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## CONTRACTUAL VS TORTIOUS LIABILITY

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### ABSTRACT

*The division of contract and tort around the concept of liability can be defined as a formative phase in the history of Contract and Tort Law. Contract law governs only the parties relevant to it whereas Tort law governs every person in the world. Tortious obligations are imposed by law, whereas contractual obligations come from the parties' agreement.*

*Varying elements in both are perplexing at the very first glance. The most horrifying thing for most individuals is being stuck in the traditional predicament of replying to a suit in which they rarely understand the phrases stated. For a layperson, being told they are liable under contract or tort law would be the biggest shock. Nevertheless, this article aims to clarify the differences between the liabilities under the two laws, which will come as a relief to many who are unsure what they are or whether they represent the same thing. The goal of the article is to search and make the clearest distinction possible between the liabilities under contract and tort laws. While the fundamental difference in both maybe the consent, but there is much more to be.*

### INTRODUCTION:

Contract law was developed for identifying various rights and responsibilities of the parties who enter into contracts. Whereas, tort law was developed to identify duty of the general public to keep an eye on the type of social behaviour that is acceptable. Therefore, while contract law is responsible for the attitude and obligation of the parties toward one another, tort law is responsible as to how one party should be acting toward another party<sup>2</sup>. While these concepts are completely unique, both laws do have certain statutes of limitations; tort law provides a shorter statute of limitations than contract law. Also, the damages in both the laws are different. Tort law has provision of punitive damages which is mostly not available for contract law.<sup>3</sup>

### 1. Tortious Liability

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<sup>2</sup> *Contractual Liability*, 2 ROM. ARB. J. 81 (2008).

<sup>3</sup> F. Maxwell Bradshaw, *The Foundations of Tortious Liability*, 1 RES JUDICATAE 320 (1935).

Tort is a civil injury. These are rights available to people against the whole world. Tortious liability is applied when a breach of duty happens which is given in the law, and the duty with regard to the people against whom the breach has been caused brings the action for damages. There are some basic elements required for establishing this liability. To hold the person who has breached the duty liable, it is important that all the conditions are fulfilled. There are various constituents to the tortious liability.<sup>4</sup>

## 2. Wrongful Act

It is pretty clear that to constitute a tortious liability, there should be commission of a wrongful act. The act commissioned should be against the recognized law, not some social or moral wrong. Not just that, even omission of certain acts can lead to the breach of duty. Thus, the commission or omission of an act when leads to violation of rights of a person, then the person that caused the violation is liable. It is significant to understand that failing to do an act properly does not constitute omission, but not doing the act completely constitutes it. For example: if an architect builds a house and in doing so, the design of the staircase is faulty or different, then it does not constitute omission. The liability due to omission of an act occurs only when there is a “duty to act”. This can be explained by using an example: If a kid is drowning in water, and if someone who knows how to swim is present around and does not come up for rescuing him, he will not be held liable because he does not have any duty towards the kid. However, if the guardian or mother/father are present and fails to try to rescue the kid from drowning, they would be held liable in the law of torts due to the presence of duty of care. In an event when there is no duty of care to rescue someone, but the person still tries to do that, he or she can be held liable if they end up worsening the situation even more.<sup>5</sup>

## 3. Legal Damage

The act or omission should cause injury or damage to someone. Damage is the harm or loss suffered by the plaintiff due to the wrongdoing of the defendant. It is the responsibility of the plaintiff to prove that some damage has been caused to him because

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<sup>4</sup> Saloni Aggawrwal, *Law of Torts and Its Justification*, LEGAL SERVICE INDIA (August 4, 2021, 10:00 AM). <https://www.legalserviceindia.com/legal/article-6237-law-of-torts-and-its-justification.html>.

<sup>5</sup> Yvonne Oldfield, *Negligence on the Job: All Care and No Responsibility?*, 37 WLR, 47, 67 (2013).

of the defendant. Legal damage occurs only when the legal right has been infringed. No damage is actionable for social or moral damage.

This can be explained using the phrase “Damnum sine injuria”. Injuria Sine Damno’ in Latin, which means ‘injury suffered without an actual loss. It means violating someone’s legal right without causing any harm or damage. But the question is that when no legal right is infringed but the damage is caused to someone then how is it not justified? This question was raised by a leading case of Gloucester Grammar School.

### **3.1 FACTS**

In the given case, the defendant was a school teacher in the plaintiff’s school. Due to some clashes, the defendant had to leave the plaintiff’s school and he set up a rival school next to the school of plaintiff. As the defendant was one of the favourite teachers of the students, students from the school of plaintiff left it and shifted to the defendant’s school. The plaintiff sued the defendant for the monetary loss caused. The plaintiff, because of the new school had to reduce his fees from 40 pence to 12 pence. Therefore, he claimed for compensation from the defendant for the damages caused.

