



# The Law of Torts in India

DR. MINAL H. UPADHYAY  
Principal,  
B.K.Mer. Bank Law College, Palanpur  
Gujarat (India)

## Abstract:

*The law of torts or civil wrongs in India is thus almost wholly the English law which is administered as rules of justice, equity and good conscience. The Indian courts, however, before applying any rule of English law can see whether it is suited to the Indian society and circumstances. Tort as we know today has evolved over the centuries and has grown tremendously in countries such as the England, United States of America, and other progressive countries and to a certain extent in India. The main study in this article however would revolve around two aspects of this branch of law, firstly, whether the law of tort in India is unnecessary and secondly, whether the law of torts has been simply overlooked. Before moving on to the core subject it would be essential to fully understand the meaning of the term tort in the Indian context. In this article I may try to explain Tort Law in India is useful and necessary.*

## 1. Introduction

The law of torts or civil wrongs in India is thus almost wholly the English law which is administered as rules of justice, equity and good conscience. The Indian courts, however, before applying any rule of English law can see whether it is suited to the Indian society and circumstances.

The application of the English law in India as rules of justice, equity and good conscience has, therefore, been a selective application. Further, in applying the English law on a particular point, the Indian courts are not restricted to the common law. The rules of English law are to be applied so far as they are applicable to Indian society and circumstances. When in a given case, statutory or customary law does not exist; Courts in India will be guided by principles of justice, equity and good conscience.

Jurists in England and in India have often demanded that the law of Torts be reduced to a statutory form. The advantage of such a step would be that the law would become definite and compartmentalized. However, one must not forget that this branch of the law has evolved out of judicial decisions, that its very basis is case law (both English and Indian), and perhaps more harm than good may be done to the development of this branch of the law by reducing it to a statutory code.

In recent times, some parts of the law of torts have been codified, as for example, The Fatal Accident Act, The Workmen's Compensation Act, The Employers' Liability Act, etc. However, the major portion of the field of this branch of the law is still based on judicial decision.

## 2. Nature of Tort

### 2.1 Definition of Tort

The term 'Tort' is French word equivalent of the English word 'wrong' and of the Roman law term 'delict'. The word 'tort' is derived from the Latin term tortum to twist, and implies conduct which is twisted or tortuous. The first reported use of the word tort is in Boulton v.Hardy, (1597) Cro.Eliz.547, 548. SALMOND AND HEUSTON. Law of Torts, (1992) (20<sup>th</sup> edition) f.n.54. Also see Union of India v. Sat Pal Dharam Vir, AIR 1969 J & K 128 (129): 1969 Kash L J 1.

It now means a breach of some duty independent of contract giving rise to a civil cause of action and for which compensation is recoverable. In spite of various attempts an entirely satisfactory definition of tort still awaits its master. To provide a workable definition in general terms, a tort may be defined as a civil wrong independent of contract for which the appropriate remedy is an action for unliquidated damages.

## 2.2 Tort and Contract

There is a well-distinction between a Contract and a Tort. A contract is founded upon consent: a tort is inflicted against or without consent. A contract necessitates privity between the parties to it: in tort no privity is needed. A tort must also be distinguished from a pure breach of contract. First, a tort is a violation of a right *in rem*, i.e. of a right vested in some determinate person, either personally or as a member of community, and available against the world at large: whereas a breach of contract is an infringement of a right *in personam*, i.e. of a right available only against some determinate person or body, and in which the community at large has concern.

Secondly, in a breach of contract, the motive for the breach is immaterial: in a tort, it is often taken into consideration. Thirdly, in a breach of contract, damages are only a compensation. In an action for tort to the property, they are generally the same. But where the injury is to the person, character, or feelings, and the facts disclose improper motive or conduct such as fraud, malice, violence, cruelty, or the like which aggravate the plaintiff's injury, he may be awarded aggravated damages. Exemplary damages to punish the defendant and to deter him in future can also be awarded in certain cases in tort but rarely in contract.

