International Journal of Advances in Psychology Research
ISSN: 2320-7485 (Online)
Journal DOI:10.7439/ijapr
Short Communication

Is it a law of tort or law of torts: Pigeon-hole theory Vs. Winfield's Theory

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Abstract

The Judge made law is traceable to Anglo-Saxon times which form the basis of English law enduring for over 900 years. The following discussion note ferrets the results of a thorough assessment of the highly diverse phenomena of law of tort, organized into a two dimensional analysis i.e. Is it a law of Tort or Is it a law of Torts, including a reference to various Specific torts. The disputes which fall within the bounds of tort law are as broad as the range of human activities itself. Every person whose action or inaction precipitates a result which another perceives as harmful is a potential tortfeasor. New torts and new class of tort actions are constantly being recognized as ideas change concerning the duties persons owe to one another. So it will be better to call it law of Tort, which is ferreted within the framework of this article.

Keywords: Tort, Torts, Action, Liability and Redress.

1. Introduction

As every law student knows, generally, a person becomes liable for a tort committed by him in person and independently. In certain situations, when one person is made liable for the tort committed by another, a sort of a fall-back theory of recovery is utilized and the liability is fixed. Liability in tort might arise subject to proof of negligence. However, strict Liability and absolute liability is also well-recognised. Coming to the point, according to one theory all injurious acts which cause harm to other persons are tort, unless there is any legal justification or excuse for it. In other words, it is the "Law of Tort". According to another theory the number of torts is specific or definite beyond which liability in tort does not arise. In other words it is the, "Law of Torts". The "pigeon hole theory" refers to Salmonds theory that any "harm" in order to constitute a legal injury must fit into some pre-determined spaces or 'pigeon holes' i.e. the number of torts is specific or definite beyond which liability in tort does not arise and there is no further space in which the next tort may fit. This is in direct contrast with Winfield's theory, according to whom all civil wrongs are actionable *per se*.

Tort law or Law of Torts fascinates us with the landscape of substantive machinery of legal redress and compensation for victims of tortuous injury. It has a mysterious quality. The same, Tort law or Law of Torts, on occasions provides deterrence or other relief for such diverse forms of harm as mental distress, impairment of reputation, and economic injuries. It encompasses many distinct causes of action, including, for example, claims for defamation, invasion of privacy, medical practice claims, negligence and false imprisonment, to mention but a few. This discussion note aims at highlighting the main rules and principles of liability regarding the scope of some tort, such as trespass to land, which are ancient in origin, while others such as strict product liability, which has emerged only recently; a number of actions, for example, deceit, are well-defined and consistently recognized, though others, for example, wrongful birth and wrongful life, which have come into existence as a result of advances in modern medical technology and the legality of the practice of abortion are the subject of little consensus *ad idem*.

The nature, scope and significance of tort law have seen sweeping transformation and radical changes over the last 200 years. It is not parroted, but it is a fact that emergence of modern machinery as well as technology, workplace environment and the

anomalies of hazardous products and a number of newer torts has increased radically with the passage of time which has given rise to the development of what we call nowadays as, modern tort law, especially the negligence doctrine of the early 20th Century as well as product liability doctrines. However, it should be borne in mind that the law of negligence has also its genesis in the power to issue writs of trespass in a particular case and thence the law of trespass originated before the tort of negligence. But, many of the ensuing problems faced by tort victims were not solved and might not be adjusted by the tort law rules independently. In such situations recourse can be made to other deterrence rules of public and private law.

Over the last more than 200 years, including the twentieth century and we can say, now the 21st Century has brought about sweeping expansion of tort law vis-à-vis product liability, medical malpractice claims and extended liability of the Corporations owing to the expansion of the information technology itself.

I trust, that our exploration with the common law principles declare that "one who interferes with another's duty does so at his own peril. As also, that, "everyone must so use his own property as not to damage another. As potential victims, we each have a fundamental interest in liberty, privacy and security of the fellow members of our society and to maintain the fair equilibrium in the social affairs. We have a fundamental interest in liberty because, without a substantial measure of freedom to impose risks upon others, we would be unable to pursue the ends and everyday affairs that give our lives meaning. In contrast to it, as potential injurers, we may not have a fundamental interest in liberty of others. Because there are many of us, and because our ends and aspirations diverge, these interests often conflict.