### **3.2 JUDGEMENT**

It was held that there was no ground to held the defendant liable even if his actions have caused monetary loss to the plaintiff. The defendant has a right to set up a school or practice any profession he desires to as long as it is legal and is not violating anyone’s legal right. The plaintiff could not prevent anyone to run a business just because it gives competition to his own.

### **3.3 CASE ANALYSIS**

The case we are discussing is related to ‘An act which caused damage but no legal right is infringed or compromised’. The plaintiff had suffered considerable damages but bona fide competition can afford no ground of action. No remedy was available to the plaintiff as the act though was morally wrong but did not cause any violation of legal right.<sup>6</sup>

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<sup>6</sup> Gloucester Grammar School Case, (1411) Y. B. 11 Hen. 4.

In another landmark case of *Ashby v. White*<sup>7</sup>, voter was the complainant who was wrongfully declined by the defendant to vote. Although the candidate whom he wanted to vote, won the election he was held liable because there was violation of legal right.<sup>8</sup>

### 3.4 REMEDY

The commission or omission of an act are of kind of a nature that a legal remedy can be applied. Legal remedy is another significant element of tort. The action should be of such a nature that it falls within the criteria of civil damage action.

## 4. Torts and Its Classifications

It can be classified into following categories:

### a. Nuisance

In the law of Torts, it can be defined as unreasonable interference to someone's enjoyment or usage of land. It can be caused by different ways such as playing loud music or escaping of smoke from someone's house and entering another's. For example, your neighbour plays loud music at unreasonable hours which causes you disturbance. The act would make him liable for the tort of nuisance. Nuisances can be of two kinds; Private nuisance and public nuisance. Private nuisance is a civil wrong, while public nuisance is a criminal wrong and a person cannot file a civil suit against a person who has committed the criminal act of public nuisance.<sup>9</sup>

### b. Negligence

It happens when careless act cause injuries to someone. However, in order to prove it certain conditions need to be fulfilled. Whether or not, defendant owed a duty of care to the plaintiff? If yes, then did he fail to perform it? If answer is yes again, then did this failure caused damage to the plaintiff? If the following conditions are fulfilled, the defendant can be held liable.<sup>10</sup>

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<sup>7</sup> *Ashby v White* (1703) 92 ER 126.

<sup>8</sup> Riya Kumar, Gloucester Grammar School Case: Case Comment INDIAN LEGAL SOLUTION (August 2, 2021, 3:13 PM), <https://indianlegalsolution.com/gloucester-grammar-school-case-case-comment/>.

<sup>9</sup> Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2(1) LAW AND PHILOSOPHY, 37, 37 (1983), <https://www.jstor.org/stable/3504649>.

<sup>10</sup> Richard Posner, *A Theory of Negligence*, 1(1) JLS, 29, 35 (1972).

**c. Trespass**

It occurs when someone, without permission enters someone's land. This is called trespass to land. Another one in this category is trespass to the body. When someone either threatens or actually use the unlawful force against a person, he is liable for trespass.

**5. Contractual Liability**

Contractual liability occurs when one party to the contract agrees to pay against any damages or losses caused by third party. This is helpful when role of one or more parties is necessary. To form a valid contract, it is important to fulfil certain conditions:

**a. Offer**

There should be an offer by one party to others.

**b. Acceptance**

The contract become binding when it is accepted by the party on the conditions mentioned in the contract.

**c. Consideration**

It is the important information about the contract such as prices and details of the goods.<sup>11</sup> To form a valid contract, it is important that the parties to the contract has entered it voluntarily, and were not forced to enter into it. None of the parties should have been induced to sign it and the parties should be competent biologically and mentally to sign a contract. Following are the reasons when a contract can be held void:

1. Someone who is a minor, that is under the age of 18.
2. A person who is intoxicated with alcohol or drugs
- 3 A person who is mentally not competent, i.e., mentally handicapped

The doctrine of privity in a contract is a common law principle which states that only parties to a contract are allowed to sue each other to enforce their rights and liabilities and no stranger is allowed to confer obligations upon any person who is not a party to contract even though contract the contract have been entered into for his benefit. It is

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<sup>11</sup> *Supra* note 2.

based on the interest theory which states that only the person who has interest in the contract is entitled for the protection of his rights as per the law.

For example: if A and B has entered into contract for selling of a bike, then if A breaches the contract, only B has the right to sue him and no one else.

In the case of *Tweddle v. Atkinson*<sup>12</sup>, John Tweddle had a son named William Tweddle. John had an agreement with a man named John Guy that William will marry his daughter against the consideration that he will pay €100 to William. The contract had specific clause stating that in failing to fulfil the given condition he had a right to sue for enforcing of the contract. Both John Tweddle and John Guy dies after marriage. William Tweddle sued for the enforcement of the contract. His claim failed as he was not the party to the contract.

