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DISTINCTION BETWEEN TORT AND CONTRACT: A FUNCTIONAL AND JURISPRUDENTIAL STUDY

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ABSTRACT

Tort law and contract law constitute two essential pillars of civil law, governing private relationships and defining the rights and duties of individuals. While both legal frameworks provide remedies for civil injury or loss, they operate on distinct principles and differ in terms of their source of obligation, scope of application, and legal outcomes. In contemporary legal practice, the lines between tortious liability and contractual liability have at times intersected, giving rise to interpretative challenges and scholarly debate. This research paper presents a functional and jurisprudential examination of the distinction between tort and contract by analysing their conceptual foundations, core elements, available remedies, and judicial treatment. The study underscores the importance of preserving a clear doctrinal separation between these two branches of law to promote consistency, fairness, and certainty in the resolution of civil disputes.

Keywords: Tort, Contract, Civil Responsibility, Negligence, Breach of Agreement, Jurisprudence

INTRODUCTION

Civil law regulates legal relationships between private individuals by defining rights, duties, and remedies in cases of civil injury or infringement. Within this broad framework, the law of torts and the law of contracts occupy a pivotal position, as both address civil liability and provide mechanisms for redress when legal obligations are breached²⁸⁷. Despite this shared objective, the two branches are founded on fundamentally different legal principles. Contractual liability is rooted in the voluntary consent of the parties, arising from promises that are legally enforceable under law, whereas tortious liability is imposed by operation of law, independent of any agreement, to protect individuals from harm caused by wrongful acts or omissions.²⁸⁸ In contract law, obligations are specific, predetermined, and confined to the

parties to the agreement, while in tort law, duties are generally owed to persons at large and are shaped by broader considerations of social responsibility and public interest. Over time, the distinction between tort and contract has become increasingly complex, particularly in cases involving negligence, professional liability, and commercial transactions, where a single act or omission may simultaneously constitute a breach of contractual duty as well as a tortious wrong.²⁸⁹ This overlap has generated significant judicial interpretation and jurisprudential debate, especially concerning the appropriate classification of liability and the nature of remedies to be awarded. As a result, a functional and jurisprudential examination of the distinction between tort and contract becomes essential not only to clarify their conceptual boundaries but also to ensure legal certainty, coherence in judicial reasoning, and

²⁸⁷ Winfield & Jolowicz, *Tort* (20th edn., Sweet & Maxwell 2021).

²⁸⁸ The Indian Contract Act, 1872, s 2(h); Ratanlal & Dhirajlal, *The Law of Torts* (27th edn., LexisNexis 2022).

²⁸⁹ *Donoghue v Stevenson* [1932] AC 562 (HL); *M.C. Mehta v Union of India*, (1987) 1 SCC 395.

fairness in the adjudication of civil disputes within a modern legal system

CONCEPTUAL FRAMEFORM OF TORT AND CONTRACT

➤ MEANING AND NATURE OF TORT

The law of torts deals with civil wrongs that arise independently of any contractual relationship and result in harm to a person, property, or legally protected interest. Tortious liability is imposed by law for the breach of a duty that exists towards society at large, rather than towards a specific individual by agreement.²⁹⁰ This principle was clearly articulated in *Donoghue v Stevenson*, where the court recognised a general duty of care owed to one's neighbour, thereby laying the foundation for modern negligence law. The objective of tort law is primarily compensatory, aiming to redress the injury suffered by the aggrieved party through unliquidated damages assessed by the court. In addition, tort law also serves a preventive and deterrent function by discouraging socially harmful conduct and promoting responsible behaviour. In certain cases, Indian courts have also extended tortious liability to uphold constitutional and environmental rights, as seen in *M.C. Mehta v Union of India*, where liability was imposed to protect public safety and welfare.²⁹¹

➤ MEANING AND NATURE OF CONTRACT

In contrast, the law of contracts governs obligations that arise out of voluntary agreements entered by parties with the intention of creating legally enforceable relations. According to Section 2(h) of the Indian Contract Act, 1872, a contract is an agreement enforceable by law, and the rights and duties of the parties are

determined by the terms of the agreement itself. Contractual liability is therefore founded on consent, and the obligations are specific and limited to the contracting parties. The principle of privity of contract, as reaffirmed in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*, establishes that only parties to a contract can enforce its terms. Remedies in contract law are designed to enforce promises or compensate for losses arising from breach, rather than to punish the wrongdoer. Indian courts have consistently upheld this approach, as reflected in *Hadley v Baxendale*²⁹², which laid down the rule for determining the extent of damages recoverable for breach of contract.

