

THE CONCEPT OF TORT LIABILITY IN OLIVER W. HOLMES' LEGAL THEORY

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Abstract

Tort law provides individuals or groups redress for wrongful harm to every dimension of life from personal insult, physical injury to property damage. This study's objective is to appraise Oliver W. Holmes' concept of tort liability. The problem that warrants this study is to determine what should be the ideal purpose of tort liability. Significantly, this study will help individuals who find themselves as plaintiffs or defendants in tortious acts to truly understand the situation and handle it properly. This study's method is analysis. Research findings reveal that, in almost every judicial system, courts adhere to the aged-long Holmesian traditional regulatory scheme of deterrence and compensation. Judges in modern times have not really built upon these ways of approach to torts. In conclusion, the study submits that tort law should not be merely a matter of the state ordering defendants in tortious acts to make amends on debts – liability, repair or compensation – to the victim, despite the fact that most tort plaintiffs are, as might be expected, given damages meant to make indemnifications for their losses or injuries sustained. Primarily, it should be about fortifying or strengthening victims with the legal power to pursue those who have wronged or treated them unjustly. So, tort enables victims inculcate in the minds of culprits that laws are standards for good conducts. It is not entirely for compensation or deterrence, but also to call to the mind of the perpetrator of tortious act that laws are touchstones for his/her action. This does not equate tort with vengeance, rather, it is to appreciate that tort is a refined, civilized and polite alternative to vengeance – a civil resort for plaintiffs, and properly channeled through and cabined by law.

Keywords: Defendant; Jury; Law; Liability; Negligence; Plaintiff; Predictability; Tort.

Introduction

In “Integrity of Holmes' Jurisprudence,” Edward White rightly observes that writing about Oliver Wendell Holmes can be considered as similar to playing William Shakespeare's *Hamlet: Prince of Denmark* in the theatre. It is like apprenticeship that legal scholars pass through as a way of measuring their fitness in order to put up with academic travails ahead (White, 1982, 633). After an earlier general impression or notion that tort was not a fitting subject for law book, Holmes considered that there is nothing wrong with the contents of torts textbooks. He has a penchant for torts because it appears to be a subject ripe for assortment or categorization. Earlier on, systematic interpretations and explanations of torts had tried to associate concepts, like trespass, defamation, and evidence, which conveyed no coherence or legal relationship to one another; however, Holmes became confident and certain that some basic notions and principles could be adduced. Work on tort theory does not terminate with innovating and groundbreaking; it also includes safeguarding – making free from danger or the risk of harm or injury.

In contrast to criminal law, which in principle imposes liability on individual only if the individual acted with *mens rea* - *guilty mind*. It also differs from contract law, which assesses and determines the nature of planned promises and undertakings. Tort bears on, and even pushes itself into the lives of non-volunteers. "Persons can fulfil the elements of costly tort claims while not thinking or saying anything. This reach means that each mistaken stance in tort puts large numbers of people in danger" (Bernstein 278). So, according to Holmes, liability for infraction of contract is grounded or anchored on the defaulting party's earlier consent to foot the bill for the injury caused by the infraction. On the other hand, tort liability unlike the contractual one, is set forth authoritatively as obligatory without the defendant's consent, founded on "some general view of the conduct which everyone may fairly expect and demand from every other" (Holmes, *The Common Law*, 63).

The Concepts of Tort Law and Liability in General

The word *tort* is derived from the Latin term *tortus*, which means "twisted." Hence, the word *tortoise* – the animal whose shell is twisted and distorted. As French is really one of the Romance Languages – the group of languages derived from Latin, the word came to mean 'wrong,' and it is still so used in French: *J' ai tort* – 'I am wrong'; *Nous avons tort* – 'We are wrong.' In English, the word 'tort' has a purely technical legal meaning – legal wrong for which the law provides a remedy (Harpwood, *Principles of Tort Law*, 2000, 1). Tort law, therefore, refers to a body of rights, obligations and remedies that is employed by courts in civil proceedings to offer alleviation, assuagement or relief for persons who have suffered harm from wrongful acts of others. The person who sustains injury or suffers pecuniary damage as the result of tortious conduct is known as the *plaintiff*, and the person who is responsible for inflicting the injury and, therefore, incurs liability for damage is known as the *defendant* or *tortfeasor* ("Tort Law," *Gale Encyclopedia of American Law*, Vol. 10, 58). According to Weston, "tort is that branch of the common law concerned with private liability for interpersonal harms, especially but not only physical harms to persons or property (Weston, "Torts," in: *Philosophy of Law: An Encyclopedia* 863). So, tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is relievable by an action for unsettled or unliquidated damages (Harpwood 1).

Tort is a private civil wrong for which a redress, remedy or rectification may be sought, in most cases in the form of monetary damages. It can mean an infraction of duty that exists under societal outlooks and expectations regarding interaction among equals in a transaction, rather than springing up from a particular contract. It can likewise be considered as a branch of legal code that addresses or handles such wrongs (Wild, *Webster's New World Law Dictionary* 257). Tort law is also regarded as a collection of principles describing the legal system's non-criminal response to harms or injuries one person brings down or inflicts on another. When an individual acts in a manner that causes some harm to another individual, tort law on certain occasions requires the injurer to pay money to the victim. A plaintiff, the injured person, may win damages from a defendant by establishing that the defendant intentionally caused harm to the plaintiff. These cases are called intentional tort cases (Best and Barnes 1). In other cases, a plaintiff can win damages by demonstrating that even though the defendant did not have in mind to do anything that the law forbids, the defendant did not act as carefully as the law expects or requires.