## **6. Attributes of Privity of Contract**

1. Two parties entered a contract: - most significant feature is that the contract has been entered by two or more parties.
2. The parties entering the contract should be competent and existence of valid consideration is essential: - no valid contract can be formed without these two.
3. One party should have breached the contract: - to apply doctrine of privity, one party must have breached the contract.
4. Only parties to the contract are allowed to sue each other: - once a contract is breached, only parties to the contract can sue each other.<sup>13</sup>

## **7. Similarities between Contract and Tort law**

Contract law and tort law, as previously stated, are both aspects of civil law. They specify how a person can conduct a civil wrong that can result in liability for injury to another person, property damage, or other interests. Both violation of contract and breach of duty of care result in the injured person being liable for monetary damages to compensate them for the harm they have suffered.

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<sup>12</sup> *Tweddle v Atkinson* (1861) 121 ER 762.

<sup>13</sup> *Supra* note 2.

As previously stated, whether the breach is written or oral, express or implied, in contract law, it is a breach of contract. It occurs when one party fails to deliver on a contract's promise of performance.<sup>14</sup>

A breach of duty in tort law refers to a violation of one party's duty of care to another. A tort claim based on negligence, for example, is the most common sort of tort claim. In order to win a negligence lawsuit, the affected party must show that the defendant violated a duty of care due to them, and that the breach resulted in their injuries or losses.

Alternatively, a person filing a product liability claim must demonstrate that a product was defective and caused their injuries or property damage. The companies that manufactured and disseminated the faulty goods are liable for monetary damages.

The payment of money damages to compensate the party who has been injured is the primary form of remediation in all three circumstances, breach of contract, carelessness, and strict liability.

## **8. Distinction between Tortious and Contractual Liability**

There is a clear boundary between the tort and contract law. In a contract, consent of the person entering the contract is important. The consent should not be caused due to coercion or undue influence which will render the contract invalid. In torts, consent does not matter. In the contracts, privity of parties is necessary whereas there is no law of privity in the torts. A tort is violating a right of a known person or even a stranger walking down the road or it may be inflicted upon the world at large. It is the violation of right in rem. If there is a breach of contract the loss or damage is caused to only other party to the contract. It is the violation of right in personam. The duty in torts is fixated by the law whereas in a contract the duty and conditions are decided by the parties. Claim for unliquidated damages are contained in the torts whereas in contract law, liquidated damage can be claimed. When a contract is breached, compensation is provided as per mentioned in the terms of the contract. In torts although, punishment is mostly the same. No place for motive and consideration is present in contracts though both consideration and motive or intention is present in torts.<sup>15</sup>

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<sup>14</sup> *Supra* note 4 at p 375.

<sup>15</sup> *Supra* note 4 at p 380.



We can see difference between liability in tort law and contract law as:

- a. **Damages:** liability in torts is never quantifiable in nature whereas liability in contract law can be quantifiable.
- b. **Rights:** the rights which are violated and breached under torts are the right in rem which means they are mostly against the society whereas in contract law, it is against a person only which is right in personam.
- c. **Cause:** cause in torts is insignificant to be considered whereas in contract law, it is very important.
- d. **Scope:** the scope of liability in torts has no limits while scope in contractual law is limited.
- e. **Remedy:** remedies available in torts law to the aggrieved is mostly compensation and in contractual law, it is restoration.<sup>16</sup>

## 9. Difference of Duties

To begin with, tortious obligations are imposed by law, whereas contractual obligations come from the parties' agreement. As a result, the principle of freedom of contract underpins contract law: parties are the best judges of their own interests, and if they freely and voluntarily entered into the contract, the law's sole duty is to enforce it. The contract's validity should not be questioned on the grounds that its effect was "unfair" or "socially undesirable," as long as it was not "really illegal or immoral, in the strict sense." However, this distinction is not irrefutable.

Many tortious duties, for example, are willingly 'assumed' by the defendant choosing to enter into a relationship with the plaintiff — most notably, when considering cases of irresponsible professional misstatements." Furthermore, it is possible to argue that some contractual obligations, such as the duty of trust and confidence in the employment context," are enforced by law rather than agreed to by the parties." The contractual obligation of care is another example. In the lack of stated provision, the contractual responsibility is inferred in law as a result of the nature of the contract.

In contrast to being drawn from the parties' choice and consent, an implied term in law is imposed on them. Nonetheless, for the sake of general analysis, knowing that tortious duties are imposed and contractual duties are undertaken is helpful.