The task of law of tort, is thus to weigh and reconcile our competing interests in liberty and security in such terms that secure for each individual member of the society the most favourable circumstances to pursue her ends or aspirations, consistent with a like freedom for others. In other words, in the context of justice, the purpose is to reconcile these competing fundamental interests favourably and fairly, because, most injuries that find their way into the tort system are not cases of intentional wrongdoing; rather, they are the result of negligence.

The understanding of the Canadian tort system and how it differs from its American counterpart is quite useful here. Both American and Canadian tort regimes share substantive and procedural similarities in the area of tort law broadly, but imminent scholars like Kritzer, Bogart, and Vidmar are of the view that, in the aftermath of injury, Americans are more likely to bring legal claims for the redressal and enforcement of the violation of their valuable rights. The number of medical malpractice claims have increased with the passage of time in Canada and the United States and both tort regimes require to establish a finding that the defendant has fallen below an expected standard of care and the liability standards for certain classes of civil wrongs like, wrongs caused by inherently dangerous goods and noxious substances is strict in both the legal regimes.

However, so far as Product liability rule is concerned Canadian regimes, fix the liability of manufacturer's product liability on the basis of proof of negligence, while by contrast American jurisdictions take the exception and fix the liability for damages caused by defective products without the proof of negligence.

The understanding of the Australian tort system shows that, the person is not liable in negligence for a course of anxiety, distress, fear or fright without any recognised psychiatric injury and in the United States the law is limited to those plaintiff's who are placed in immediate risk of physical harm by the defendant even though the injury is not direct bodily or physical injury.

The tort of malicious prosecution has a history of its own. It is not as well known to the general public or as utilized as many other tort. Henry de Bracton believed that false imprisonment is one of the oldest violations of rights known. It has been described variously as a tort, a trespass, an assault, a wrong, a damage, and an injury, giving one a cause of action to bring suit against another for a remedy.

In his Magnum Opus "The Common Law". Holmes observes, that all the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm that is, the conduct which a man pursues at his peril. The only guidepost for the future to be drawn from a decision against a defendant in an action of tort is that similar acts, under circumstances which cannot be distinguished except by the result from those of the expected standard care of the defendant, are done at the peril of the wrongdoer; that if he escapes liability, it is simply because by good fortune no harm comes of his action in the particular event."

2. Conclusion

The minimum aim of any decent tort legal system is to ensure a certain degree of fair stability in the society, which could not be achieved if people were free to assault or beat each other, or falsely or wrongfully imprison and confine each other without justifiable cause, or steal their chattels, or trespass their land, send fumes to their household or publish in the eyes of third parties something defamatory and hence unacceptable; whether a particular tort fits into the Salmond's pigeon-hole theory or is left to the Winfield's Criterion of Tort-theory. The tort of negligence may be described as a "two-in one tort". Thus, by recognising new torts the courts have widened the scope and ambit of tortious liability exponentially.

A reference may be made to Holt, J; who has observed: "If men multiply, injuries, actions must be multiplied too, for every man who is injured ought to have recompense." This observation seems to be more correct and clear in letter; and hence whether a particular tort fits into the pigeon-hole theory or not, should not be material. However, the subtle distinction between the two theories is not immaterial too. In summary, a historical view of the tort reveals its own flexible and remedial nature. This was seen in the genesis of the tort to provide relief for the procedural and substantive disadvantages faced by plaintiffs in the actions of detinue and trespass to goods. This is perhaps best illustrated in the utility of the remedy for conversion, that is, the measure of damages in a claim for trover allowing the recovery of the full value of the property converted. Thus, flexible and remedial nature of the tort is of vital importance, and the discussion on the same is warranted and is not futile. I am in favour of the view that, "If men multiply injuries, actions must be multiplied too, whether a particular tort fits into the Pigeon-hole theory or not".

Last word is that, it is submitted, that it is a pot-lid theory of tort-as there will be number of pots, there should be number of lids to cover the pots in order to show that the consistency of a particular tort system requires a particular result, but it is not all.

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