These instances are negligence tort cases. Again, in some situations a defendant will be liable to a plaintiff even if the defendant did not have in mind or mean to harm the plaintiff, even if the plaintiff acted with whatever care the law requires. These cases are known as strict liability cases (Best and Barnes 1).

The Elements and Objectives of Tortious Liability

In every tort action, three elements must be established or found. First, the *plaintiff* must establish that the *defendant* was under a legal duty to act in a particular manner. Second, the plaintiff must demonstrate that the defendant breached or infringed this duty by failing to conform his or her behaviour accordingly. Third, the plaintiff must prove beyond every reasonable doubt that he incurred injury, harm or loss as a direct consequence or result of the defendant's breach. (*Gale Encyclopedia of American Law*, Vol. 10, 58). On the other hand, tort law serves four major objectives. First, it tries to counterbalance, compensate, and indemnify victims, who are plaintiffs, for harms or injuries incurred by the blamable action or inaction of others, who are defendants. Second, intends to dislodge and reposition the cost of such harms to the individual or individuals who are *de jure* and in a legal manner accountable or answerable for inflicting them. Third, it seeks to prevent and discourage careless, harmful, injurious, and risky behaviours in the future. In other words, it acts as deterrence to others. Fourth, it seeks to act as vindication of the legal rights and interests that have been attenuated, compromised, weakened, or subverted. In a theoretical manner, these objectives are served when tort liability is visited or brought down on individuals who have committed tortious acts for intentional wrongdoing, negligence, and tremendously dangerous and risky activities (*Gale Encyclopedia of American Law*, Vol. 10, 59).

Tracing the Origin of Modern Concept of Tort Liability: Holmes Perspective

In *The Common Law*, Holmes traces the beginning or origin of common law to the ancient societies where the concept of liability was founded or predicated upon feelings of retaliation and the subjective intentions of a morally censurable and culpable wrongdoer. For instance, Holmes points out that in such societies creditors were allowed to mutilate, mangle, and divide the bodies of their debtors who contravened the terms of an agreement. In *The Code of Hammurabi*, one of the best-known legal documents of antiquity, Hammurabi, king of Babylon r. 1792-1750 B. C.), introduces the law of retaliation for wounds: "If a man has destroyed the eye of a member of the aristocracy, they shall destroy his own eye. If he has broken his limb, they shall break the same limb ... Children could be punished for the crimes of their fathers" (Noble *et al.* 16; Anyaorah¹ 15). Nonetheless, in *Ancient Law*, Henry Sumner Maine points out how criminal acts and tortious acts were regarded by the penal law of ancient communities, he writes:

The penal law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrong doer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds ... [All such Torts] gave rise to an obligation or *vinculum juris*, and were all requited by a payment of money (Maine, *Ancient Law* 358; Madden 833-834).

However, advanced, precocious, and progressive societies, Holmes maintains, no longer resolve tortious, contractual, and even other forms conflicts and disagreements in such a

barbarous, brutal, vicious, and uncivilized manner. Societies have developed to the extent where liability is now predicated upon objective and external criteria, standards or touchstones that distinguish moral responsibility from legal obligation, and entirely get rid of concerns, vexations, and worries regarding the actual guilt of the wrongdoer. Holmes maintains that common law principles demand judges and juries to interpret tortious actions from the point of view of an average person with ordinary intelligence or even common sense, irrespective of how a particular tortious action have actually been understood, perceived or performed by the individuals themselves who are directly involved (*Gale Encyclopedia of American Law*, Vol. 5, 298).

Oliver W. Holmes' Concept of Tort Liability

Oliver W. Holmes, an illustrious and esteemed legal philosopher, American jurist and Supreme Court Justice, made a very scholarly and epochal contributions to the evolution of tort law. In his works, Holmes inquires and penetrates deeply into the nature of tort law, its developments, and the principles inherent and fundamental to tort liability. He expounds his theory of torts in series of lectures he presented in Boston, especially Lectures III and IV. All the lectures he presented were published in 1881 as *The Common Law*. The above-mentioned two lectures formed the last part of his thorough and systematic investigation, already started in Lecture I, of “The General Theory of Liability: Civil and Criminal” (Holmes 6). The entire volume of *The Common Law* is the most renowned and valued legal philosophy in the history of the United States. In this masterpiece, Holmes systematically analyses, classifies, and explicates various aspects of the U. S common law, straddling from torts to contracts to crime and punishment (*Gale Encyclopedia of American Law*, Vol. 5, 297). Holmes avers that the aim of his two lectures on torts is to find out whether there is any rallying point or common ground at the end of all liabilities in tort, and if this is so, what that ground is (*The Common Law* 63). Then, Holmes explicates why he restricts the “common ground” issue to torts. Having put forward his topic and justifying its restricted ambit, Holmes moves ahead to give a new or different definition to the problem reworded as follows:

- (1) Tort law determines whether a defendant is liable or responsible for harm he has done: there is no liability in tort case except when a defendant's actions result in harm to another.
- (2) Acts that are exactly alike, and incapable of being perceived as different in all relevant respects in certain occasions cause harm and in some other occasions do not.
- (3) Therefore, tort law cannot enable someone to predict or tell in advance with certainty “whether a given act under given circumstances will make him liable” (Holmes, *The Common Law*, 64).
- (4) The sole guide, standard or template for the future capable of being derived from a tort decision imposing liability is the conclusion that similar and identical actions are performed at the “peril of the actor” – the doer will be held responsible in tort should the deeds result to harm.
- (5) So, to ascertain or determine the general principle of all tort liability, one should get rid of the event as it turns out – the harm; and search for the principle on which the “peril of an actor's conduct” – the risk of liability should the deed result in harm, is thrown on the doer (Kelley 689).