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<sup>16</sup> Adam Slavny, *Nonreciprocity and the Moral Basis of Liability to Compensate*, 34 (3) OJLS, 417, 420 (2014), <https://www.jstor.org/stable/24562854>.

Second, contractual obligations are owing to a specific person or group of people (in personam), whereas tortious obligations are owed to all people (in rem)." The objective of contract law, according to Burrows, is to "fulfil the expectations aroused by a binding promise," which entails preserving the plaintiff's expectation interest by placing him "into as good a position as if the contract had been completed."

The goal of tort law, on the other hand, is to protect the defendant's status quo claim by putting him "into such good a position as if no harm had occurred." The explanation for this discrepancy, according to Burrows, stems from the dichotomy described above: because tortious liability is imposed, responsibility for failing to benefit would be an excessive imposition of human liberty.<sup>17</sup> This distinction, however, should not be taken too literally.

The varied rules that apply to tortious and contractual claims are accounted for by these conceptual contrasts, such as the assessment criteria guiding compensatory damages for each regime of liability or the limitation periods for enforcing the claims. As a result, if we recognise the possibility of concurrent claims, we must explore the subsequent question of which set of rules should apply, which is known in the concurrent liability literature as the issue of incidental rules. To be clear, when we say "cases of concurrent claims," we don't just mean situations in which the plaintiff is pursuing both contractual and tortious claims.<sup>18</sup>

Although a plaintiff has the option to do so, the principle against double recovery requires the plaintiff to choose between the remedies available under the two claims. We also consider examples in which the plaintiff has taken a strategic decision depending on which set of rules is most favourable before starting legal procedures to bring only one claim against the defendant.<sup>19</sup> Even in these cases, the subject of 'incidental rules' must be considered. The interaction of the incidental norms in contract and torts is thus at the heart of the current state of ambiguity surrounding concurrent liability.

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<sup>17</sup> *The Path of the Law*, 10(8) HARVARD LAW REVIEW, 457, 462 (1897).

<sup>18</sup> John Gardener, *Tort Law and Its Theory*, OLSR, 1, 5 (2016).

<sup>19</sup> Michael Pesce and Matthew Varacallo, *Tort and Liability*, STAR PEARLS (2018).

## 10.Can A Claim of Contract and Tort Be Filed for the Same Lawsuit?

It is conceivable to file a civil lawsuit in which various causes of action are asserted under both contract and tort law. In some situations, the facts of the case may warrant both a tort and a contract action.<sup>20</sup> A breach of contract claim and a tort claim both require the components to be present and justified by the circumstances. That would imply that the parties had made a contract, which one of them had broken.

In the situation of strict product liability, both a tort claim and a breach of contract claim could be brought in the same action. Liability is a tort-based cause of action.

A contract between the purchaser and the seller of a damaged goods is common, and it may include a warranty of some sort. As a result, the purchaser of the defective product may sue for breach of warranty, a sort of contract claim, as well as strict product liability, a tort claim.

Tort and contract lawsuits are frequently pursued separately due to the differences in the responsibilities owed, the damages sought, and the components required to establish a tort and contract claim.

## CONCLUSION

We can easily distinguish between tort and contract and their respective liabilities by plain reading of both. In torts law, the duties are fixed by the law whereas in contracts the parties fix the conditions. Torts law is applicable to everyone but contract law isn't. Many cases have been explored to learn about the two laws individually and using the information, differences have been formed. The two laws though very different, are significant for the proper functioning of the world and to maintain a specific rule of conduct. Tort and contract law contains many elements and classifications which makes the topics very wide and deep.<sup>21</sup> One punishes for the rights violated against the whole society while other deals with the rights violated against one person or party. Remedies available are also different for both. Torts provide for compensation and contract for restoration. Existence of intent is important in one and absence of which is insignificant in other. Law of torts covers crimes such as trespass, negligence etc.

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<sup>20</sup> Alora Johnson, LEGAL SCHOLARSHIP NETWORK, 6(18) WLR (2016).

<sup>21</sup> *Key aspects of the law of contract and the tort of negligence*, ACCAGLOBAL (August 4,2021, 11:30 PM). <https://www.accaglobal.com/my/en/student/exam-support-resources/fundamentals-exams-study-resources/f4/technical-articles/key-aspects-of-the-law-of-contract-and-the-tort-of-negligence.html>.

and law of contracts covers various agreements like rental agreement or sale agreements.<sup>22</sup> All in all, two are very different in approach, punishment and remedies from each other and careful examination have been done through this research paper.

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<sup>22</sup> Brown, Sarah. "Difference Between Contract and Tort." *Difference Between Similar Terms and Objects*, 24 June, 2019, <http://www.differencebetween.net/miscellaneous/legal-miscellaneous/difference-between-contract-and-tort/>