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Tort is a Civil wrong but all Civil wrongs are not Tort - A Comparative Study

Ameey Vikram Chouhan^a

^aRajiv Gandhi National University of Law, Patiala, India

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The word tort comes to us from the Latin word "Tortus", which roughly means "twisted." or from "Tortum", which means "wronged."¹ This depicts Torts to be about actions that are twisted or actions that are lawfully "wronged". The first-ever legal treatise which was found to have been using the word "Tort" was in 1859 by Hilliard, who was an author of American origins³. Although explanations for tortious liability dates back to Aristotelian times where Aristotle talked about his theory of moral structures. He gave the idea that individuals have the right not to be wronged by their peers⁴.

Keywords: *tort, civil wrong, pigeon hole theory.*

¹ Ashish Goel, 'Comprehensive Analysis of Tort - Defamation' (*Legalserviceindia.com*) <https://www.legalserviceindia.com/articles/cr_tr.htm> accessed 19 July 2021

² 'Tort - Dictionary Definition' (*Vocabulary.com*) <<https://www.vocabulary.com/dictionary/tort>> accessed 19 July 2021

³ Francis Hilliard, *The Law of Torts or Private Wrongs* (Little Brown and Company 1859)

⁴ Cristina Carmody Tilley, 'Tort Law Inside Out' (2016) 126 *Yale Law Journal* <<https://www.yalelawjournal.org/article/tort-law-inside-out>> accessed 21 July 2021

INTRODUCTION

Although there is no fixed definition for tort as it comprises of many different wrongs, each of which has its own genesis and history. A loose attempt at defining Torts would be a civil wrong done to a person which isn't exclusively a breach of contract or breach of trust and for which the injured party has a right to be compensated. Thus, tort law provides the people with compensation for any unforeseen wrongs that can be done to them. The damages received under tort laws are generally unliquidated.

The essential points of tort law are to give alleviation to injured individuals for hurt brought about by others, to force liability on parties answerable for the injury, and to dissuade others from submitting destructive demonstrations. Torts can move the weight of misfortune from the injured party to the individual who is to blame or more qualified to bear the weight of the injury. Normally, an individual looking for change through tort law will request damages as money related compensation. Legal actions in Torts are driven by *HARM*. Everything is placed around the one fact that some kind of harm has been caused to someone by another. Thus torts lie in clear contrast to criminal law, which revolves around the interests of the state, and also in contrast to contract law as it revolves around a set of promises.

The main issue of the law of tort is drawing a line that isolates the sorts of losses that somebody needs to manage and those kinds of losses for which somebody can consider somebody liable. A person can be held liable in tort if

- a) He/she has caused harm to another.
- b) He/she failed in performing his/her duty of care towards another
- c) Something which is in his/her possession or something which he/she has control over has caused harm to another

**These come with a few exceptions*

The liability arising from an act might also depend on the reason behind the performance of the act. Purpose drives actions. In some cases, the purpose might not matter and what does is

the fact that harm was caused; in other matters, the purpose might serve the dominant basis upon which liability is to be decided.⁵

WHAT ARE CIVIL WRONGS?

A civil wrong is a private wrong; the course of action consists of the injured party suing the party that brought harm to him. The party which is injured can file a civil suit against the wrongdoer. The main role of a civil suit is to monetarily remunerate the harmed party. In a civil trial, the offended party has the weight of delivering proof that the respondent caused the injury and the damage. At the point when an individual causes civil liability, she/he winds up taking care of a sort of punishment as a rule. It is a financial sum that the court believes is legitimised for one to pay for their wrong. There is normally no detainment.⁶ Civil wrongs cover a wide spectrum of injuries, from breach of contract to breach of duty to simple negligence.

ALL TORTS ARE CIVIL WRONGS

A tort is a civil wrong. Torts is not about corrective justice; it is not about making defendants realise and carry out their moral duties; it is instead about making the injured capable of demanding damages and remedies from those who have wronged them. So torts work on the principle that an injured person shall be provided with the right to extract damages from the wrongdoers. It thus emphasises on one's privacy rights. Thus, tort, too, just like all other civil wrongs, is a private wrong. The fact that the right which is violated is a private right distinguishes tort from crime. Once a wrong has been identified as a Tort, the next stage would be to file for civil proceedings like it is to be done in a civil case. Also, the purpose of these proceedings, like other civil proceedings and unlike a criminal proceeding, is to secure the rights of the individual and compensate him/her for the violation of his/her rights.