Although tort and contract are distinct branches of civil law, their application may sometimes overlap, particularly in cases involving negligence arising from contractual relationships. In such situations, the same act or omission may give rise to both contractual and tortious liability, depending on the nature of the duty breached. The House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* recognised that a duty of care in tort may exist independently of contractual obligations, especially where negligent misstatements cause economic loss. Similarly, Indian courts have acknowledged that the existence of a contract does not necessarily exclude tortious liability if an independent duty imposed by law is violated. This overlap necessitates a clear conceptual distinction between tort and contract to determine the appropriate legal framework, standard of liability, and remedies applicable in civil disputes.

²⁹⁰ *Donoghue v Stevenson* [1932] AC 562 (HL); *M.C. Mehta v Union of India*, (1987) 1 SCC 395.

²⁹¹ The Indian Contract Act, 1872, s 2(h); *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL); *Hadley v Baxendale* (1854) 9 Exch 341.

²⁹² *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

SOURCE OF OBLIGATION IN CIVIL LIABILITY: CONSENT BASED DUTIES AND LAW IMPOSED RESPONSIBILITIES

A fundamental jurisprudential distinction between the law of contract and the law of tort lies in the source from which legal obligations arise, namely consent in contract and operation of law in tort. In contract law, liability is consensual in nature, as obligations come into existence only when parties voluntarily enter into an agreement with the intention of creating legal relations, and such obligations are confined to the terms expressly or impliedly agreed upon by them.²⁹³ The binding force of a contract is therefore derived from the mutual assent of the parties, and liability for breach arises only when a party fails to perform what has been promised. In contrast, tortious liability is not dependent on the consent or agreement of the parties but is imposed by law to protect individuals and society from harm caused by wrongful acts or omissions.²⁹⁴ The duties in tort are general in nature and are owed to persons at large, reflecting broader considerations of public policy, social justice, and prevention of harm. Even in the absence of any contractual relationship, a person may be held liable in tort for negligence, nuisance, defamation, or other civil wrongs if their conduct results in legally recognisable damage. This distinction was firmly established in judicial reasoning, particularly in cases recognising a duty of care independent of contractual obligations, thereby reinforcing that tort law operates as a mechanism of social control rather than private agreement.²⁹⁵ The divergence between consent-based liability and law-imposed responsibility thus highlights the distinct functional roles played by contract and tort within the civil justice system, while also explaining why tortious liability may coexist alongside contractual obligations in certain circumstances.

NATURE OF DUTY IN CONTRACT LAW AND TORT LAW

The nature of duty constitutes one of the most significant points of distinction between the law of contract and the law of tort, as it determines both the scope of liability and the class of persons to whom the duty is owed. In contract law, the duty arises from the voluntary agreement between the parties and is therefore specific, predetermined, and confined strictly to the contracting parties.²⁹⁶ Such duties are defined by the express and implied terms of the contract and are enforceable only by those who are parties to the agreement, in accordance with the doctrine of privity of contract. The contractual duty is thus private in character and depends entirely upon the intention and consent of the parties at the time of entering into the agreement. In contrast, tort law imposes duties by operation of law, independent of any contractual relationship, and such duties are generally owed to the public at large or to a broad and indeterminate class of persons.²⁹⁷ The most prominent example is the duty of care in negligence, which extends to all persons who are reasonably foreseeable to be affected by one's acts or omissions, as laid down in the landmark decision of *Donoghue v Stevenson*. This duty is not limited by agreement but is shaped by considerations of foreseeability, proximity, and public policy. The broader nature of tortious duty reflects the social function of tort law, which aims not merely to regulate private relationships but to prevent harm, promote responsible conduct, and protect legally recognised interests within society.²⁹⁸ As a result, while breach of contractual duty gives rise to liability only between the contracting parties, breach of a tortious duty may result in liability towards any person who suffers legally cognisable harm, thereby highlighting the fundamentally different

²⁹³ The Indian Contract Act, 1872, s 2(h); Pollock & Mulla, *Indian Contract and Specific Relief Acts* (15th edn., LexisNexis 2017).

