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Applicability of Mental Element in Tort: Comparative Analysis with Crime

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ABSTRACT

Tort is defined under section 2 (m) of the Limitation Act, “tort means a civil wrong which is not exclusively the breach of contract or the breach of a trust”. In this article, we will be dealing with ‘the applicability of mental elements in tort and the comparative analysis with crime. The difference between the mental element in crime and torts, how the mens rea is applied in crime, and how intention, motive, malice, negligence, recklessness, and the other mental elements work in torts. As jurist Salmond defined it – “It is the act and not the motive for the act that must be regarded. If the act, apart from the motive, gives rise merely to damage with legal injury, the motive, however reprehensible it may be, will not supplement that element”. The difference between mental elements in torts and crime and the different types of mental elements in torts will be discussed in depth with various case laws and judicial precedents. The questions to answer in this article are, ‘the importance of mental elements in torts’; ‘how the mental elements differ in crime and torts’ and ‘what significant role do mental elements play in determining tortious liability? The two different types of torts, intentional and unintentional torts will be discussed in depth. The mental element in this article refers to the person’s ‘intention’ to harm any other person by infringing his or her legal rights. The objective of this article is to study the comparative analysis with crime, how the mental element is essential in crime and not that relevant in torts, and vice versa. The article also deals with a critical analysis of the applicability of mental elements in torts and crime.

Keywords: mental elements, tortious liability, Salmond, judicial precedent, crime, and torts.

I. INTRODUCTION

A tort is defined under section 2 (m) of the Limitation Act, “tort means a civil wrong which is not exclusively the breach of contract or the breach of a trust”³. The word tort is derived from the Latin word ‘tortum’ meaning ‘twist’ and implies ‘twisted’ or ‘tortious conduct.’ Many jurists have defined torts as

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³ The Limitation Act, 1963, No. 36, Acts of Parliament, 1963 (India).

Salmond

“Civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligations.”

Winfield

“Tortious liability arises from the breach of a duty primarily fixed by laws, this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.”

Tort principle has evolved throughout the world, whether it's statutory enactments or common law. It is available in the court of India under the doctrine of “justice, equity, and good conscience”; this is by virtue of declaration in section (sec) 9 of the Civil procedure code 1908 (CPC). This gives the court the power to entertain all suits of civil nature which is further supported by the doctrine of civil courts' inherent powers, which is founded upon morality. The case law *Jay Laxmi Salt works Pvt. Ltd. Vs State of Gujarat*⁴ plays a significant role in the evolvement of tort law in India. In this case, the liability of the state was decided for its act of negligence.

The crime constitutes when there is both a guilty mind and guilty action involved. The mens rea, with actus rea makes a crime. There are lot of similarities between torts and crime, which may be confusing so in this article we will be discussing about the comparison of the mental elements in torts and crime and how differently they are applicable.

II. ELEMENTS OF TORTS AND CRIME

ESSENTIAL ELEMENTS OF TORTS

There are three main elements when it comes to the constitution of a tort-⁵

1. A wrongful act by defendant
2. Legal damage to the plaintiff
3. Legal remedies

1. A wrongful act or omission by the defendant

Tort must include an act or omission on the part of the defendant. Act means doing what the law prohibits and omission means not doing what the law requires. In the case of *Rogers v.*

⁴ 1994 SCC (4) 1

⁵ Law of torts, G.S. Pande

Rajendra Dutt⁶ The court held that the act done should be legally wrongful and it must hurt the aggrieved party's legal right.

2. Legal damage to the plaintiff

The damage must be in such a way that the aggrieved party's right must be infringed, and he should suffer some kind of injury. Injury here means 'violation of legal right' whereas damage means some kind of actual loss of money, comfort, service, health, or the like suffered by a person.

