The Basic Concept of Tort Law

Gandhi Pandit*

Introduction
Tort is a remarkably wide-ranging subject and probably the most difficult of all legal areas to lay down all-embracing principles in one book or article. Therefore, it is not possible to analyze and discuss the concept of tort in comprehensive manner. The method the writer has taken in discussing the basic concept of tort law in this article is to lay down a general pattern of tort law and then to show some of the main deviations from this pattern. In this article, the writer will attempt to explain some very basic principles, which underlie the law of tort.

I. Meaning of Tort
The word ‘tort’ is derived from the Latin "tortus" meaning ‘twisted’. It came to mean ‘wrong’, and it is still so used in European countries. In the US, the word ‘tort’ has a purely technical legal meaning – a legal wrong for which the law provides a remedy.

A tort is a civil wrong in the sense that it is committed against an individual (which includes legal entities such as companies) rather than the state. The essence of tort law is to give protection to the interest and right of a person. These interests protected by law can be enforced by a court awarding a sum of money, known as damages, for infringement of a protected interest.

II. History of Tort Law
Tort law is a field of law that encompasses material of considerable breadth and diversity and whose existence, is reflected in individual actions seeking civil redress for injuries not arising out of contractual relations, which can be traced back to primitive societies. It would therefore be a staggering task to write the history of tort law. However, tort law is developed and originated from common law of England. It is not codified like other branches of law. It is derived from Latin term "Tortum" which implies conduct that is twisted or wrong.¹

The typical torts that we have understood in present time are intentional interference with the person, such as assault, battery, or false imprisonment, as well as intentional interference with chattels and real property. Prior to the late nineteenth century, none of these torts included as an element intentional harm by the defendant. The traditional torts generally are traced from the common law writ of trespass developed in 13th century in England.²

In the final decades of the nineteenth century, Frederick Pollock and Oliver Wendell Holmes proposed a general theory of intentional tort, a theory eventually known by the courts as the "prima facie tort doctrine." That doctrine can be summarized in a simple proposition: the intentional infliction of injury without justification is actionable.³

Modern tort law recognizes a number of so-called "intentional torts," that is, causes of

---

* Attorney at Law, Corporate lawyer practicing law in Supreme Court of Nepal


² Ibid

³ Ibid
action, which arise only when the defendant acted with the intent to injure the plaintiff or with substantial certainty that his action would injure the plaintiff. Examples of modern intentional torts include several "traditional" intentional torts, recognized as causes of action for centuries, such as assault, battery, false imprisonment, trespass to chattels and trespass to real property.4

III. Basic Elements of Tort
a. Commission or Omission
The tort consists of an act or omission by the defendant, which causes damage to the claimant. The damage must be caused by the fault of the defendant and must be a kind of harm recognized as attracting legal liability.5

Example
A drives his car carelessly with the result that it mounts the pavement and hits B, a pedestrian, causing B personal injuries. The act is A driving the vehicle. This act has caused damage to B. The damage was as a result of A’s carelessness, i.e. his fault. The injury suffered by B, personal injury, is recognised by law as attracting liability. A will be liable to B in the tort of negligence and B will be able to recover damages.

b. Variation
i. Strict Liability
The elements of act (or omission) and causation are common to all torts. There are certain torts which do not require fault. These are known as torts of strict liability. 6

Example
An Act makes it compulsory for employers to ensure that their employees wear safety helmets. The employer may be liable in a tort called breach of statutory duty if the employee does not wear a helmet and is injured as a result.

ii. Damnum sine injuria
In some cases the act or omission of the defendant may have caused damage to the claimant but the claimant may have no action as the interest affected may not be one protected by law. Lawyers refer to this as damnum sine injuria or harm without legal wrong.7

Example
A opens a fish and chip shop in the same street as B’s fish and chip shop. A reduces his prices with the intention of putting B out of business. A has committed no tort as losses caused by lawful business competition are not actionable in tort.

IV. Interest Protected by Tort Law
a. Personal security
People have an interest in their personal security. This is protected in a number of ways. If one person puts another in fear of being hit, then there may be an action in the tort of assault. If the blow is struck, then the person hit may have an action in the tort of battery. A person whose freedom of movement is restricted unlawfully may be able to sue for false imprisonment. If personal injury is caused negligently, then the claimant may have an action in the tort of negligence.8

b. Interest in property
Property in the broad sense of the word is protected by tort law. A person has an interest in their land which is protected by a number of torts such as nuisance and

---

4 Supra Note 4
7 Supra 6 P 4
8 Ibid Page 6
trespass to land. Interests in personal property are protected by torts such as trespass to goods and conversion. Where clothing or a car is damaged in a negligently caused accident, then a person may have an action for damages in negligence.\textsuperscript{9}

c) Economic interests
Tort law will give limited protection to economic interests where the defendant has acted unlawfully and has caused economic loss to the claimant. These are known as the economic torts. Such protection is limited because the common law has been cautious in drawing the line between lawful and unlawful business practice. This is a line which is largely left to statute to draw.

d) Reputation and privacy
Increasingly important are a person’s interests in their reputation and privacy. Where a person’s reputation is damaged by untrue speech or writing, then they may have an action in the tort of defamation. There is no specific tort in English law to defend privacy but there have been some interesting developments in this area, which are dealt with in the chapter on privacy.