Furthermore, Holmes stresses the importance and values of the reasonable person standard in tort law. The idea is that responsibility or liability for tortious action, conduct of such character as to subject the actor to civil responsibility under tort law, should be decided based on how a typical person would act in related or similar situations. This offers an objective, undistorted, and non-bias measures or criteria for judging negligence.

Holmes' Perspectives on Negligence and Intentional Torts

An intentional tort is any consciously designed or deliberate interference with a lawfully recognized interest, like the right to bodily integrity, emotional calmness or placidity, dominion with regard to property, privacy or seclusion from public intense look or scrutiny, and freedom from restriction, confinement, deceit or misleading falsehood. These interests are infringed by the intentional torts of assaults – the use of aggressive force against somebody; battery – unlawful use of force against someone, including injurious and offensive contacts; trespass – unlawful entrance or encroachment into another person's property, including land, without right or permission; false imprisonment; invasion of privacy; conversion; misrepresentation – a wilful perversion of facts, in other words, falsification; and fraud – intentional deception resulting in injury to another person, in other words, dupery, hoax, humbug, fiddle, or spoof (*Gale Encyclopedia of American Law*, Vol. 10, 59). For Holmes, the intent element of these tortious actions is met, conformed to or fulfilled when the wrongdoer acts with the expectation, wish or desire to produce injurious consequences, and is considerably or substantially sure and convinced that such harmful consequences will be a follow-through, that is, successfully accomplished. So, Holmes stresses that for a tort to be categorized as intentional, there must be a deliberate action taken by the defendant with the aim of causing a particular final result or with the awareness that such final result was substantially certain to take place or occur (Holmes 62).

Under certain circumstances, the law allows individuals to intentionally carry out a course of conduct that will inevitably or of necessity result to injury to others. The injury that results from such action is said to be overbalanced and preponderated by more important interests or sake. A typical example of one of such interests is *self-preservation*, substantiated or corroborated in the right of *self-defense*. In self-defense or self-protection, individuals may exercise adequate force to push back an approaching or impending threat of bodily harm. It is only by individuals who sanely believe that their lives are periled or jeopardized and for whom there are no sensibly means of escape or scarpering that *deadly force* may be applied. In other words, “*reasonable force*, but not deadly force may be employed in defense of property” (*Gale Encyclopedia of American Law*, Vol. 10, 59).

Holmes reiterates the fact that consent is a defensive or protective measure in almost every intentional tort. To this effect, the law will not indemnify or redress individuals who, by any means, deliberately or knowingly allow someone to harm them. Nonetheless, consent ought to be given freely and voluntarily to be efficacious. When consent is brought on or elicited by coercion, duress, undue influences or chicanery – the use of tricks to deceive someone, usually to extract money from him or her, it is not legally efficacious. Also, consent is not legally effective when given by an incompetent individual or a person who lacks full deliberative capacity – children and the mentally deficient. Consent to intentional torts that have to do with severe and grievous bodily injury is equally considered inefficacious in many jurisdictions (*Gale Encyclopedia of*

American Law, Vol. 10, 59). In all, intentional torts differ from negligence where the focus is on the breach or infraction of a duty of care, rather than the aim, intent or purpose behind an act.

With regard to negligence, Holmes maintains that it is fundamentally an inability to keep or conform to the standard of conduct prescribed by the law. This inability or failure results to liability when it causes injuries to others. Holmes argues that the law should concentrate or hold its attention on the falling out of duty that every reasonable person would keep or maintain without infraction. Holmes is not oblivious of the fact that most injuries from tortious actions are the direct product of negligence, not really intentional wrongdoing. Generally, the term *negligence* is used in tort law to describe action that create unreasonable risk or danger of harm not only to persons, but also to property (*Gale Encyclopedia of American Law*, Vol. 10, 59). An individual acts negligently when his action departs from duty – when his behaviour deviates or turns away from the conduct ordinarily required of a reasonably discreet and sensible person under the circumstances, in Holmes' conceptual schemes (Holmes 43). By and large, the law requires judges and jurors to utilize their common sense and life experience in deciding the appropriate degree of care and vigilance with which people ought to live their lives to avert endangering or jeopardizing the safety of others.

In actual sense, it is not every accident producing injury that brings about liability for negligence. There are some accidents that cannot be averted even with the exertion of sensible care. For instance, an accident that results from a defendant's abrupt and unanticipated physical illness, like seizure or blackout – a momentary loss of consciousness or even amnesia – partial or total loss of memory, generally exempts the defendant from liability from injury caused during his or her period of unconsciousness. Be that as it may, defendants who are aware that they already have such medical issues are required to take sensible precautionary measures to ward off impending dangers, damages, injuries or risks the problem creates. In some jurisdictions inescapable accidents are called *Acts of God* (*Gale Encyclopedia of American Law*, Vol. 10, 59).