There are two types of maxims that deal with this-

a. Damnum sine injuria

This maxim translates simply to damage without injury, which means the party has suffered damages which is not a legal injury. In the case Gloucester Grammar School case⁷, where the defendant had opened a school that rivalled the school of the plaintiff due to which the plaintiff had to decrease the rate of fee, leading them to financial loss. Court held that this type of financial loss has no remedy in the law as the plaintiff's right has not been infringed.

b. Injuria sine damnum

This maxim translates simply to injury without damage, which means the party's legal right has been infringed but he has not suffered from any damage. In the case of Ashby v White⁸, the court held that the legal right of the plaintiff was infringed by not letting him vote and the defendant will be held liable even though there has not been any damage.

3. Legal remedies

This can be understood by the legal maxim 'Ubi jus ibi remedium' which simply translates to where there is right there is a remedy. In the case of Ashby v White where the court held the defendant liable even though there has not been any damage just because the right was infringed. In the case of Bhim Singh v state of Jammu and Kashmir⁹, the petitioner's right under article 21 of the Indian constitution was violated. The supreme court held the defendant liable and awarded rs.50,000 as a legal remedy.

ESSENTIAL ELEMENTS OF CRIME

There are 4 major essential elements of a crime¹⁰:

⁶ (1860) 8 M.I.A. 103; 13 Moor, P.C. 219.

⁷ 1410 Y.B. 11.

⁸ (1703) 92 ER 126, (1703) 2 Ld Raym 938

⁹ Air 1986 Sc 494

¹⁰ Indian penal code, by T Bhattacharya

- a. Human being: the wrongful act or omission must be done by a human being, which means that if an injury is caused by an animal, the owner of the animal is held liable instead of the animal
- b. Mens Rea: mens rea or any act done with the guilty intention constitutes a crime which means that if there is no guilty intention behind doing an act then it does not amount to a crime.
- c. Actus Rea: a guilty mind or intention alone does not constitute a crime, there must be an actus rea or guilty act or omission in order to constitute a crime
- d. Injury: harm should be caused to someone or their property in order to constitute a crime.

In the case *R v. White*¹¹, the defendant put poison in his mother's drink with the intention of killing her. After some time, the mother was found dead. The reason for her death in the medical evidence was a coronary failure. The court held that the defendant was not liable for murder.

III. MENTAL ELEMENTS OF TORTS AND CRIME AND ITS COMPARATIVE ANALYSIS

MENTAL ELEMENT IN TORT

There are three types of mental elements in torts namely¹²:

- a. Intention:

Intention is when the defendant commits the deed intentionally with the full knowledge and the desire for the consequence. In simple language, intention implies knowledge of conduct and consequence and the desire for the consequence. Thus, the law decides the liability from the desire and ascertains the intention of a person from his conduct. There are two types of intention

1. Intentional tort

Types of intentional tort are

- a. Battery it happens when a person with the intention to harm the person without his consent by applying force or purposely touching. A battery is told to be constituted when there is intention, contact, harm, no consent, and no lawful justification.

¹¹ [1910] 2 KB 124

¹² <https://www.lawyersclubindia.com/articles/mental-elements-essentially-in-tort-5116.asp>

- b. Assault it is a planned attempt to violently harm a person. An assault is said to be constituted when an act or conduct is intended to create, a reasonable apprehension, of imminent harm.
- c. False imprisonment when a person intentionally restricts another person's from exercising his freedom is known as false/wrongful imprisonment. False imprisonment is said to constitute when there is a probable cause of imprisonment, the plaintiff has the knowledge for the imprisonment, the intent of the defendant during imprisonment, and the confinement period. (The wrongful confinement is defined under sec 340 of IPC)
- d. Trespass it is an intentional unreasonable interference with one's person or property, it is said to be an action that exceeds the limit given by the law. There are two types of trespass, trespass against a person and trespass against a property.