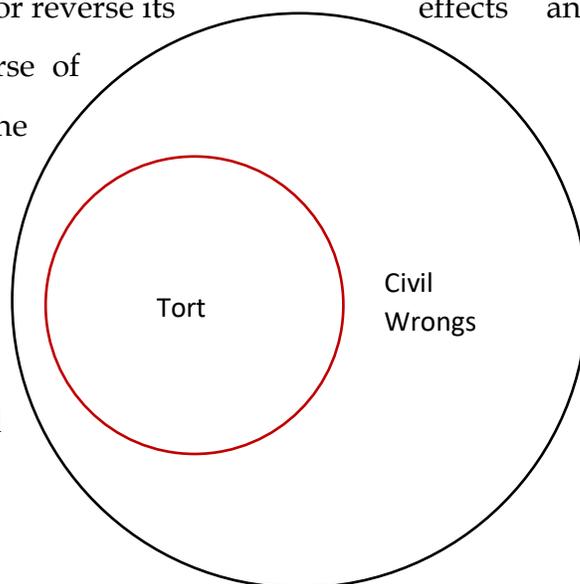
⁵ Warren A Seavey, 'Principles of Torts' (1942) 56 Harvard Law Review 1

⁶ Lore Rutz-Burri, 'Civil, Criminal, And Moral Wrongs' (*Openoregon.pressbooks.pub*)

<<https://openoregon.pressbooks.pub/ccj230/chapter/8-2-civil-criminal-and-moral-wrongs/>> accessed 22 July 2021

Also, it is to be noted that in the case of a crime, the plaintiff who is the victim of the crime in the talk is not compensated. Instead, justice is delivered by punishing the wrongdoer who committed the crime. It is also possible that the same act may lead to the commission of both a civil and a criminal wrong; in such a case, a civil action lawsuit to compensate the injured party and criminal action to punish the wrongdoer will both proceed simultaneously.⁷

Damages are the most significant remedy for Torts. In Torts, the wrong committed is mostly of such a nature that it is usually not possible to undo or reverse its effects and return to the state before. And so, the only course of action left is to find a monetary equivalent to the damage caused and make the wrongdoer compensate the injured for the same. These damages in Torts are unliquidated, which means that these damages are not fixed beforehand as the nature of injury could not have been decided beforehand.



ALL CIVIL WRONGS ARE NOT TORTS

Tort has often been seen to be defined as a Civil Wrongs different from other Civil Wrongs. Even though tort is too is a kind of a Civil Wrong, it only constitutes a part of the entirety of the different kinds of Civil Wrongs. The same can be understood with the use of the following very simple vein diagram. The outer black circle circumscribes all the different kinds of Civil Wrongs, while the inner red circle circumscribes all the Civil Wrongs that fall under the category of tort. The red circle does not the entirety of the area under the black circle. This depicts how all civil wrongs does not fall within the ambit of a tort. Similarly, the entire red circle falls under the black circle, depicting that all wrongs that can be classified as a tort is Civil Wrong.

⁷ RK Bangia, *Law of Torts* (Allahabad Law Agency 2020)

For example, person A has failed to hold his contractual obligations against another person B. Thus, B is wronged, and A has breached the contract between him and B. This is a Civil Wrong. However, this does not amount to a Tort. On the other hand, if A and B have had no contract between them and A had a certain duty of care towards B, which he failed to hold, this would amount to a Civil Wrong which is also a Tort.

The question that now presents itself before we are:

“How do we differentiate between a Civil Wrong which is a Tort and which is not a Tort?”

A very popular theory to help out in answering this question is the popular Pigeon Hole Theory given by Salmond. Another popular theory was given by Winfield.⁸

SALMOND’S PIGEON HOLE THEORY OF TORTS

Salmond said that there is no general principle to classify a wrong as a tort. However, what one can do is to perceive the pre-existing torts like nuisance and defamation as 'Pigeon Holes'. If the person who is wronged can put his wrong into one of the pigeon holes, then he could be eligible for damages under the law of torts.