In the first part of Lecture IV, Holmes looks at and weighs some nominate torts that have connection with fraud, malice, and intent to decide whether liability is founded on a criterion or touchstone of personal moral error, mistake or on the same external standard he had considered inherent in liability for negligence. Here, to a great extent, Holmes banks on his earlier lecture on criminal law, “in which he had taken James FitzJames Stephen's definition of criminal intent and reduced it to knowledge by the defendant of facts from which ordinary reasonable person would foresee the probability of harm” (Holmes, *The Common Law*, 45; Kelley 694). Criminal liability is visited or imposed when the wrongdoer, of his or her own free will, acted with the awareness of circumstances from which a common or sensible person would predict the chance or probability of certain particular harms as outcome or final result of the action. “Personal moral culpability, malice, or evil intent in the common sense of the terms was not required: the test is purely external, adopted to deter dangerous conduct” (Holmes 45; Kelley 694).

Also, in Lecture IV, Holmes did the same philosophical reduction on the nominate torts of conspiracy – a secret agreement between two or more people to perform a harmful and unlawful act; deceit – a misleading falsehood; slander – words falsely spoken that damage another person's reputation; malicious prosecution, and trover – an action which lies in any

case to recover a value of goods wrongly converted by another to his/her own use – in this case the finding, though alleged, is an immaterial fact, the injury lies in the conversion. Holmes tries to demonstrate that the forms of action that appear to be founded on personal moral culpability are actually founded on an external standard of what would be morally censurable in any average, discreet, or prudent man.

However, in the last part of Lecture IV Holmes restates and refines his essential theory. This restatement is very important because in it he made it clear how his theory explains all of tort law and is, therefore, a fully appropriate and harmonious “scientific” theory of tort liability. He summarily renders a clear statement of the policies implicit in tort liability, according to him:

The general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbours, not because they are wrong, but because they are harms. The true explanation of the reference of liability to a moral standard, in the sense which has been explained, is not that it is for the purpose of improving men's hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it. It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury (Holmes, *The Common Law*, 115).

For Holmes, in extraordinary or uncommon cases, the public policy privileging freedom of action outbalances or preponderates the public policy privileging the barring or exclusion of harm. In such situations, certain injuries are not indemnified, despite the fact that they are the predictable outcome or consequences of a defendant's freewill and unforced act, and regardless of the fact that the act is done with intent or malice in the common morally significant sense. From another point of view, in some kinds of cases, other public policies may so outbalance the policy privileging freedom of action that defendants are strictly responsible or liable for certain injuries, notwithstanding the fact that the injury was not predictable by any common or sensible person and, therefore, not evitable or avertable. However, in most cases, liability is visited only when the wrongdoer or defendant had knowledge of the circumstances that would make any common or sensible human being, based on the accrued or increased experiences of the community or society, to predict or foresee peril, danger, or risk to others (Kelley 695-696).

Holmes and Strict Liability

There are some cases where tort law brings down or imposes liability on defendants who are neither negligent nor culpable of intentional error, known as *strict liability* or liability without faults, this arm or subdivision of tort attempts to govern those activities that are utile and essential but which creates abnormally unsafe and hazardous risks to the society. These abnormally hazardous activities include, blasting or blaring – making a harsh and strident noise; transporting dangerous materials; storing or keeping dangerous substances; keeping certain hazardous and wild animals in captivity; and so on. Individuals who carry out or participate in exceedingly risky or unsafe activities may be

morally culpable because no amount of concern or diligent effort can make their activities unhazardous for the society. All the same, such individuals will be held legally responsible for injury that ensued from their activities as a way of transferring the costs of harm from prospective or possible victims to the parties who have committed the tortious acts. Persons and entities that carry out abnormally risky activities for earnings or gain must be disposed and ready to guarantee the safety of others as a price of doing business, as a matter of social policy and decency (*Gale Encyclopedia of American Law*, Vol. 10, 60).

Holmes proposes that the process of specifying rules of strict liability is very likely to take place when the situations one ought to know and judge the perilousness of an act are few and simple. In such cases, for Holmes, the experiences of the community will speedily and promptly be integrated into specific rules of law. In this category are cases in which the offenders' actions prove with proportional certainty the wrongdoer's knowledge of one or more subsequent circumstances that experience indicates render the conduct hazardous and dangerous. Therefore, when walking, "one knows that one walks on the ground belonging to someone, so courts adopted a specific rule of "strict" liability for trespass *quare clausum fregit*?" (Kelley 696). The Latin phrase: "quare clausum fregit?" is the legal concept of trespass. It simply means "why did he/she break into the enclosure or enclosed property?" Similar principle explicates the deriving from the general principle of specific rules obviously imposing strict liability on intruders or meddlers with personal property, custodians of dangerous wild animals, possessors or owners of trespassing cattle, and people keeping in their houses and lands anything or animal very likely to become mischievous and maleficent should it break loose and escape.

