CONTRACT VS. TORT – ARE WE THERE YET?

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CHAPTER 1
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CONTRACT VS. TORT:  ARE WE THERE YET

The doctrine of “contort” is a complex and at times seemingly amorphous rule of law employed by Texas courts. It is defined by Black’s Law Dictionary as, “The overlapping domain of contract law and tort law,” or “a specific wrong that falls within that domain.”\(^1\) But it is perhaps more aptly described by one of the very courts charged with applying it, “The law of ‘contorts’ is a muddy area, devoid of bright line rules or easy answers as to what conduct constitutes a tort, and what a breach of contract. The acts of a party may breach duties in tort or contract alone, or simultaneously in both.”\(^2\) The function of the doctrine is to bar plaintiffs from bringing tort claims when there is a contract between the parties that defines their relationship.\(^3\) A consequence of this is that when a plaintiff sues for economic loss under a tort theory, they are almost always barred from recovery.\(^4\) The cases seem to suggest that tort claims require physical injury to person or property. The question is, are we there yet? Is the line clear: Economic loss belongs to contract alone while tort recovers for physical harms? The answer is that we are much closer than the Air Freight case would lead one to think. This paper will trace the origins of the doctrine by focusing on the factors of “contort” and then will look at how recent cases have interpreted the doctrine.

The “contort” doctrine has evolved overtime as courts have struggled with the problem of separating claims based on torts from claims based on contracts. The doctrine was born in two phases. The first phase of early cases laid a foundation upon which the doctrine was built.\(^5\) However, these cases, while tailored to fit the problems at hand, left many things unresolved. The continued confusion lead to a second phase nearly half a century later when the Court took up the doctrine again in an attempt to reconcile its earlier decisions.\(^6\) These later cases furthered the framework for analysis and established the rule as it stands today.

I.  SOURCE OF DUTY

One of the earliest cases to deal with the problem of when a claim sounds in tort or in contract was in 1946 with the case of International Printing Pressmen and Assistants’ Union of North America v. Smith.\(^7\) Mr. Smith had been a member in good standing of the International Printing Pressmen and Assistants’ Union of North America for more than ten years.\(^8\) Then, in 1940, Mr. Smith was expelled from the union and was unable to continue to work in his profession because the union refused to reinstate him or allow him to work on a union job.\(^9\) The union constitution provided strict guidelines for bringing charges against a member and these guidelines were not followed when Mr. Smith was expelled.\(^10\) Mr. Smith subsequently brought suit and was awarded damages by the jury for his wrongful expulsion.\(^11\) The union filed and obtained a judgment non obstante veredicto based on the premise that Mr. Smith’s claim was a tort claim and thus barred by the statute of limitations.\(^12\) The case was appealed to the Texas Supreme Court where the Court analyzed whether the action was based in tort, and thus barred under a two year statute of limitations, or one sounding in contract and timely brought under the longer four year limitation for contracts.

The Court began its analysis by acknowledging the difficult position it was in. “It is said that ‘while the general distinction between actions in contract and tort is clearly defined and well understood, it is often difficult to determine whether a particular action is the one or the other.”\(^13\) The Court went on to try and provide a distinction by saying, “actions in contract and tort are to be distinguished in that an action in

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3. This can be done at various stages in litigation, See Houstex, Inc., v. Landmark Graphics, 26 S.W.3d 103(Tex. App.—Houston [14th Dist.] July 13, 2000) (trial court granted defendant’s motion for summary judgment based on the “contort” bar); See also Classical Vacations, Inc. v. Air France, WL 1848247 (Tex. App.—Houston[1st Dist.], April 10, 2003)(overturning jury verdict because the only injury suffered was economic loss and “therefore, its cause of action was for breach of contract, not for any tort”).
4. There is an exception to this statement in that economic damages are allowed in the torts of fraudulent inducement and tortious interference of contract, but the courts have refused to extend these exceptions beyond these torts.
8. Id. at 731.
9. Id. at 731-732.
10. Id.
11. Id. at 731.
12. Id. at 735.
13. Id.
contract is for the breach of a duty arising out of a contract either express or implied, while an action in tort is for a breach of duty imposed by law.” 14 The court thus embraced an analysis based on the source of the duty. The Court found that, when the duty is imposed by law, then the action is one in tort but “in cases where the duty imposed upon the defendant arises purely by virtue of a contract, the action for a breach must necessarily be in contract.” 15 The Court saw that the relationship between Smith and the Union was one of contract and that the action was “for damages for the failure of the union to do the things expressly or impliedly imposed upon it by the contract.” 16 The Court thus introduced the first step in the “contort” analysis; the source of the duty test.