²⁹⁴ Ratanlal & Dhirajlal, *The Law of Torts* (27th edn., LexisNexis 2022).

²⁹⁵ *Donoghue v Stevenson* [1932] AC 562 (HL).

²⁹⁶ The Indian Contract Act, 1872, s 2(h); *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL).

²⁹⁷ Ratanlal & Dhirajlal, *The Law of Torts* (27th edn., LexisNexis 2022).

²⁹⁸ *Donoghue v Stevenson* [1932] AC 562 (HL); Winfield & Jolowicz, *Tort* (20th edn., Sweet & Maxwell 2021).

character and objectives of duties under tort and contract law.

SCOPE OF RIGHTS AND PERSON AFFECTED

The scope of rights and the category of persons entitled to seek remedies constitute a crucial point of distinction between the law of contract and the law of tort, reflecting their differing legal foundations and social objectives. In contract law, rights are essentially personal and relational in nature, arising solely from the mutual consent of the parties who enter into a legally enforceable agreement under the Indian Contract Act, 1872. As a general rule, only the parties to the contract, or their lawful representatives, can enforce contractual obligations, a principle firmly established by the doctrine of privity of contract. This doctrine ensures certainty and predictability in contractual dealings by limiting liability strictly to those who have voluntarily assumed obligations. Consequently, third parties, even if they derive some benefit from the contract, are ordinarily excluded from enforcing contractual rights unless specific statutory or judicially recognised exceptions apply. In contrast, tort law adopts a broader and more inclusive framework concerning the persons affected, as tortious duties are imposed by law rather than created by agreement. The duty in tort is typically owed not to a specific individual but to an indeterminate class of persons who may be foreseeably harmed by a wrongful act or omission. As a result, any person who suffers legally recognisable injury due to a tortious act may seek redress, irrespective of the existence of a prior relationship with the wrongdoer. This expansive scope reflects the underlying objective of tort law, which is to protect societal interests, prevent harm, and ensure corrective justice. Unlike contract law, where liability is confined and structured by consent, tort law emphasises accountability and social responsibility by extending protection to all individuals whose rights are infringed.

The divergence in the scope of rights and persons affected thus highlights the functional

distinction between contract as a mechanism for enforcing private promises and tort as a system for addressing civil wrongs that impact broader social interests.

NATURE OF DAMAGES IN TORT AND CONTRACT

The nature and assessment of damages form a crucial point of divergence between the law of contract and the law of tort, reflecting the distinct objectives pursued by each branch of civil law. In contract law, damages are primarily compensatory and are intended to place the aggrieved party in the position they would have occupied had the contract been duly performed. Such damages are either liquidated, where the parties have pre-determined the amount payable in case of breach, or unliquidated but calculated on the basis of losses that naturally arise in the usual course of events or were within the reasonable contemplation of the parties at the time the contract was formed.²⁹⁹ This principle ensures certainty and predictability in commercial transactions and limits liability to foreseeable consequences of breach. In contrast, tort law adopts a broader and more flexible approach to the award of damages, as tortious liability arises independently of consent and is imposed by law to redress civil injury. Damages in tort are generally unliquidated and are assessed by the court after considering the nature, extent, and impact of the harm suffered by the claimant, including physical injury, mental suffering, loss of reputation, or damage to property. The primary aim of tort damages is *restitutio in integrum*, that is, restoring the injured party, as far as possible, to the position they were in before the tortious act occurred.³⁰⁰ Furthermore, unlike contract law, tort law recognises the award of punitive or exemplary damages in appropriate cases, particularly where the defendant's conduct is oppressive, malicious, or grossly negligent, with the object of punishing the wrongdoer and deterring similar conduct in

²⁹⁹ *Hadley v Baxendale* (1854) 9 Exch 341; The Indian Contract Act, 1872, ss 73–74.

³⁰⁰ Ratanlal & Dhirajlal, *The Law of Torts* (27th edn., LexisNexis 2022); *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL).

the future. Such damages are rarely available in contractual disputes, as contract law is concerned with enforcing promises rather than penalising misconduct. The differing approaches to damages thus highlight the functional distinction between contract law's focus on enforcing private obligations and tort law's broader role in addressing civil wrongs and promoting social accountability.