In each of the above-mentioned cases, the wilful act itself entails knowledge and awareness of a circumstance from which common experience enables any sensible person to predict danger or condition of being susceptible to harm or injury. If the situation is more complex that awareness of danger or hazard cannot be suggested as a logically necessary consequence from the freewill or voluntary act itself – the process of specification will not ordinarily work, the court should entrust or leave to the jury the problem of deciding whether the defendant was truly aware of the circumstances, beyond those essential to accomplish or perfect the act, that would make any sensible person to foresee danger. Holmes utilizes this particular theory to explain why the general negligence standard, and not a specified rule, is employed to even those who keep domestic animals, according to him:

Experience as interpreted by English law has shown that dogs, rams, and bulls are in general of a tame and mild nature, and that, if any one of them does by chance exhibit a tendency to bite, butt or gore, it is an exceptional phenomenon. Hence, it is not the law that a man keeps dogs, rams, bulls and other like tame animals at his peril as to the personal damages which they may inflict, unless he knows or has notice that the particular animal kept by him has the abnormal tendency which they do sometimes show. The law has, however, been brought a little nearer to actual experience by statute in many jurisdictions

(Holmes, *The Common Law*, 125; Kelley 696-697).

With regard to defectively manufactured products, consumers who have fallen victims can fall back or hold on to strict liability. Under the tenet of strict product liability, a manufacturer must ensure that his products are fit, appropriate and worthy for their intended use when they are marketed for public consumption. The law of tort can hold manufacturers strictly liable for any harms/injuries that result from placing unreasonably hazardous or unsafe products into the stream of commerce. This can happen even “without regard to the amount of care exercised in preparing the products for sale and distribution and without regard to whether the consumer purchased the product from, or entered into a contractual relationship with, the manufacturer” (*Gale Encyclopedia of American Law*, Vol. 10, 60).

In *Henningsen v. Bloomfield Motors, Inc.*, the New Jersey Court needed to decide whether it would extend liability to the manufacturer of a defective automobile for medical expenses incurred by persons in a crash, where the purchaser had signed a contract limiting the manufacturer's liability to fixing the defective parts. The plaintiff was not able to point to an established rule of law to prevent the defendant car manufacturer from standing on the contract both had signed. The Court looked at several relevant principles including the principle of *caveat emptor* (buyer's risk or let the buyer beware) that in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens. Also, they considered the very basic principle of Anglo-American law that the Courts will not permit themselves to be used as instruments of inequity and injustice. The manufacturer's “special obligation” arising from the society's general dependence on his products was equally taken into serious consideration (Dworkin, *Taking Rights Seriously*, 23; Anyaorah² 81-82). At the end, the manufacturer was held liable because of the society's general and heavy dependence on his products, but unfortunately they are not as trustworthy as the people expected.

Revisiting Holmes' Tort Liability Theory

As a backdrop for revisiting Holmes' concept of tort liability, it would be *ad rem* to reprise the fundamental elements of his theory:

- (1) The primary test of liability in tort is threefold: (i) the defendant or wrongdoer acted voluntarily – of his or her own freewill; (ii) that particular act caused or gave rise to harm to the plaintiff; and (iii) at the point in time the defendant acted, any prudent person who were in the defendant's shoe would have foreseen danger to others from the action.
- (2) The primary test of tort liability is connected to moral culpability as follows. In most cases, such conduct would be morally culpable in the person of ordinary discretion, intelligence, or prudence because the community normally regards it to be morally wrong to act cognizant of the fact that one's action imperils or poses a threat to others. A defendant may befittingly be held liable under the threefold test, all the same, despite the fact that he was not personally culpable, as liability is imposed when the defendant has knowledge, capacity, foresight, and prevision than the man of ordinary intelligence and prudence. If deportment or behaviour conforming to the basic threefold test of liability would not be regarded by the community to be morally censurable in the man of ordinary intelligence and prudence, a court may decline to apply the basic test of liability, in order to uphold

the effectiveness of the law. In each case, this decision is strictly contingent upon the court's practical judgment about the harmful effect of applying the ordinary test. There is no necessary connection between legal standards for tort liability and the moral standards of the community.

- (3) The primary test of tort liability harmonizes and sends on two public policies: it advances the public safety by deterring and precluding perilous conduct while saving and maintaining socially delectable/desirable freedom of action when hazard and danger from people's conducts are neither predictable nor foreseeable.
- (4) The deterrence role or function of the threefold test is intensified by the process of specification, that is, the courts continuously transform the general threefold test of liability into more specific rules imposing tort liability on more narrowly defined behaviours or conducts. This process makes the law more cognizable, fixed, definite, and sure, thereby intensifying its effectiveness in discouraging perilous, hazardous or dangerous conducts; also increasing its effectiveness in guaranteeing and securing freedom of action (Kelley 724-725).

Holmes arrogate that the foundation of tort liability in the predictable or foreseeable consequences of action is concordant with his notion that legal standards and criteria must be fixed, sure, definite, and cognizable if they are to accomplish or satisfy their role and purpose of guiding and controlling people's conduct. Now, how would somebody set about testing Holmes' assumptions and claims that his tort theory is more concordant with the common law of torts than any other alternative explicative and informative theory? As might be expected, one could analyse and study in detail the materials that Holmes himself disregarded and refused to acknowledge: views, positions, and perspectives of courts explaining the reasons for their decisions, and antecedent treatises explaining the principle underlying the liability for particular torts. Thereby, one could "attempt to show that Holmes was inconsistent with the expressed understanding of the basis for tort liability given by those operating the tort system" (Milsom 25). Once someone is able to get the better of Holmes' claim of consistency, one would be able to turn down the claim that his theory explicates the common ground of all tort liability without taking into serious consideration whether it is really concordant with the expressed understanding of the rationality and grounds for tort liability given by the people running or operating the legal system.