II. CONTRACT AND THE LAW IMPOSED DUTY

In the following year the Court again faced the dilemma of whether an action was based in contract or tort. In Montgomery Ward & Co. v. Scharrenbeck, the Court made the “contort” analysis when it faced a claim based on negligent repairs arising out of a repair contract. 17 Mr. Scharrenbeck sought and obtained a repairman from Montgomery Ward to fix a kerosene heater installed at his house. 18 The repair man came to Scharrenbeck’s home and repaired the heater. 19 When the repair man left the house, he left the heater on. 20 The roof subsequently caught fire and the house was destroyed. 21 Scharrenbeck brought suit and alleged the repair man’s negligent repairs caused the destruction of his house. The defendant claimed that Scharrenbeck’s suit failed to state a breach of any duty that would give rise to a claim of negligence. 22 The Texas Supreme Court granted writ to consider whether the action was based in tort or contract.

At first glance the case appeared to be rooted in contract. The repair man agreed to make the repairs based in tort or contract. However, the court in Scharrenbeck allowed the tort recovery, holding: “A contract may create the state of things which furnishes the occasion of a tort.” 24 The Court reasoned this was because “Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedition and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.” 25 Further, “where there is a general duty even though it arises from the relation created by, or from the terms of a contract, and that duty is violated, either by negligent performance or negligent nonperformance, the breach of the duty may constitute actionable negligence.” 26 The Scharrenbeck decision confused the contort issue because litigants had two competing viewpoints they could argue. From Pressmen they could argue that breach of a duty arising from a contract is not a tort; under Scharrenbeck they could argue that implied duties run with contracts and breach of these duties, even though they arose from a contract, is a tort. Further clarity was needed but the Court would wait nearly forty years before it approached the issue of “contort” again.

III. ECONOMIC LOSS RULE AND THE TYPE OF INJURY SUFFERED

The modern “contort” doctrine can be attributed to two seminal cases decided by the Texas Supreme Court, Jim Walter Homes v. Reed 27 and Southwestern Bell Telephone Co. v. DeLanney. 28 Reed introduced the need to look at the type of injury complained of and barred claims where the plaintiff suffered only an economic loss from sounding in tort.

In Reed, the plaintiff sued for damages that arose out of the sale and construction of a house. 29 The Plaintiffs sought both actual and punitive damages based on the allegation that the homebuilder was grossly negligent in its supervision of the construction of the house. 30 The Court in a brief two page opinion made short work of the punitive damages award. Citing both Pressmen and Scharrenbeck for their respective rules the Court stated; “The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the

14 Id.
15 Id. at 736.
16 Id.
17 204 S.W.2d 508 (Tex. 1947).
18 Id. at 508-509.
19 Id. at 509.
20 Id.
21 Id.
22 Id. at 510.
23 Id. at 509.
24 Id. at 510.
25 Id.
26 Id.
27 711 S.W.2d 617 (Tex. 1986).
28 809 S.W.2d 493 (Tex. 1991).
29 Reed, 711 S.W.2d at 617.
30 Id.
subject of a contract itself, the action sounds in contract alone.” 31 The Court determined the injury suffered by the plaintiffs was that the house they were promised and had paid for was not the house they received. 32 Concluding that, “This can only be characterized as a breach of contract, and breach of contract cannot support recovery of exemplary damages.” 33 The Court thus reconciled the apparent confusion by providing that if the injury is based solely on the economic loss that is the subject matter of a contract, there can be no tort recovery.

This new test added another layer to the “contort” analysis. First under Pressmen the court must look to see where the duty arose from. Next they must look at what type of injury they are being asked to redress. When this two step process is applied to the early cases the conflict seems to be resolved. In Pressmen the injury was purely economic, the loss of wages and privileges that arose out of the union contract. 34 Applying the reasoning in Reed, the outcome would be the same, the claim was one founded in contract. The duty arose from a contract and the injury was “to the subject of the contract itself.” In Scharrenbeck, the damages sought were for the destruction of a house while the contract concerned the repair of a heater. 35 The injuries were non-economic, actual physical injuries to property. The duty arose from a contract but the injury was not “to the subject of the contract itself.” The Reed analysis again seems to support the Court’s conclusion. The duty, while arising out of a contract, was imposed by law in performance of the contract and the injury was for physical damages outside the scope of the contract, so the claim was founded in tort.

The injury analysis performed by the Court in Reed led to the development of the economic loss rule. Many courts have held that, if the plaintiff is suing solely for economic loss then the action is barred under the rule. 36 As the court in Zurich stated, “The economic loss rule provides that, in tort cases economic damages are not recoverable unless they are accompanied by actual physical injury or property damage.” 37 Further, physical injury or property damages are defined as “some physical destruction of tangible property.” 38 If the plaintiff fails to show a physical injury then the tort claim is barred. This is because “economic losses may be pursued only via contractual remedies ‘even when the breach might reasonably be viewed as a consequence of a contracting party’s negligence.’” 39 Thus, under Reed and its progeny a plaintiff may not bring a tort claim without physical damage to property or person because the economic loss rule works to bar such claims in tort.

