

# **RMM LAW COLLEGE SAHARSA**

## **LAW OF TORTS**

### **IIIrd Part**

### **Paper -V**

**TOPIC-** Pigeon Hole Theory – Salmond’s Theory of Law of Torts

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A general question of debate is whether the subject of tort should be called as ‘Law of Torts’ or ‘Law of Tort’. According to Salmond it is law of torts and in his support he proposed the Pigeon Hole Theory.

Salmond in his book asked a question – ‘Does the law of torts consists of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consists of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility?’

In his support we can propose examples, as in *Furniss v. Fitchett* (1958) N.Z.L.R. 396 at 401 Barrow C.J. said ‘the well known torts do not have their origin in any all embracing general principle of tortious liability.’

In *Bollinger v. Costa Brava Wine Co. Ltd.* (1960) ch.262 at 283, Danckwerts J.said ‘ the substance was that before a person can recover for loss which he suffered from another person’s act, it must be shown that his case falls within the class of actionable wrongs.’

Pigeon hole theory: Salmond chose the Second alternative, and as per him the liability under this branch of law arises only when the wrong is covered by any one or the other nominate torts. We can presume these nominate torts as pigeon holes with some specific essentials. If the plaintiff can place his wrong in any one of the pigeon hole, each containing a labeled tort,

he will succeed.

So, there is no general principle of liability. According to Salmond just as criminal law torts consists of a body of rules establishing specific injuries.

### **Law of Tort:**

Winfield on the other hand was the supporter of the first alternative as posed by Salmond in his book. He says, all injuries done to another person are torts, unless there is some justification recognized by law. Thus according to this theory tort consists of not merely of those wrongs which have acquired specific names but also includes the wider principle that all unjustified harm is tortious.

Supporting Winfield's view we can discuss the matter from another point of view. The general meaning of the word tort is wrong. These specific kind of wrong evolved through a process of exclusion of other kinds of wrongs, i.e. criminal or moral wrongs. So the periphery of tort could be narrow down to civil wrong. Further not all civil wrongs are tort, but it becomes so only after the exclusion of breach of contract, breach of trust and other equitable obligations. As the periphery of tort is certain, it could be used as an argument in support of Winfield's view. And to do this we have to ascertain the general principles of liabilities in tort.

Generally the essentials of tort are 1. Act or omission 2. Legal damage or injuria. In addition to this tortious liability is generally based on two premises; i.e. negligence in case of ordinary torts and intention or ill motive in cases of intentional torts such as assault, battery, malicious prosecution etc. here we can mention about the doctrine of 'prima facie tort', developed in America, which could be used as a good support to Winfield's view; as the theory provides for some general principles of liability for tort.

In the 19th century J. Holmes & Pollock developed this doctrine whereby intentional infliction of injury of any kind without justification was made actionable.

Prima facie tort theory: Under the prima facie tort doctrine, a wrong which does not fall within a traditional tort category may nevertheless be actionable if the wrongdoer without just cause or excuse has willfully and intentionally caused injury.

In the final decades of 19th century Pollock and Holmes proposed a general theory of intentional tort, known by the courts as prima facie tort doctrine. That summarized in simple proposition: the intentional infliction of injury without justification is actionable. Holmes & Pollock organized tort into three categories; i. cause of action based on intentional conduct, ii. Cause of action based on negligent conduct, iii. Cause of action based on strict liability.

Holmes saw prima facie tort not merely as another intentional tort, but as the general principle upon which rested all liability for intentional harm. So prima facie tort doctrine is regarded as imposing liability with respect only to conduct not otherwise actionable under any of the nominate torts.

In simple, the common law doctrine; that if a person had a legal right to engage in an activity, one injured thereby, had no cause of action against the actor, regardless of the motive prompting the actor. But this certainty of common law was abandoned by the American jurists with the development of prima facie tort doctrine.

In support of this we can mention the landmark decision of the New Mexico Supreme court in *Schmitz v. Smentowski*, whereby it was said that the prima facie tort is to provide a remedy when alleged conduct does not come within the intendment of one of the established classes of torts. The court also provided the elements of prima facie tort which are

- i. an intentional lawful act by defendant,
- ii. An intent to injure the plaintiff
- iii. Injury to plaintiff
- iv. Absence of justification.

These elements could be seen as the general principles of liability for tort. And if in a case these elements are satisfied the plaintiff can plead prima facie tort in alternative to other established torts. Pronouncement of this judgment provides sound support to Winfield's concept of tort whereby we can assure some general principles of liability for tort cases. And there remains no need to fit every case of tort in one of those nominated pigeon holes.

Further the development of new torts can be used to support Winfield's theory.

For example:-

- i. the tort of inducement to a wife to leave her husband developed in *Winsmore v. Greenbank*
- ii. Tort of deceit in its present form had its origin in *Pasley v. Freeman*.
- iii. Tort of inducement of breach of contract had its origin in *Lumley v. Gye*.
- iv. Tort of strict liability developed in *Rylands v. Fletcher*. Etc.

From the above mentioned cases it becomes clear that the law of tort is a developing subject and we can easily negate Salmond's pigeon hole theory.

To conclude we can quote Holt, C.J. who while giving judgment in *Asbhy v. White* clearly favoured Winfield's theory. He said that, if man will multiply injuries, action must be multiplied too, for every man who is injured ought to have recompense.

At last we should mention that Indian Judiciary also shown a favour to Winfield's theory. In *M.C. Mehta v. UOI* Justice Bhagwati said --- "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 constricted by reference to the law as it prevails in England.... We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence." In the same case the Supreme Court established the concept of absolute liability.