Specifically speaking, Salmond wrote the following while stating his theory:

“Just as criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability. Whether I am prosecuted for an alleged offence or sued for an alleged tort, it is for my adversary to prove that the case falls within some specific and established rule of liability, and not for me to defend myself by proving that it is within some specific and established rule of liability, and not for me to defend myself by proving that it is within some specific and established rule of justification or excuse.”⁹

⁸ Aparna Ramamoorthy, 'Pigeon Hole Theory - Salmond's Theory of Law of Torts' (*Legal Bites - Law and Beyond*, 2020) <<https://www.legalbites.in/pigeon-hole-theory/>> accessed 23 July 2021

⁹ Salmond, *The Law of Torts* (Sweet & Maxwell Ltd 1987)

The theory manages to cover one part of the question but fails to acknowledge something important. Experts have adjudged this theory to be narrow as it fails to recognise newer developments to be made in the field of tort as wrongs are only being judged by pre-existing Pigeon holes. This criticism was addressed by Jenks, who said the theory is being misunderstood. Jenks claims that Salmond, with his theory, was not at all restricting courts to create newer torts. His argument was that every newer development must have a certain similarity to existing torts and should fall under the definition to be called a tort.¹⁰

WINFIELD'S THEORY OF TORT

Winfield tried to improve on Salmond's narrow theory by adopting a different, more broader approach than him. Winfield, in his theory, said that every injury/wrong done to a person is a tort unless the law of the land says otherwise. According to Winfield general principle of liability shows up when a person injures or wrongs others and the legal injury is against the established law or when the violation of duty leads to injury to a person.

In this theory, Winfield provided for a wider perspective and even gave space for the creation of new torts. Supporters of this theory often like to back it up with the legal maxim "*Ubi jus ibi remedium*", which means where wrong is caused, a remedy is also available for it. Winfield's theory was able to cover up the points which Salmond's theory failed to do. For this reason, it is often considered to be the superior among the two. Unlike the Pigeon hole theory, Winfield's theory received next to no criticism. One small detail which was criticised was that the ever-evolving nature of a tort, which the theory provides, allows for newer wrongs that may be very subjective or arbitrary. Laws in India align more with Winfield's theory. It suggests that "every injury is a tort unless justified". The conceptualisation of torts can be traced back to England; thus, India too follows the English approach to tort, which is aligned with Winfield's theory.

WINFIELD VS SALMOND

¹⁰ Aayushi Singh, 'Salmond Pigeon Hole Theory of Law of Torts - Our Legal World' (*Our Legal World*, 2021) <<https://www.ourlegalworld.com/salmond-pigeon-hole-theory-of-law-of-torts/>> accessed 25 July 2021

Winfield and Salmond both proposed theories that helped understand the application of the word tort better. Although their approach were both very different, they both aimed towards one common objective, to provide a theory capable of defining tort and differentiate it from other Civil Wrongs. In order to understand which theory differentiates the best, we first need to differentiate between the two theories.

Winfield's Theory	Salmond's Theory
An injury to another is tort if it is not justified by the law of the land	If the tort can be placed under any pigeon hole or specified head of torts, there is a remedy; otherwise, it is not a tort and no right of action
Room for new Torts	No room for new Torts
A single category of tort	Multiple categories of torts
The general principle of liability	No general principle of liability
The remedy is available to injuries if it is not accepted by law	The remedy is available against the existing heads of torts. Beyond it, no remedy
Law of Tort	Law of Torts

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Now that we have successfully made the differences between the two theories very clear, it would be easier for us to find which theory answers our questions better in different fields.

¹¹ Aiswarya M, 'Winfield's Theory and Salmond's Pigeon Hole Theory of Tortious Liability (*Law column*, 2020) <https://www.lawcolumn.in/winfields-theory-and-salmonds-pigeon-hole-theory-of-tortious-liability/#Winfields_theory> accessed 25 July 2021

This allows for the determination of a better theory by comparing multiple differences between them. Now to find the better theory among the two, the best possible way to do so must is to determine which of the two theories provide for better aid to the courts in various judgements. It is to be noted that both the theories tend to achieve the same; only Winfield took a different approach than Salmond in order to fill in the gaps left by the Pigeon Hole theory.