V. State of Mind in Tort\textsuperscript{10}
There are three states of mind which one may need to be aware of in tort law. These are malice, intention and negligence. Where a tort does not require any of these it is said to be a tort of strict liability.

a) Malice
Malice in tort has two meanings. (a) the intentional doing of some wrongful act without proper excuse; (b) to act with some collateral or improper motive.

In the sense of (b) above there is a basic principle that malice is irrelevant in tort law. If a person has a right to do something then his motive in doing it is irrelevant.\textsuperscript{11}

Example
The defendant extracted percolating water in undefined channels with the result that the water supply to the plaintiffs’ reservoir was reduced. The defendant’s motive in doing this was to force the plaintiffs to buy his land at his price. The action failed, as the defendant had a right to extract the water. As he had such a right, his motive, even if malicious, was irrelevant.

b) Intention
The meaning of intention varies according to the context in which it is used. Intention is relevant in three groups of torts:\textsuperscript{12}

1. In trespass, intention means where a person desires to produce a result forbidden by law and where they foresee it and carry on regardless of the consequences. The defendant must intend to do the act, but need not intend harm.

2. In cases of fraud, the defendant must make a statement, which they know is untrue.

3. In cases of conspiracy, if two persons combine together and act to cause injury to other person, then the other person will have an action provided that they can prove that their primary motive was to cause them damage.

c) Strict liability
Whereas fault is a positive idea, strict liability is a negative one. Under the principle of law, strict liability means liability without fault. In the last century, the emphasis was placed by the courts on fault-based liability only, and strict liability was generally ignored.

\textsuperscript{9} Supra 9
\textsuperscript{10} Ibid
\textsuperscript{11} Ibid
\textsuperscript{12} Supra Note 12
The basic structure that encompasses that of strict liability is the fact that liability is maintained despite any intent otherwise. In this way, it matters only that the action was performed to its fruition and an eventual injury of another. Certain areas in which safety laws have had to come to the forefront concerning liability include incidents involving product defects. In cases such as these, consumers must only prove that their injuries stemmed directly from the product in question in order to garner an appropriate judgment from the court. The purpose behind such a seemingly rigid form of legislature is to prevent future occurrences from happening by providing precedence to fall in line with.\(^{13}\)

What is common to all tort actions is the idea of causation. The claimant must always prove that the defendant caused their injury. There are frequently calls for drug manufacturers to be made strictly liable for injury caused by their products. If this were to occur then the claimant would no longer have to prove negligence but would still be faced with the difficult task of proving that it was that drug which caused their injury.

VI. Objective of Tort Law

The objectives of the law of tort can be many, some of which are summarized as below:\(^ {14}\)

a) Compensation
The most obvious objective of tort is to provide a channel for compensating victims of injury and loss. Tort is the means whereby issues of liability can be decided and compensation assessed and awarded.

b) Protection of interests
The law of tort protects a person’s interests in land and other property, in his or her reputation, and in his or her bodily integrity.

Various torts have been developed for these purposes. For example, the tort of nuisance protects a person’s use or enjoyment of land, the tort of defamation protects his or her reputation, and the tort of negligence protects the breaches of more general duties owed to that person.

c) Deterrence
It has been suggested that the rules of tort have a deterrent effect, encouraging people to take fewer risks and to conduct their activities more carefully, mindful of their possible effects on other people and their property. This effect is reflected in the greater awareness of the need for risk management by manufacturers, employers, health providers and others which is encouraged by insurance companies. The deterrent effect of tort is less obvious in relation to motoring though the incentives to be more careful are present in the insurance premium rating system.

d) Retribution
An element of retribution may be present in the tort system. People who have been harmed are sometimes anxious to have a day in court in order to see the perpetrator of their suffering squirming under cross-examination. This is probably a more important factor in libel actions and intentional torts than in personal injury claims which are paid for by insurance companies. In any event, most cases are settled out of court and the only satisfaction to the claimant lies in the knowledge that the defendant will have been caused considerable inconvenience and expense. The claimant also risks financial loss if the case is decided against him or her and this is a factor to be weighed in the balance when retribution is sought.