## 2.3 Tort and Crime

A tort is also widely different from a crime. First, a tort is an infringement or privation of the private or civil right belonging to individuals considered as individual; whereas a crime is a breach of public rights and duties which affect the whole community considered as a community. Secondly, in tort, the wrongdoer has to compensate the injured party: whereas, in crime, he is punished by the state in the interests of society. Thirdly, in tort, the action is brought by the injured party: in crime, the proceedings are conducted in the name of the state and the guilty person is punished by the state. Criminal Courts are authorized within certain limits and in certain circumstances to order payment of a sum as compensation to the person injured out of the fine imposed on the offender. The compensation so awarded resembles the award of unliquidated damages in a tort action but there is a marked difference.

## 3. Torts in India Whether Unnecessary or Simply Overlooked

“A tort is a civil wrong for which the remedy is an action for unliquidated damages and which is not exclusively the breach of a contract, or the breach of a trust, or the breach of other merely equitable obligation”- **Salmond**

The term ‘tort’ was introduced into the terminology of English Law by the French speaking lawyers and Judges of the Courts of Normandy and Angevin Kings of England. As a technical term of English law, tort has acquired a special meaning as a species of civil injury or wrong. Till about the middle of the seventeenth Century tort was an obscure term, at a time when procedure was considered more important than the right of an individual. This emphasis on procedural aspect for determining the success for a case continued for some 500 years, till 1852, when the Common Law Procedure Act was passed and primacy of substance over the procedure gradually gained firmer ground. Today the maxim as it stands is ‘**ubi jus ubi remedium**’, i.e. where there is right there is remedy.

Tort is the French equivalent of the English word ‘wrong’ and of the Roman law term ‘delict’. The word tort is derived from the Latin word ‘tortum’ which means twisted or crooked or wrong and is in

contrast to the word rectum which means straight. It is expected out of everyone to behave in a straightforward manner and when one deviates from this straight path into crooked ways he is said to have committed a tort. Hence tort is a conduct which is twisted or crooked and not straight. Though many prominent writers have tried to define Tort, it is difficult to do so for varied reasons. The key reason among this being, that the law of Torts is based on decided cases. Judges while deciding a case, feel their primary duty is to adjudge the case on hand rather than to lay down wider rules and hence they seldom lay down any definition of a legal term. Furthermore the law of tort is still growing. If a thing is growing no satisfactory definition can be given.

#### **4. Tortuous Liability**

It is pertinent to understand what is meant by tortious liability or rather the nature of tort law in order to understand its utility. To throw more light, the word tort evolved, from at one time very nearly passing into literary use as a synonym for wrong but after the middle of the seventeenth century, a practice began in the courts of the common law, of distinguishing between actions in 'contract' for breaches of contract and actions for other wrongs, and of using the word 'tort' as a compendious title for the latter class of actions. Since then it was usual to speak of 'actions in contract' and 'action in tort'. So a tort came, in law to refer to that particular class of wrongs for which an action in tort was recognized by the courts of common law as a remedy and to lose the generic sense of wrong which it may have helped in popular use.

Another interesting result of this association of the word with a form of action was that it came to refer also to the liability of a person who did not commit any tort or wrong, e.g. a master who is sued for the damages by the person injured by a tort committed by his servant. This was because an 'action in tort' was the remedy against the master and in course of time and in response to new needs and conditions, the master was held liable to pay damages even though he had not committed any tort. So the law of torts is that body of law which deals with the liability of persons against whom an 'action in tort' would lie.

Tort as we know today has evolved over the centuries and has grown tremendously in countries such as the England, United States of America, and other progressive countries and to a certain extent in India. The main study in this article however would revolve around two aspects of this branch of law, firstly, whether the law of tort in India is unnecessary and secondly, whether the law of torts has been simply overlooked. Before moving on to the core subject it would be essential to fully understand the meaning of the term tort in the Indian context.

#### **5. Tort Law in India**

In India the term tort has been in existence since pre-independence era. The Sanskrit word Jimha, which means crooked was used in ancient Hindu law text in the sense of 'tortious or fraudulent conduct'. However, under the Hindu law and the Muslim law, tort had a much narrower conception than the tort of the English law. The punishment of crimes in these systems occupied a more prominent place than compensation for wrongs. The law of torts in India presently, is mainly the English law of torts which itself is based on the principles of the common law of England. However the Indian courts before applying any rule of English law can see whether it is suited to the Indian society and circumstances. The application of the English law in India has therefore been a selective application.