Thus, an intentional tort is where the wrongdoer has the intent to infringe the right of another person and has the desire to harm the other person. In the case of *Bhim Singh v state of Jammu and Kashmir*, the court observed that the petitioner was falsely imprisoned as it was proven that the police officers had acted deliberately and had mala fide intentions.

2. Unintentional tort

Unintentional tort happens due to an accident caused by a person which was not intentional but has caused another person injury/damage, harm, or loss. The most famous example of unintentional tort is negligence. In layman's language negligence is a breach of a legal duty of care by the defendant which results in undesired damage to the plaintiff. The essentials to constitute negligence are

1. Duty of care
2. The duty must be towards the plaintiff
3. Breach of duty to take care
4. Actual cause or care in fact
5. Proximate cause
6. Consequential harm to the plaintiff

In the case *Donoghue v. Stevenson*¹³ was a landmark judgment after which negligence was established as a tort, whose breach can bring legal action. It was observed that it was the negligence of the manufacturers that the remnant of snails was found in the drink of the plaintiff

¹³ [1932] AC 562

who suffered an injury. This case is famously known as the ‘ginger beer case’, the defendant was held liable to compensate for the damages/injury suffered by the plaintiff.

b. Motive:

A person’s motive is the state of mind that compels him to perform any act. It also refers to the reason for performing any action. According to Salmond “It is the act and not the motive for the act that must be regarded. If the act, apart from the motive, given rise merely to damage with legal injury, the motive, however reprehensible it may be, will not supply that element.” In the case of *Bradford corp. V pickles*¹⁴ the motive was to force the corporation to pay a higher price for the defendant's land or pay him damages which led them to stop the water from flowing freely.

c. Malice:

Malice is a term that has two separate meanings in tort law: malice in fact and malice in law. In some torts, like defamation, malice in law signifies that the tort was done with full knowledge and without justification. The supreme court ruled in the case of *S.R. Venkatraman v. Union*¹⁵ of India that committing a wrongdoing wilfully without justification or without reasonable cause constitutes malice in the legal sense. Malice in fact actually refers to a wrong motive, which includes ill will amongst many other factors.

As stated above there are two separate meanings in the law of torts that are

- Malice in fact

The term malice means evil or improper motive, malice in fact is known as ‘actual malice. When the wrongdoer has done an act with any ill will or in vengeance towards the plaintiff it is said to be done maliciously. Malice is often told to be done to satisfy personal enmity. In the case of *Town Area Committee vs Prabhu Dayal*¹⁶, the supreme court held that the motive is irrelevant when the act which is done is legal.

- Malice in Law

Malice in law signifies that the tort was done with full knowledge and without justification. In the case of *Melia v Naete*¹⁷, Justice baron Bramwell defined malice in law as disinterested rancour. He said that it can be said as intention to do an illegal act.

¹⁴ (1895) AC 587

¹⁵ AIR 1954 SC 375 (G)

¹⁶ AIR 1975 All 132

¹⁷ 176 E.R. 347

THE MENTAL ELEMENT OF CRIME

Unlike tort law, the mental element is very essential in crime, the maxim 'Et actus non facit reum nisi mens sit rea'¹⁸ which means that an act does not make a man liable for a crime until he has a guilty mind. In layman's language, it means that a crime can constitute only when the guilty action is backed up by a guilty mind.

In the case of *R v Khan*¹⁹, where the accused hit the head of the victim with the intention of killing him, which rendered the victim unconscious, and then the accused burned down the house believing that the victim is dead due to which the victim died. The court viewed the case in two parts 1st stage where he hit the victim, where there was a guilty mind but no guilty action as the victim has not died then the 2nd stage where he burned the house where he had no intention of killing but the victim died due to the burning, meaning the guilty action took part. The accused was not held liable for murder. Whereas in the case of *Meli and others v R*²⁰ the court took both stages as one. Where there was an intention of killing the victim by giving a blow to his head which rendered him unconscious and the defendants believing him to be dead threw him off the cliff which killed the victim and thus the guilty action took place. Here in this case the court held the accused liable for murder.