\(^{13}\) Catherine Elliot & Frances Quinn, The Law of Tort, Pearson & Longman, 7th ed 2009, P 6

\(^{14}\) See Richard Owen, Essential Tort Law, 3rd Ed, Cavendish Publishing, 2000 Page 7-12
e) Vindication
Tort provides the means whereby a person who regards him or herself as innocent in a dispute can be vindicated by being declared publicly to be ‘in the right’ by a court. However, again, it must be noted that many cases never actually come before a court and the opportunity for satisfaction does not arise.

f) Loss distribution
Tort is frequently recognised, rather simplistically, as a vehicle for distributing losses suffered as a result of wrongful activities. In this context loss means the cost of compensating for harm suffered. This means re-distribution of the cost from the claimant who has been injured to the defendant, or in most cases the defendant's insurance company. Ultimately, everyone paying insurance or buying goods at a higher price to cover

g) Punishment of wrongful conduct
Although this is one of the main functions of criminal law, it may also play a small part in the law of tort, as there is a certain symbolic moral value in requiring the wrongdoer to pay the victim. However, this aspect has become less valuable with the introduction of insurance.

VII. Types of Tort
Tort is basically categorized in three types: Negligence tort, Intentional Tort and Strict Liability Tort. 15

1) Negligence
Negligence in tort has several meanings. It may refer to the tort of negligence or it may refer to careless behaviour. Negligence does not refer to a state of mind. A person who totally disregards the safety of others but does not injure them is not guilty of negligence, although they may be morally reprehensible. On the other hand, the person who tries their best, but falls below the standard set by the court and causes damage, will be liable. There are three elements in negligence:

i) Standard of Conduct
There are certain elements that are required to prove that a defendant acted negligently. There is a specific code of conduct, which all people are expected to follow, and there is a duty of the public to act in a certain way, which reduces the risk of harm to others. Negligence can only be claimed by an injured plaintiff, whose interests have actually been interfered with. This portrays that a plaintiff must prove his injuries, and prove that they were caused by the defendant. This proximate cause is the link between the defendant's actions and the plaintiff's injuries.

ii) Negligence Proof
The necessity for a negligence case to be tried in a court of law is essential and evident. Tort law, like any other law, is tough to decide upon when an enforcement or violation issue arises, and is furthermore tedious. In negligence cases, a court appoints a jury to make a decision upon a case based on the direct or circumstantial evidence that is available to them. The burden of proof a plaintiff faces in a case, relates to four elements of proof that must exist in order for them to be able to prove that a negligent act not only existed, but the fact that the act by a defendant, led to the injury sustained by the plaintiff.

---

16 Ibid
iii) Proximate Cause
The name given to the direct cause of an accident, or incident leading to injury, is referred to as 'proximate'. The term proximate has long been known to mean near, or in the vicinity of, not actual. This gives a misconception to the name, as if the cause was nearly opposed to the actual one. Other issues arise deeper within proximate cause, and that is with the scope of liability and its extent. Controversy exists as to where liability should be extended to a defendant, based on their responsibility or duty.

2) Intentional tort
An intentional tort is an act that is intentionally committed against another person with the aim of causing harm such as assault, battery, conversion, fraud, false imprisonment, trespassing and invasion of privacy.\(^\text{17}\)

A. Trespass
a) Trespass to a person: If one man intentionally applies force directly to another, the plaintiff has cause of action on trespass to the person\(^\text{18}\). Trespass is defined in a case, Letang v. Cooper 1964, by Lord Denning stating "If one man intentionally applies force directly to another, the plaintiff has cause of action on trespass to the person..."

b) Trespass to land: It is simply a direct and unlawful interference with land which is in the possession of another.\(^\text{19}\)

B. Assault
Assault is often defined as an attempt to injure to someone else, and in some circumstances can include threats or threatening behavior against others. One common definition would be an intentional attempt, using violence or force, to injure or harm another person. Another straightforward way that assault is sometimes defined is as an attempted battery. Indeed, generally the main distinction between an assault and a battery is that no contact is necessary for an assault, whereas an offensive or illegal contact must occur for a battery.

In assault, a person is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contract, and (b) the other is thereby put in such imminent apprehension.

Even though contact is not generally necessary for an assault offense, a conviction for assault still requires a criminal "act".

C. Battery
A typical definition for battery is the intentional offensive or harmful touching of another person without his or her consent. Under this general definition, a battery offense requires all of the following:
   i) Intentional touching;
   ii) The touching must be harmful or offensive;
   iii) No consent from the victim.

A battery generally does not require any intent to harm the victim (although such intent often exists in battery cases). Instead, a person need only have intent to contact or cause contact with an individual.

