, 1859 (interception of underground percolating water) – The plaintiff, a mill owner was, for past 60 years, using water for his mill from a stream which was supplied by rainfall percolating through the underground of the defendant's land. The defendant's dug a deep well on their land and pumped large quantities of water which intercepted the water and caused loss of the volume of water and consequently the plaintiff had to close his mill. The defendants were held not liable as it was a case of *Damnum sine injuria*.

Mugal Steamship Co. vs. McGregor Gow and Co., 1892 (trade competition case) – a number of steamship companies combined together and drove the plaintiff company out of the tea-carrying trade by offering reduced freight. It was held that the plaintiff has no cause of action as the defendant's acted with lawful object of protecting and extending their trade and increasing their profits.

Bradford Corporation vs. Pickles, 1895 – Even if the harm to the plaintiff has been caused maliciously, no action can lie for the same unless there is violation of a right.

Ushaben vs. Bhagyalaxmi Chitra Mandir, AIR 1978 Guj 13 (Jai Santoshi Maa movie case) – Plaintiff contended that the film hurt his religious feelings so far as Goddesses Saraswati, Laxmi and Parwati were depicted as jealous and were ridiculed. It was held that hurt to religious feelings is not recognized as a legal wrong. There is no violation of legal right.

Distinction between *injuria* and *damnum*

S.No.	Injuria	Damnum
1.	A violation of legal private right.	Actual and substantial loss.
2.	It is actionable <i>per se</i> .	It is not.
3.	It contemplates legal wrongs for which there is legal remedy.	It contemplates loss for which there is no legal remedy.

Legal remedy

The essential remedy for a tort is an action for damages.

Ubi jus ibi remedium – where there is a right, there is a remedy.

- This principle was first established in *Ashby vs. White, 1703*
- If a man has a right, he must have a means to vindicate and maintain it, and a remedy if his right is violated. It is a vain thing to imagine a right without a remedy. Want of right and want of remedy are reciprocal.

- *Per Holt, C J in Ashby vs. White*

MENTAL ELEMENT IN TORT

In many torts like assault, battery, false imprisonment, deceit, malicious prosecution and conspiracy the mental state of the wrongdoer is relevant to determine his liability.

Intention >> desire to produce consequence (knowledge of consequence + desire = Intention)

Motive >> the ulterior reason for the conduct.

As a general rule motive is irrelevant in the law of torts. - *Allen vs. Fllod, 1898*

A wrongful act is not converted into a lawful act by a good motive. A wrongful act does not become lawful merely because the motive is good. Similarly, a lawful act does not become wrongful because of a bad motive. - *Smt. S.R. Venkataraman vs. UOI, AIR 1979 SC 49*

Vishnu Bashudeo vs. TLH Smith Pearse, AIR 1949 Nag 364 – Followed the *Allen vs. Fllod* and held that as a general rule motive is irrelevant in the law of torts, except in cases like (i) **malicious prosecution**, (ii) **defamation** and (iii) **conspiracy**.

Malice >> Evil (bad) motive.

Malice is of two types -

1. Malice in fact or actual malice >> an act done with ill-will towards an individual.
2. Malice in law or legal malice or implied malice >> an intentional wrongful act without justification.

Exception to the general rule – Malice or evil motive is relevant in the following circumstances:

1. When the act is otherwise unlawful and wrongful intention can be gathered from the circumstance of the case.
2. In the torts of deceit, malicious prosecution and conspiracy.
3. In case of defamation where qualified privilege or fair comment is pleaded as a defence.

Distinction between motive and intention

Motive is the ultimate object with which an act is done, whereas intention is the immediate purpose. e.g. the immediate intention of a person may be to commit theft, the motive for the theft may be to buy food for his children or to help a poor man.

Liability without fault

Rylands vs. Fletcher, 1868 >> Laid down the rule to strict liability.

If a person makes non-natural use of his land by collecting there something which is likely to do mischief by escape, he will be liable if the thing so collected escapes and causes damage.

M.C. Mehata vs. UIO, AIR 1997 SC 1086 – following *Rylands vs. Fletcher*, the SC recognized the principle of absolute liability in case of hazardous and inherently dangerous industry.

GENERAL EXCEPTIONS (DEFENCES OR JUSTIFICATION)

1. *Volenti non fit injuria* (Leave and licence)

Meaning – Where the sufferer is willing, no harm is done.

Harm suffered voluntarily does not constitute a legal injury and therefore not actionable.

Underlying principle – Everyone is the best judge of his interest and if he consents voluntarily to take the risk he suffers, there is no harm in the eye of law.

Consent may be either express or implied.