IV. COMPARATIVE ANALYSIS OF MENTAL ELEMENTS IN TORTS AND CRIME

The mental element in crime is one of the main essentials whereas the mental element in tort is not that relevant. The case laws can further explain this.

In the case *Ravule Hariprasada Rao v State*²¹, the supreme court held that until and unless the legislation expressly denies and states that mental element is not important in constituting a crime, no one should be held guilty for an if they do not have intention to do so.

Whereas, in the case of *Wilkinson v. Downton*²², the defendant in order to prank the plaintiff, told her that her husband had an accident and has been hospitalized, this led to the plaintiff being shocked and ill. Later the plaintiff sued the defendant under tort asking for damages. The defendant stated that he did not want to cause any harm to the plaintiff and his intentions were only to joke. The court denied the appeal of the defendant and held him liable and observed that intention is not an essential factor in tort.

¹⁸ Indian penal code, by T Bhattacharya

¹⁹ I.L.R. 15 Bom. 194

²⁰ [1954] 1 WLR 228

²¹ 1951 AIR 204, 1951 SCR 322

²² EWHC 1 (QB), 2 QB 57

In the case of *Sweet v Parsley*²³ the House of lords said that the applicant had no knowledge that her farmhouse was used for smoking of cannabis (which she was sentenced for). So as the mens rea was absent and as to commit a crime mental element must be present her appeal was accepted.

In the case of *Vishnu Basudeo v. T.H.S Pearse*²⁴ the court held that if the act is legal then the motive and malice becomes non relevant. The court said that the thing which matters the most is the legality of an act if it is legal or not, and if it is the motive is insignificant.

In the case of *R vs Prince*²⁵, the defendant was held liable as the mistake of fact is not a defence and kidnapping a 14-year-old girl is unlawful. The crime which is committed does not require any knowledge of the fact and thus the defendant was convicted.

Thus, the applicability of mental element is different in both Torts and crime due to reasons like

1. The mental element is necessary in few types of torts whereas it is necessary in every type of offenses except for those which are done against the state, statutory rape, counterfeiting. In the case of *R v Tolson*²⁶, it was held that²⁷ “The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition.”

2. In crime the main goal is to punish the wrongdoer whereas in torts the main goal is to redeem the right of the injured party which was infringed.

V. CONCLUSION

There are so many classifications in torts regarding the mental element like intentional or unintentional torts, Motive, and malice which are also divided into sub-categories, and in crime, the mental element comes under mens rea. The tort is a civil wrong where the mental element may not be of that relevance but in crime, the crime is said to be done when the mens rea and actus rea are present.

In our opinion the different application is needed as the highest punishment which can be given to the wrongdoer is death penalty in crime whereas in tort the punishment is to compensate the

²³ [1970] AC 132

²⁴ AIR 1949 NAG 364

²⁵ (1875) LR 2 CCR 154

²⁶ (1889) 23 QBD 168, 187

²⁷ <https://www.iclr.co.uk/knowledge/glossary/mens-rea-and-actus-reus/>

damages (in monetary value) and if there is imprisonment the act constitutes a crime. Now as the punishment is of death penalty when it comes to crime it is very much necessary to know whether the person had a guilty intention or not as it can lead to him losing his life

To conclude, this article helps to understand and differentiate between the mental elements of Torts and crime and how it is applicable in the same. There is a lot of similarity between the two, so we hope that this article comprehends some knowledge on the mental element of the two. The knowledge of the act for which a person is being convicted is also important if the person has the knowledge of the act, then he will be held liable and if not then he will not be held liable. The legality of the act is also important if the act is done maliciously but is lawful then the defendant will not be held liable. An act done against any minor does not need to have knowledge as statutory kidnapping or rape is unlawful and the defendant will be held liable even with the consent of the minor as the mistake of the fact is not a defence.