3) Torts of Strict Liability
Although the vast majority of tort actions are for negligence, it is not necessary to prove fault in some torts. All that needs be proved is that the defendant committed the act complained of, and that the damage was the result of that act. These are termed torts of 'strict liability'.\(^\text{20}\)

\(^{17}\) Supra Note 16
\(^{18}\) Letang v. Cooper 1964
\(^{19}\) Chris Turner, Supra note 8 at 287.
Strict liability is a legal doctrine that makes a person or company responsible for their actions or products, which cause damages regardless of any negligence or fault on their part.\textsuperscript{21}

In this kind of tort, the burden of proof or responsibility of the conduct cannot be shifted to another person. Strict, or "absolute," liability applies to cases where responsibility for an injury can be imposed on the wrongdoer without proof of negligence or direct fault. What matters is that an action occurred and resulted in the eventual injury of another person. Defective product cases are prime examples of when liability is maintained despite intent. In lawsuits such as these, the injured consumer only has to establish that their injuries were directly caused by the product in question in order to have the law on their side. The fact that the company did not "intend" for the consumer to be injured is not a factor.\textsuperscript{22}

4) Defamation

Not all torts result in bodily harm. Some cause harm to a person’s reputation instead. Defamation is the general tort that encompasses statements that damage one’s reputation. There are different forms of defamation, including libel and slander. The difference between libel and slander is simply whether the statements are written (libel) or spoken (slander). If a person suffers injury to his or her reputation because of another person's statements, he or she can sue under the theory of defamation.\textsuperscript{23}

It is the act that violates the privacy of another or the reputational injuries. In order to prove defamation, the plaintiff must prove:

\begin{enumerate}
  \item a. that a statement was made about the plaintiff’s reputation, honesty or integrity that is not true;
  \item b. publication to a third party (i.e., another person hears or reads the statement); and
  \item c. the plaintiff suffers damages as a result of the statement.
\end{enumerate}

\textbf{Defence to Defamation}

One absolute defense to defamation is consent. If the plaintiff consented to the publication of defamatory information about him or her, the consent is a complete defense. Another defense to libel or slander is truth. Traditionally, it was presumed that a statement was false once the plaintiff proved it was defamatory.\textsuperscript{24}

\textbf{VIII. Tort and Contract}

The remedy for breach of duty in tort is usually an action for damages. The main aim of tort is said to be compensation for harm suffered because of the breach of a duty fixed by law.\textsuperscript{25}

Contract on the other hand has been less concerned with fault as a basis of liability, and it is often unnecessary to prove fault in order to be compensated for a breach of contract. All that is necessary to prove is that the act, which caused the loss, was committed. This is known as strict liability, and is a feature of much of the law relating to sale of goods.\textsuperscript{26}

\textbf{IX. Tort and Criminal Law}

Torts are concerned with the actions brought or to be brought by a private individual against other individuals or legal persons. Whereas criminal law is concerned with prosecutions

\begin{footnotes}
\item {\textsuperscript{21}} Ibid.
\item {\textsuperscript{22}} Ibid.
\item {\textsuperscript{23}} Ibid.
\item {\textsuperscript{24}} Supra Note 21
\item {\textsuperscript{25}} Vivienne Harpwood, Modern Tort Law, 7th Ed, Routledge-Cavendish, 2009 page 13
\item {\textsuperscript{26}} Ibid.
\end{footnotes}
brought on behalf of the state for breaches of duties imposed upon individuals for the protection of society. Criminal prosecutions are dealt with by criminal courts, and the standard of proof is more stringent than in civil cases. The consequences of a finding of criminal guilt are regarded as more serious for the individual concerned than are the consequences of civil liability whereas standard of proof in tort claim is less stringent than in criminal case.27

X. Insurance and the law of tort
Foundation of the modern tort system is the arrangement of insurance, which provides payment of compensation in most tort cases. Indeed, it is usually not worth the trouble and expense of suing in tort unless the defendant is insured (or is very wealthy). It is possible to insure against liability in tort in relation to many different activities.28

There is, of course, a counter-argument concerning insurance – that people who are aware that they are insured are likely to be less careful because they can be confident that their insurance company will compensate any victims of their wrongful activity. Insurance can also create problems of waste because it is impossible to predict when liability will arise and people may over-insure. It has also been claimed that in some cases insurance motivates the law of tort.29

Nevertheless, insurance is a useful way of spreading the cost of compensating people who suffer injury because of negligence. Insurance allows people to recover damages for negligent driving from close relatives, so easing the burden of caring within families.30

XI. Conclusion
Tort is difficult to define. It suffers throughout from many internal inconsistencies because of haphazard decisions and judicial policy. It must be concluded that the search for a grand design, which gives the law of tort internal coherence, is naive and is likely to prove inconclusive.31 But this law need to improve and implement to protect personal and financial interest of a person. Strengthening of tort law will properly redress the victim from loss or injury caused by the negligent actor. 

27 Supra Note 24 page 5
28 Supra Note 24 page 6
29 Ibid.
30 Supra note 26 p 6
31 Ibid