Essential conditions -

- (i) Consent must be free – It should not be obtained by undue influence, coercion, fraud, misrepresentation, mistake or the like elements which adversely affect a free consent.
- (ii) Consent cannot be given to an illegal act.
- (iii) Mere knowledge does not imply consent – to apply the maxim two things must be satisfied.
 - (a) The plaintiff knew that risk is there.
 - (b) He, knowing the same, agreed to suffer the harm.

Limitation (exception) to the maxim –

Rescue cases – When the plaintiff voluntarily encounters a risk to rescue some body from an imminent danger created by the wrongful act of the defendant, the defendant cannot take the defence of *volenti non fit injuria*.

Hence vs. Harwood, 1935 KB – The defendant negligently left his horses unattended in a crowded street, a boy threw a stone at them and they bolted, causing grave danger to women and children on the road. Plaintiff, a constable on duty, seeing the same, managed to stop the horses but in doing so, he himself suffered serious personal injuries.

It being a rescue case, the defence of *Volenti non fit injuria* was not accepted and the defendants were held liable.

It was held that in rescue cases it was immaterial whether the plaintiff acted deliberately from a sense of moral duty, because he acts in such a case under compulsion of the duty.

2. **Inevitable Accident**

Meaning – An inevitable accident is that which could not possibly be prevented by the exercise of ordinary care, caution and skill.

If in the performance of a lawful act, done with all due care, damage caused through some unavoidable reason, such damage affords no cause of action.

Stanley vs. Powell, 1891 QB – The defendant, who was member of a shooting party, fired at a pheasant, but the shot from his gun recoiled from an oak tree and injured the plaintiff. It was held that the injury was accidental and the defendant was not liable.

3. Act of God (*Vis major*)

Act of God is -

- (i) extraordinary circumstance due to natural forces,
- (ii) without human intervention,
- (iii) which could not have been
 - (a) foreseen, and
 - (b) guarded against.

Whether a particular event amounts to act of God or not is a question of fact.

Nichols vs. Marsland, 1876 – The defendant created some artificial lakes on his land by damming some natural streams. Once there was an extraordinary heavy rainfall which destroyed the lakes. The rush of water damaged the plaintiff's bridges. It was held that the defendant was not liable as the loss had occurred due to act of God.

4. Necessity

- An act causing damage, if done under necessity to prevent a greater harm is not actionable even though harm was caused intentionally.
- If the necessity has arisen by negligent act of the defendant, it does not afford a defence.
- If the interference is not reasonably necessary, the defendant will be liable.
- Necessity and private defence – In necessity, harm is caused to an innocent person whereas in private defence harm is caused to a plaintiff who himself is the wrongdoer.

Example – Throwing goods overboard a ship to lighten it in storm, or

Pulling down a house on fire to prevent further spread of fire.

5. Private Defence

Meaning – use of reasonable force to protect one's person or property.

If the defendant uses the force which is necessary for self-defence, no action is maintainable for the harm caused thereby.

There should be imminent danger to the personal safety or property.

The force employed must not be out of proportion to the apparent urgency of the occasion.

Test – Honest and reasonable belief of imminent danger.

N.B. - Sections 96 to 106 IPC speak about the right of private defence against criminal acts.

6. Plaintiff, the wrongdoer (Illegality defence)

Ex turpi causa non oritur actio – If the plaintiff's claim is based on some illegal or immoral transaction, he cannot recover damages.

- If plaintiff's own act is the determining cause of the harm suffered by him, he has no cause of action.
- If the wrongful act of the defendant and not of the plaintiff, is the determining cause of the harm, the defendant will be liable.

7. Statutory Authority

Meaning – An authority or power given by law to do certain act.

- When an act is done under a statutory authority the injured person have no claim unless the act is done negligently.
- But the injured party may claimed such compensation as may have been provided by the statute.
- The statutory authority may be absolute or conditional.

Absolute >> no liability at all for any tort. (except such compensation as may have been provided by the statute)

Conditional >> the authorized act can be done (if possible) without causing any harm.

Exception – The defendant is liable if the authorized act is done negligently.

8. Parental and Quasi-Parental Authority

The exercise of force or restraint by a parent, teacher or custodian towards the child, pupil or lunatic respectively, for the purpose of correction or chastisement is not actionable.

- *Loco parentis* – in the place of parents.
- Use of force must be -
 - reasonable,
 - *bona fide*, and

- within moderate limits.
- The authority is not limited to wrong committed by the pupil in the premises of the school but may extend to acts done by pupil while on the way and from school. - *Cleary vs. Booth, 1893 QB*