In this context, in *M.C. Mehta v. Union of India*, Justice Bhagwati observed- "We have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence."

During British rule, courts in India were enjoined by Acts of Parliament in the UK and by Indian enactments to act according to justice, equity and good conscience if there was no specific rule of enacted law applicable to the dispute in a suit. In regard to suits for damages for torts, courts followed the English common law insofar as it was consonant with justice, equity and good conscience. They departed from it when any of its rules appeared unreasonable and unsuitable to Indian conditions. An English statute dealing with tort law is not by its own force applicable to India but may be followed here unless it is not accepted for the reason just mentioned.

## **6. Tort Law In India Whether Unnecessary**

“Truly speaking the entire law of torts is founded and structured on morality. Therefore, it would be primitive to close strictly or close finally the ever expanding and growing horizon of tortious liability. Even for social development, orderly growth of the society and cultural the liberal approach to tortious liability by court would be conducive.”- Sahai. J.

The observation made by Hon’ble Sahai.J dispels any illusions as to the necessity of the law of torts. His observations also envisage the growth of tort litigation in India. To fully assess the role played by tort law in a modern society, it would be instructive to turn to the history England during the last three centuries. This is for two reasons firstly, tort litigation in England has grown significantly, making it an interesting study and secondly, the law of torts in India has been largely borrowed from the English law of torts.

The outstanding fact of England’s legal history relevant to the present context is the growth of her own tort law from small beginnings to the size and status of a separate branch of law. This was the work of her lawyers and judges who developed the action for damages as a remedy for violations of rights and duties and fashioned it as an instrument for making people adhere to standards of reasonable behaviour and to respect the rights and interests of one another.

As a result, the English people benefited by the cultivation of habits of thought and conduct which helps social peace and co-operative effort, inculcated a live sense of individual rights which they do not hesitate to ascertain in courts of law. The necessary corollary of this is the formulation of a large body of rules defining in detail the rights of the individual in relation to others and the conditions in which he can assert them in a court of law. So we have a body of law whose rules have grown and are constantly growing in response to new concepts of rights and duty and new needs and conditions.

If it is true to say that the English people attained during this period, a degree of social unity and integration enabling them to achieve phenomenal success in various aspects of their life, activity and welfare, it is difficult to resist the inference that among the many forces and influences that made this possible, was the development of their system of law and justice so as to afford security to the citizen in his life, person, property and rights and interests which he values. An integral and important part of this system is tort law. Evidence of its importance is afforded by the large and growing volume of litigation and case law in actions for torts of various kinds and in particular those of defamation, negligence and nuisance. In deciding these actions English judges and juries have tried to make their decisions sub-serve the purposes already stated. They have taken care to allow claims only when they are just and make their awards of damages serve, on the one hand as a deterrent of wrong doing and on the other, afford satisfaction to parties suffering from injury or loss. The views here stated find support in the almost whole sale adoption of tort law of England along with her other laws by progressive nations like those of the U.S.A, Canada and Australia.

Though we have done likewise in borrowing the English law of tort, we have to make a far greater use of it than we do now for making it serve the purposes for which the people of other countries aforesaid have used it. The use made of it in these countries is evidenced not only by the case law in their courts but also by the continual interest evinced by their lawyers, judges and professors in the

development of this branch of law by means of their contributions to the growing volume of literature on it.

It is undeniable that we cannot afford to neglect any agency which can help to regulate individual conduct in conformity with the needs of social peace and contentment which are the basic factors on which our plans of national advancement can rest. It is hardly necessary to add that while adopting English rules and theories, we have to make alterations and adaptations of them which are demanded by conditions in India as observed by various Indian Judges and also take note of the great changes in this branch of law that are taking place elsewhere.

Therefore it is unnecessary to state that, there is absolutely no scope of doing away with this branch of law. Some may argue that the law of torts merely plays merely a role of a residuary law. However bearing in mind the facts above mentioned it is clear that there is no truth in this argument.