Salmond's theory might suffice in a narrow and practical situation, but because of the ever-evolving nature of Torts, a broader view of the same was necessary. It can be said that that the court may refer to the Pigeon Hole theory only until it discovers that the existing laws are not enough to decide on the case, then the court refers to Winfield's theory which provides a wider perspective and is more accepting than the Pigeon Hole theory.¹².

CIVIL WRONGS OTHER THAN TORTS

Now that we have established that not all Civil Wrongs are Tort let us talk about few Civil Wrongs which are not tort and how are they different from Torts.

Breach of Contract and Tort

Contracts make up a huge part of today's world of growth and development. This also made a huge impact on the number of cases based on Contracts. Breach of Contract became a very important wrong, and litigation numbers kept increasing as newer developments were made in the field of law. So much, so that Breach of Contracts formed a separate field of Civil Wrongs. If a civil wrong is exclusively a Breach of Contract, it cannot be a Tort, according to Winfield. Both laws of contracts and laws of tort are two separate domains, and so is contractual liability and tortious liability. Differences between the two can be seen as follows:

1. In tort, the duty against another is provided by law, whereas in contracts, it is provided by the agreement between the parties.

¹² Ramamoorthy (n 8)

2. The duty in tort is against everyone, whereas in contracts, it is only against the parties entered into the contract.
3. A tort is committed without consent; a contract is entered into by consent.
4. To act against tort, no privity is required to be proved; in contracts, privity is required to be proved.
5. Motive can be a factor in tort; motive is not a factor in breach of contracts.
6. Damages are unliquidated in Torts; damages can be either liquidated or unliquidated in breach of contract.
7. Law of Torts is uncodified, Contract laws have been codified
8. In tort, the person can be entitled to damages for the damage he hasn't actually suffered

Breach of Trust and Torts

Trust comes under Property laws. A person is trusted by another to hold his property and use it for the benefit of the latter. The person being trusted here is called the trustee, and the person to whom the property belongs is the beneficiary. A breach of such trust is considered to be a civil wrong, and applying Winfield's theory, no civil wrong is a tort if it is exclusively a breach of trust.

The differences between Torts and Breach of trust are:

1. All tortuous acts are civil Wrongs; breach of trust may be civil or criminal depending on the circumstances
2. Torts provide unliquidated damages; damages are liquidated in a breach of trust
3. A tort is a violation of a right in rem, whereas breach of trust is a violation of a right in personam.
4. Law of torts are not codified, breach of trust is a codified law
5. Motive can be a factor in Torts; motive is a factor in breach of trust
6. The duty in tort is against everyone, whereas in breach of trust, it is only against the trustees and the beneficiaries

VERDICT

A tort is the encroachment of a private right and recognised from a public right. As a rule, each encroachment of a private right, for example, the right to individual security, notoriety, or ownership, denotes a physical issue for which the harmed individual is qualified for remuneration from the wrongdoer. The wrongful demonstration should go under the classification of wrongs for which the cure is civil harm. The fundamental solution for a tort is an activity for harm; however, there are different cures. All the following torts are civil injuries, trespass, false imprisonment, defamation, deceit, negligence, nuisance, conspiracy, privacy, abuse of legal procedure, intimidation, slander, passing off, injury to person etc.

Although a tort is a civil injury, all civil injuries are not torts. For example, public nuisance committed by a person is not a tort, and an action for it has to be taken by the state. Only in cases where the particular act of public nuisance amounts to private nuisance those private citizens are entitled to bring an action. If a person wrongfully obstructs a public road, the Government authorities are, as a rule, entitled to take action against the wrongdoer. On the other hand, if the obstruction causes great inconvenience, delay and excess cost of conveyance to a particular person who has to travel that way long with heavy luggage in loaded wagons and is compelled to take another route, he will be able to get damages from the wrongdoer for the special damage suffered by him. Thus the invasion of a public right or a right that belongs to the public in general, such as the right to a public high-way, is not as a rule actionable as a tort, for 'the remedy of the public is by indictment, and if every member of the public were allowed to bring actions in respect of such invasion, there would be no limit to the number of actions which might be brought.' However, when, in addition to the injury to the public, a special, peculiar and substantial damage' is occasioned to a particular individual by the infringement of a public right, then such individual will have a private redress by an action for damages¹³.

¹³ Goel (n 1)