Holmes asserts that a test of unavoidable or ineluctable accident is whether harm from defendant's act was predictable at the moment the defendant wilfully acted; if danger was never predictable/foreseeable – if the defendant did not act wilfully, the result was inescapable or inevitable accident. He backs up his argument in this regard by citing two cases: "cases in which defendant's apparently innocent act combined with an intervening extraordinary event to cause harm – relying on *Gibbons vs. Pepper* as his prime example" (Holmes, *The Common Law*, 74; Kelley 730), and cases in which defendant performed an act unaware of the circumstances that rendered the action perilous or dangerous – relying on *Brown vs. Kendall* without expressing so clearly (Holmes, *The Common Law* 76). It may be appropriate to look at the decisions of *Gibbons vs. Pepper* and *Brown vs. Kendall* in order to find out how consistent Holmes' principal argument is with them.

In *Gibbons vs. Pepper*, a Trespass action of 1695, the plaintiff instituted legal proceedings against defendant for harm engendered when the horse the defendant was riding ran

into/collided with the plaintiff. In justification or exculpation, the defendant pleaded that his horse became too scared, headed for the hills with him, and unfortunately ran into the plaintiff, who was standing in a crowd on the street and disregarded defendant's screams and yells to get out of the way. The court held for the plaintiff on the reason that the justification was not rightly or correctly pleaded, the facts supposed or reported by the defendant would demonstrate and prove the defence of unavoidable or inevitable accident. The coherent and logical thinking of the court appeared to be found on the argument that "an intervening responsible cause between the defendant's conduct and the ensuing harm relieves the defendant of liability (Kelley 731). Be that as it may, a vital query for Holmes is not really the court's existent rationale, but whether the defensive measure, exoneration or vindication of inevitable accident acknowledged in *Gibbons vs. Pepper* is really in concordance with Holmes' foreseeability of that defence. This is exactly where Holmes' explication crumbles and falls apart. Holmes' argument proposes that the underlying touchstone is not foreseeability of danger – without any qualification or condition, but foreseeability of a certain magnitude of danger or hazard. Still, when Holmes sums up this particular argument, issues regarding the magnitude of foreseeable or predictable danger were completely excluded.

In *Brown vs. Kendall*, the defendant had ownership of one of two dogs engaged in a fight, and he was beating the dogs with a four-footed or quadruped stick to disengage and pull them apart, fully aware that the owner of the other dog was around that particular place – five and half yards away. Moving rearwards as the dogs suddenly moved towards him, he unintentionally struck/hit the plaintiff in the eye. It appears inconceivable and even impossible to say that this is a case in which the possibility of injury or harm to the plaintiff from the defendant's behaviour was unpredictable or incapable of being anticipated. Nonetheless, the court in its judgment held that the defendant could get away from liability if the jury decided that under these circumstances he was exercising "ordinary care," that is, "that kind and degree of care, which prudent and cautious men could use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger" (Kelley 732). So, the test of ordinary care in *Brown*, then, could not have been just predicted or foreseen with regard to possible harm. Just like *Gibbons*, *Brown vs. Kendall* contains facts from which any just and impartial beholder or perceiver would conclude that any ordinary prudent person in the defendant's position would realize that harm from his conduct was feasible and possible.

The above-mentioned two cases of inevitable accident on which Holmes banks on to back up his theory have to do with facts or rules permitting a finding of unavoidable accident despite the fact that any ordinary and reasonable person in the defendant's position would have thought over the possibility of harm from the action. The principle of predictable/foreseeable harm *simpliciter* – without any qualification or condition, which Holmes puts forward, then, is simply not conformable with the two major backups he himself applied to demonstrate that his theory was in agreement with the common law of torts. The general aim of the predictable danger is to discourage and prevent potentially hazardous and precarious activities. Again, it aims to promote advantageous and favourable non-hazardous activities by eliminating from those beneficial activities the scary and shuddery wand of potential liability.

However, none of these goals can be efficaciously accomplished except when the general

standard/criterion is rendered or interpreted into defined, distinct, and cognoscible liability rules. If it happens to be the case that the overall predictable harm standard of negligence is not, as a matter of fact, continually being rendered into defined, specific, and determinate liability rules, then Holmes' theory is internally disjointed and inconsistent. According to Kelley, "the twentieth-century expansion of the scope of application of the general negligence standard and the refusal of the courts to elaborate specific rules of liability indicate that Holmes' theory is no longer an internally coherent explanation of the purposes and policies of tort law" (740). Another renowned legal philosopher who is credited with discrediting Holmes' jurisprudential ideas, even to the level of tort theory, is H. L. A. Hart.

H. L. A. Hart's Critique of Holmes' Legal Theory

In *The Concept of Law*, H. L. A. Hart divides his critique of Holmes into two parts: one negative and the other constructive. On the negative path, Hart demonstrates that Holmes' prognostic or predictive theory of law is indefensible, unjustifiable, and untenable. The analysis of legal obligations Holmes offered fails to appropriate the phenomena that a jurisprudential theory ought to capture to achieve adequacy and sufficiency. On the constructive part, Hart provides a model or theoretical account that affords or gives a plausible analysis of the sense in which it is weighty and powerfully persuasive to talk about legal obligations, legal responsibilities, and legal duties as a species/specific kind of obligation parallel and comparable to, but still distinguishable from obligations acknowledged in ordinary course of events or everyday life (Goldberg and Zipursky 1572). The negative aspect of Hart's critique of Holmes' duties has two major components: the argument against legal prediction and the argument from the obliged/obligated distinction.