### **7. Tort Whether Simply Overlooked**

The next logical progression would be to determine whether tort law has been simply overlooked. The development of the absolute liability rule in the M.C. Mehta case and the Supreme Court's direction on Multi national corporation Liability, recognition of Governmental tort by employees of government, principles on legality of State, evolution of tort of sexual harassment, grant of interim compensation to a rape victim, and award of damages for violation of human rights under writ jurisdiction, including a recent Rs.20 crore exemplary damages in the Upahaar Theatre fire tragedy case by the Delhi High Court are significant changes in the tort law of India, which affords a preliminary answer that tort law has not been overlooked.

There have been a number of enactments such as the Public Liability Insurance Act, 1991, Environment Protection Act, 1986, Consumer Protection Act, 1986, Human Rights Protection Act, 1998, Pre-Natal Diagnostics Techniques Regulations and Prevention of Misuse Act, 1994, embodying the new principles of tortious liability in India. The Motor Vehicles Act, 1988 and judicial interpretation continue to contribute to development of accident jurisprudence. The unfortunate Bhopal Gas Leak disaster has triggered a new path of tort jurisprudence, leading to environment tort, toxic torts, governmental torts, MNCs liability, congenital torts, stricter absolute liability, etc. Still the Indian Law Reports furnish in this respect a striking contrast to the number of tort cases before the Courts.

While most branches of law, e.g., crimes, contracts, property, trusts, etc, have been codified, it is interesting to observe that there is yet no code for torts in India. Most of the development in tort law is the contribution of the Indian Judges and lawyers. Though recommendations for an enactment on tort law were made as early as in 1886 by Sir F Pollock, who prepared a bill known as the 'Indian Civil Wrongs Bill' at the instance of the Government of India, it was never taken up for legislation.

Undoubtedly a code is useful, but it is well to recognize that this branch of law is still in the process of growth and while it would be difficult to prepare a code, it would not also help a proper development of the law to do so. Lack of a code for the law of torts acts as a deterring factor for it to branch out as a favored form of litigation. The growth of tort law in India does not even compare to other progressive countries which have put it to much better use as discussed previously.

Acknowledging the fact that a code on torts would be premature for the reasons aforementioned, it would perhaps be wiser to start with enactments on particular topics on which the case-law in India is unsatisfactory and has to be rectified. One of the first recommendations for legislation made by the Law Commission appointed by the Government of India is on the subject of liability of the government for torts of its servants.



Recently the National Commission for Review of Working of Constitution (NCRWC) also recommended a law to give liability of state for torts of its employees in the report of the commission headed by MN Venkatachaliah CJ (2002).

One the other hand the reason why an Indian code on this branch of law is premature is that there is very little tort litigation in our courts and there have not been sufficient opportunities for applying principles evolved elsewhere or evolving principles appropriate to Indian conditions. At present it is a singular circumstance that very few cases of torts go before the Indian courts. However this proves to be a Catch 22 situation as until there is a code for the law of torts not many people will prefer to go to the courts for cases involving torts, as they would not be sure of its outcome.

### **8. Conclusion**

The law of torts in India is definitely not unnecessary but merely requires enactments to make it more ascertainable. Failure of aggrieved persons to assert their legal rights is perhaps to be ascribed not merely to insufficient appreciation of such rights but to other causes as well, e.g., difficulties in proving claims and obtaining trustworthy testimony, high court fees, delay of courts. The elimination of difficulties which obstruct aggrieved parties in seeking or obtaining remedies which the law provides for them is a matter which is worthy of consideration. If these lacunae are removed, India could also witness a growth in tort litigation.

### **References**

1. AIR 1988 SC 1037
2. Jay Laxmi Salt Works (p) ltd. v. State of Gujarat (1994) 4 SCC 1  
Ramaswamy Iyers- The Law of Torts (Ninth Edition), Lexis Nexis Butterworths.
3. M.C. Mehta v. Union of India (AIR 1988 SC 1037), Jay Laxmi Salt Works (p) ltd. v. State of Gujarat (1994) 4 SCC 1
4. Rich v Pilkington (1688) Carth 178
5. Romford Ice Factory v Lister (1955) 3 All ER 460 (CA)
6. Text of Narada cited in Priyanath Sen Hindu Jurisprudence, p 211.