REMEDIES AVAILABLE UNDER BOTH THE LAWS

The nature and range of remedies available under the law of contract and the law of tort further underline the functional distinction between these two branches of civil law, as each seeks to achieve different legal objectives through its remedial framework. In contract law, remedies are primarily designed to enforce promises and uphold the sanctity of agreements, reflecting the consensual basis of contractual obligations. The Indian Contract Act, 1872 provides for several remedies in cases of breach, including compensation for loss or damage, specific performance of contractual obligations, injunctions to restrain breach, rescission of contracts, and restitution.³⁰¹ These remedies aim either to compel performance of the contractual promise or to place the aggrieved party in the position they would have occupied had the contract been properly performed. Specific performance and injunctions, governed largely by equitable principles, are distinctive features of contract law and are granted where monetary compensation is inadequate to remedy the breach. In contrast, the law of tort primarily focuses on compensating the injured party for harm suffered as a result of a civil wrong, rather than enforcing any pre-existing obligation. The principal remedy in tort is the award of unliquidated damages, assessed by the court based on the nature and extent of injury, loss, or damage caused by the tortious act.³⁰² While injunctions may also be granted in tort cases—

particularly in matters involving nuisance, defamation, or continuing wrongs—the scope of remedial relief in tort is comparatively narrower than in contract law. Tort law does not ordinarily recognise remedies such as specific performance or restitution arising from consensual obligations, as its primary concern is redressal of harm rather than enforcement of promises. This distinction in remedial structures reflects the broader objectives of the two legal regimes: contract law seeks to preserve certainty and trust in private dealings, whereas tort law aims to restore violated rights and deter wrongful conduct that affects individuals and society at large.

LIMITATION AND DEFENCE

The rules relating to limitation periods and available defences further demonstrate the conceptual and functional differences between the law of contract and the law of tort, as both branches address civil liability through distinct legal mechanisms. In contract law, the limitation period for instituting a suit generally begins from the date on which the breach of contract occurs, since contractual liability arises immediately upon non-performance of a legally enforceable promise. This approach reflects the certainty and predictability that contract law seeks to maintain in private and commercial transactions.³⁰³ The Limitation Act, 1963 prescribes specific time frames within which contractual claims must be brought, failing which the remedy becomes barred by limitation. Contractual defences are similarly rooted in the consensual nature of obligations and include consent, waiver, impossibility of performance, frustration of contract, mistake, misrepresentation, and discharge by performance or agreement. These defences operate to excuse or justify non-performance by demonstrating that the contractual obligation has either ceased to exist or was never validly formed. In contrast, tort law adopts a more flexible approach to limitation, as

³⁰¹ The Indian Contract Act, 1872, ss 73–75; Pollock & Mulla, *Indian Contract and Specific Relief Acts* (15th edn., LexisNexis 2017).

³⁰² Ratanlal & Dhirajlal, *The Law of Torts* (27th edn., LexisNexis 2022); *State of Gujarat v Shantilal Mangaldas*, AIR 1969 SC 634.

³⁰³ The Limitation Act, 1963; The Indian Contract Act, 1872, ss 37, 56; Pollock & Mulla, *Indian Contract and Specific Relief Acts* (15th edn., LexisNexis 2017).

tortious liability often arises from the occurrence of damage rather than from the wrongful act itself. Consequently, the limitation period in tort cases generally commences from the date on which actual injury or loss is suffered, particularly in cases involving latent or continuing harm.³⁰⁴ Defences in tort law are also distinct in character and are closely linked to fault, causation, and public policy considerations. Common tortious defences include contributory negligence, where the claimant's own lack of care has contributed to the harm; act of God, involving damage caused by natural forces beyond human control; inevitable accident; statutory authority; and necessity. These defences seek to limit or exclude liability by showing that the harm was unavoidable, legally justified, or partly attributable to the claimant. The differing rules on limitation and defences thus reinforce the broader distinction between contract law's emphasis on certainty and voluntary obligations and tort law's focus on fault-based liability, social responsibility, and equitable distribution of loss.