The Argument against Legal Prediction: In a bid to give reasons or explanations for the common parlance of duty – what it entails for a speaker to affirm that he or she is under an obligation to hold back doing *X* – Holmes suggests handling or regarding such statements as predictions, anticipations, foretelling that liability will follow if he/she does *X*. Hart's more succinct, compact, and in some ways more destructive, reply to this perspective is that people apparently can imply or intend something different from predicting the oncoming of disagreeable or uncongenial consequences when they affirm that they, themselves, or some other persons are under a legal obligation, because it is logically and meaningful to affirm *both* that someone is subject to an obligation and that he/she is under no risk of sanction, according to him:

If it were true that the statement that a person had an obligation {to someone} meant that he was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, example, to report for military service but that, owing to the fact that he had escaped from the jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer. In fact, there is no contradiction in saying this, and such statements are often made and understood (Hart 84).

Furthermore, Hart points out carefully and clearly that statements and affirmations with regard to obligations, without doubt, can carry some content that are not predictive. In

another place, Hart maintains that Holmes “predictive” analysis peculiarly lacks the necessary forcefulness to give reasons or explanations for judicial speech about obligations (Hart 10-11; Goldberg and Zipursky 1573).

The Argument from the Obligated/Obligation Distinction: This is possibly the most unforgettable negative argument in *The Concept of Law* directed against Holmes' conception of obligation. Holmes maintains that having a legal obligation or duty to do *X* as a result of a law established by the sovereign is approximately similar to being told by a menacing or threatening gunman that one must do *X*. Such an individual would be obligated to do *X* on pain of suffering some penalties or sanctions that the more powerful party is in a position to inflict. In law, this powerful party is the state. In his reply, Hart points out that to espouse or adopt such a picture is to be no longer able to see the distinction between being *obliged* and being *obligated*. In the above-mentioned instance, the addressee may really depict himself/herself as “obliged to do *X*.” However, if the threat issued were the only reason offered to him to do *X*, then, it would not be right to describe this as an obligation to do *X*, according to Hart, “there is a difference ... between the assertion that someone was *obliged* to do something and the assertion that he *had an obligation* to do it” (Hart 82).

Analyzing the above-named examples, the former is a psychological statement pertaining to the beliefs and motives with which something is done. However, “the statement that someone *had an obligation* to do something is of a very different type ...” (Hart 83). It implies that there are or may be compulsory or mandatory reasons, required by rule, applicable to the person under the obligation for which he/she ought to do *X*. Holmes' explanation of duties completely leaves out this important distinction, in Hart's conceptual schemes.

From Hart's perspective, law also consists of what he calls “primary rules” (Hart 91). The powerful effect or influence of this primary rule is to generally direct, order or demand behaviour of certain kind. For those who drive, for example, “car lights are to be turned on after dusk or when it is raining.” This is a primary rule ordering and directing individuals who drive cars to turn on their headlights under certain circumstances. “Individuals should use fork and knife while eating” is a primary rule, too – one of etiquette. Generally, legal and moral rules impose obligation, while other forms of rule – rules of etiquette, for instance, do not. Hart maintains that three features differentiate those domains of life in which socially acknowledged rules are considered as imposing and those in which they are not. First, rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and when the social pressure brought to bear upon those who deviate or threaten to deviate is great (Hart 86). Second, and to some extent explicating why there is social pressure or insistence in the domain where obligations are imposed by rules, the rules are “believed to be necessary to the maintenance of social life or some highly prized features of it” (Hart 87). Third, Hart affirms solemnly and formally that:

It is generally recognized that the conduct required by these rules may, while benefitting others, conflict with what the person who owes the duty may wish to do. Hence, obligations and duties are thought of as characteristically involving sacrifice or renunciation, and the standing possibility of conflict between obligation or duty and

interest is, in all societies, among the truisms of both the lawyer and the moralist (Hart 87).

Hart argues that legal systems are among those whose primary rules do enforce, bring down or impose obligations and duties. His recognition that the primary rules of law enjoyed the above-named three features, is linked together with his analysis of obligations as peculiar or specific to rules enjoying these features. The final result is that Hart is able to provide a fascinating and captivating explanation of what it entails to say that a law imposes obligations, over and above saying that it has rules that merely direct or order human conduct (Goldberg and Zipursky 1574).

Therefore, for Hart, a person has a legal obligation to do *X* if there is a valid legal rule relevant and applicable to him/her that directs him/her to do *X*. To state categorically that someone has a legal obligation to do *X* is not to predict or foresee that he/she will be penalized or held liable if he does not do *X*, as Holmes would like us to believe. It is rather to affirm that there exists a valid legal rule applicable to him that says, in reality, “do *X*.” Naturally, it is in consequence of such an existing rule that a legal system will equally authorize or endow someone to impose a liability or sanction for non-compliance to its primary rules. So, stating categorically that there is a primary rule – “do *X*” applicable to the actor is not just predicting or foreseeing what will or may happen if the actor does not do *X* (Goldberg and Zipursky 1574).