IV. INDEPENDENT INJURY

The Court advanced the injury analysis in Southwestern Bell v. DeLanney. In DeLanney, a businessman advertised his real estate business in the Yellow Pages for several years. 40 When he made a minor change to his account, Southwestern Bell’s internal procedures automatically removed his ad from the Yellow Pages. 41 DeLanney sued for negligence in the omission of the ad from the Yellow Pages alleging that this omission caused harm to his business. 42 Southwestern Bell countered that the claim failed to state a cause of action for negligence. 43 The jury awarded DeLanney past lost-profits and future lost-profits which Southwestern Bell appealed. 44 The appellate court affirmed the trial court basing its decision on Scharrenbeck. The court focused on the reasoning that with every contract comes a duty to perform with care, skill, reasonable expedience and faithfulness the things agreed to be done. 45

On appeal the Supreme Court immediately set about clarifying its previous holding in Scharrenbeck. “In failing to repair the water heater properly, the defendant breached its contract. In burning down plaintiff’s home, the defendant breached a common-law duty as well, thereby providing a basis for plaintiff’s recovery in tort.” 46 The Court emphasized that the duty breached in Scharrenbeck was not rooted in contract but in a duty imposed by law because of the contract. The Court then introduced another step for the “contort” analysis, the independent injury

31 Id. at 618.
32 Id.
33 Id.
34 Pressmen, 198 S.W.2d at 737-738.
35 Scharrenbeck, 204 S.W.2d at 508-509.
37 Id.
38 Id. at *3.
40 DeLanney, 809 S.W.2d at 493.
41 Id.
42 Id. at 493-494.
43 Id. at 494.
44 Id.
45 Id.
46 Id.
have also used the source of the duty test to bar negligence actions where the duty is derived from contract. But what other areas are included in the “contort” bar?

The courts have drawn firm lines in the area of negligent misrepresentation. In D.S.A., Inc., v. Hillsboro I.S.D., the Court held that negligent misrepresentation cannot be used to recover economic loss damages. The Court reasoned that because the plaintiff failed to prove an independent injury it was barred from bringing the tort claim. As stated in a later case, “A plaintiff may not bring a claim for negligent misrepresentation unless the plaintiff can establish that he suffered an injury that is distinct, separate and independent from the economic losses recoverable under a breach of contract claim.”

The “contort” bar has been extended to include claims of fraud as well. In Classical Vacations, Inc., v. Air France, the plaintiff brought a claim of fraud based on complications arising out of ticket sales by a travel agent. The court reasoned that because the only loss suffered was from economic loss relating to the subject of the contract the claim sounded solely in contract. The court held that fraud that occurs after the formation of a contract and results only in loss to the subject of a contract is not actionable in tort.

The courts have also used the “contort” bar to exclude claims based on breach of a fiduciary duty where the duty arose from contract and claims of duress. In Thomason, the court found that “because Thomason’s claims for breach of fiduciary duty and for breach of good faith and fair dealing are based on C & A’s alleged failure to pay him commissions, summary judgment on these claims was proper.”


48 DeLanney, 809 S.W.2d at 494.

49 “If the defendant’s conduct—such as negligently burning down a house—would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff’s claim may also sound in tort. Conversely, if the defendant’s conduct such as failing to publish an advertisement—would give rise to liability only because it breaches the parties’ agreement, the plaintiff’s claim ordinarily sounds only in contract.” Id.

50 See Express One Internat’l, Inc., v. Steinbeck 53 S.W.3d 895 (Tex. App.—Dallas, August 22, 2001); See also Blanche v First nationwide Mortgage Corporation, 74 S.W.3d 444,453 (Tex. App. Dallas, March 14, 2002)(holding that claims of economic damages are not recoverable in a simple negligence action).

51 Express One, 53 S.W.3d at 899.

52 Casteel v. Crown Life Ins. Co., 3 S.W.3d 582, 589 (Tex. App.—Austin, aff’d in part, rev’d in part on other grounds, 22 S.W.3d 378 (Tex. 2000)(where court struck down plaintiff’s negligence claim because the duty was derived from contract).

53 973 S.W.2d 662 (Tex. 1998).

54 Id. at 663.


57 Id. at *2.

58 Id. at *3.


61 Thomason, 2004 WL 624926 at *3.
reasoned that the injury suffered was only an economic loss and the “contort” bar applied. In Showalter, the focus was on the source of duties. The court stated, “the duties upon which the claim of economic duress was based arose under the not and P.C.’s fee agreement…therefore, there was no distinct tort injury with actual damages to support an award of punitive damages for economic duress.”

The above cases show that the “contort” bar is a vibrant doctrine in the Texas legal landscape, but are we there yet? Have we reached a point where physical injury is required in order to recover in tort? As shown above the courts continue to apply the “contort” bar in a consistent fashion, when a tort claim involves purely economic loss then the plaintiff’s claim is barred. A plaintiff may succeed in tort only when they can show a duty imposed by law and a physical injury or certain collateral torts. The answer seems to be “almost yes!”

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62 Showalter, 1998 WL 350518 at *5 nt. 11.