OVERLAP BETWEEN TORT AND CONTRACT

In contemporary legal systems, the distinction between tort and contract is not always rigid, as certain factual situations may simultaneously give rise to both contractual and tortious liability, reflecting the evolving nature of civil responsibility. This overlap commonly arises in cases where a contractual relationship exists between the parties, yet the conduct complained of also amounts to the breach of a duty imposed by law, independent of the contract. Professional negligence serves as a classic illustration of this dual liability, where a professional's failure to exercise reasonable skill and care may constitute a breach of contractual obligations as well as a tortious breach of the duty of care owed to the client.³⁰⁵ Courts have consistently held that the mere

existence of a contract does not automatically exclude the application of tort law, provided that the essential elements of tort—such as duty, breach, causation, and damage—are independently established. This principle ensures that individuals are not deprived of tortious remedies merely because their relationship with the wrongdoer is governed by contract. Judicial recognition of this overlap is particularly evident in cases involving negligent misstatements, defective services, and economic loss, where the law has acknowledged that contractual duties and tortious duties may coexist without one extinguishing the other.³⁰⁶ The coexistence of tort and contract in such cases serves important functional objectives: contract law continues to protect the expectations arising from voluntary agreements, while tort law safeguards broader societal interests by enforcing standards of reasonable conduct. This convergence underscores the adaptability of civil liability in addressing complex commercial and professional relationships, while still preserving the conceptual distinction between consent-based obligations and law-imposed duties.

JURISPRUDENTIAL ANALYSIS

From a jurisprudential standpoint, the distinction between the law of contract and the law of tort is deeply rooted in their underlying philosophical justifications and the values they seek to protect within a legal system. Contract law is primarily grounded in the principle of individual autonomy and freedom of will, as it recognises and enforces obligations that arise from the voluntary consent of parties who choose to bind themselves through legally enforceable promises. The emphasis on autonomy reflects the belief that individuals are best placed to determine their own interests and that the role of law is to uphold the sanctity of agreements in order to promote certainty, predictability, and trust in commercial and

³⁰⁴ Ratanlal & Dhirajlal, *The Law of Torts* (27th edn., LexisNexis 2022); *Municipal Corporation of Delhi v Subbaganvi*, AIR 1966 SC 1750.

³⁰⁵ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL); Pollock & Mulla, *Indian Contract and Specific Relief Acts* (15th edn., LexisNexis 2017).

³⁰⁶ *Donoghue v Stevenson* [1932] AC 562 (HL); Ratanlal & Dhirajlal, *The Law of Torts* (27th edn., LexisNexis 2022).

personal dealings.³⁰⁷ In contrast, tort law is founded upon broader notions of corrective justice and social responsibility, as it seeks to address civil wrongs that arise independently of consent and to restore equilibrium disturbed by wrongful conduct. The central concern of tort law is not the enforcement of promises but the redressal of harm caused by the violation of legally imposed duties, thereby ensuring that losses are fairly allocated to those responsible for causing them. Jurists have consistently viewed tort law as a mechanism for correcting imbalances created by negligent or intentional acts and for reinforcing socially acceptable standards of behaviour.³⁰⁸ This philosophical divergence explains why contract law focuses on expectation interests and agreed risks, while tort law prioritises protection against harm and the maintenance of social order. The jurisprudential distinction between the two thus reflects differing conceptions of justice—contract law embodying voluntary obligation and private ordering, and tort law embodying imposed responsibility and corrective justice—both of which are essential to the effective functioning of civil liability in a modern legal system.

CONCLUSION

The distinction between tort and contract is fundamental to the proper functioning of civil justice systems. While both address civil wrongs and provide remedies, they differ in terms of origin, scope, nature of duty, standard of liability, and available remedies. A clear understanding of these differences is essential to avoid doctrinal confusion and to ensure appropriate legal redress. Although modern legal developments have led to areas of overlap, maintaining a conceptual distinction between tort and contract remains crucial for legal certainty, fairness, and effective dispute resolution.

³⁰⁷ Pollock & Mulla, *Indian Contract and Specific Relief Acts* (15th edn., LexisNexis 2017); Charles Fried, *Contract as Promise* (Harvard University Press 1981)

³⁰⁸ Winfield & Jolowicz, *Tort* (20th edn., Sweet & Maxwell 2021); Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995).