In *The Path of Law*, Holmes notably counsels graduating law students that the good lawyer gradually acquires expertise by gathering pieces of information from the legal system applicable to his/her clients – details or information concerning what possible liability or sanctions lie ahead for certain modes or courses of action, conduct or behaviour. In contrast to Holmes, Hart stresses a lawyer's or layperson's capacity to gather information concerning the stand of the legal system on what the person is allowed or not allowed to do. Hart awesomely and splendidly differentiates his legal actor's point of view from the one presented by Holmes: The Hartian actor occupies the “internal point of view,” on the contrary, the Holmesian actor occupies the “external point of view” (Hart 89-91; Goldberg and Zipursky 1575). Hart introduces this notion of “internal point of view” by pointing out that, within a social group which has rules of conduct, “it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group who accepts and uses them as guides to conduct” (Hart 91). Those who are concerned with the rules in the latter way have, Hart tells us, adopted the internal point of view towards the rules. Hart, thus, defines the internal point of view in a very specific manner, by reference to the notion of accepting and using a rule.

The analysis carried out in this study on the methodology and substantive difficulties and problems in Holmes' theory may be utile in calling attention to a pitfall, that is, an unforeseen, unexpected or surprising difficulty into which tort theorists may dabble into if they embrace wholeheartedly Holmes' theory. This unforeseen or surprising difficulty may even ensnare a theorist at the very beginning – at the time he/she is simply giving a picture of the current state of negligence law. At this point, he/she may recognise the stress Holmes' lays on predictability of harm as essential test of negligence (Posner 69-71). However, there are basis for accepting that predictability of harm *simpliciter* never had a lot to do with negligence liability.

Earlier before Holmes, negligence has been defined in diverse ways as inability or failure to act as a normal/ordinary sensible person under the circumstances (Kelley 741) or as the

neglect or infract of an already existing legal duty (Wharton 3), but not just as the failure to avert predictable harm; antecedent to Holmes, predictability or seeing ahead of danger, if made reference to at all, was always adjunct or subsidiary to a wider test of what a sensible/reasonable person would do, and “foreseeable harm or danger was considered as one influence on the behaviour of the reasonable man. Subsequent references to a simple foreseeability standard for determining negligence, then, can be traced directly to Holmes (Kelley 741). Nonetheless, in the daily operation or functioning of the tort system, the predictability test may have little influence, on account of the fact that juries – a body of citizens sworn to give a true verdict according to the evidence presented in a court of law, are normally made to understand that negligence is deportment/behaviour contrary to that of a reasonably careful individual under similar situation, or the word *negligence* is even overlooked and juries are instructed that defendant can be held responsible for his/her inability to exert ordinary care, normally defined as the precaution, foresight or care employed by any reasonably prudent individuals or persons under the same circumstances.

Elaborating on this, Kelley affirms that in normal circumstances, juries are not burdened with the task of determining what is and what is not predictable or foreseeable, the judges are ordinarily permitted to make that decision only within the protective cocoon of the rules governing submission of negligence matters to the jury. The intractability of foreseeability simply leads courts to commit or entrust more and more cases to the jury, a result, in an ironic manner, in disagreement or conflicting with Holmes' proposed process of specification (742). Therefore, modern tort theorists ought to learn their lesson from Holmes' methodological mistakes, and deal with the challenges, issues, and problems of developing and explicating a theory of civil liability liberated from his exclusive influence.

Conclusion

Legal scholars and jurists who studied Holmes' works generally concur that his theory of torts has significantly influenced the sequent development of tort theory. Also, it has given insight and direction to many scholars of the legal process (Gilmore 48-60; White, 1980, 12-19; Lundquist 607). Furthermore, the prevailing current tort scholars' attraction to Holmes' jurisprudence is quite understandable, but at long last wanton, obstinately perverse in judgment or opinion, and deviating from what is considered right, proper or good. Anyone can comfortably share Holmes' perspective that tort law is actually a distinctive enterprise. Also, anyone can accommodate his views that tort law is “created,” not found in nature; and that its content, message, substance, or subject-matter has evolved and will continue to evolve along with changes or modifications in the economic, intellectual, political, and social environment in which tort functions, still, none of these implies or has a logical consequence that tort law is a law of liability rules, or that it is what the circumstance or situation demands, or that it is whatever the judges aver it is. The mendacity or falsity of these kinds of supposed implications is precisely what Hart sets out to demonstrate prove, and lay down at a general or jurisprudential levels. Unlike Holmes, Hart would make people believe, tort law should not be a law of sanction or liability rules. It ought to be a law of authentic, genuine, and sincere duties of behaviour or conduct.

Finally, as already mentioned, the primary aim of tort liability should not be merely a matter of making compensations to the victim, even though they are part of it. However, no amount of compensation will equal a life lost in a car accident because of careless driving, for example. Principally, it should be about beefing up and fortifying victims with the legal power to pursue those who have wronged or treated them unjustly. It is involving the government to use her authority to let the perpetrators of tortious acts know the need for them to always do the right thing, and be conscious of the existing laws. This does not equate tort with vengeance. Rather, it is to appreciate that tort is a refined, civilized and polite option to vengeance – a civil resort for plaintiffs, and properly channeled through and cabined by law. In line with Hart, and as already pointed out, laws ought to be obeyed, not because of the foreseeable or predictable danger of sanction or liability for failure to obey; rather, because individuals have acknowledged them as standards that guide and justify their conducts/behaviours. In other words, laws should be obeyed, not because of fear of possible penalization or being held liable for non-compliance, but basically because individuals have accepted them from the 'internal point of view' as legitimate norms, which are binding standards for their conducts. When human beings' approach to law is seen from this perspective, many things will change for good even in the least developed nations.

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