



The Virtue of Morality: A Comparative Study Between Indonesia and England

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Abstract

*This article examines the morality of tort in Indonesian and English civil law. This is legal research by studying statutory regulations, court decisions and other related documents. A tort is an act that can harm another party. Based on the results and discussion, it is known that the concept of morality is found in the broader meaning of tort in Indonesia. Similar to Indonesia, England also aligns the concept of unlawful acts with morality. This can be seen in the neighbour principle, which then gives rise to the duty of care. Through this principle, a person must be careful, especially towards people in direct contact with us, so that our actions, whether active or passive, do not cause harm to other people. Morality, whether in Indonesia or England, is one of the keys to determining whether an action is against the law. In the *Donoghue v. Stevenson* case, reason is used to apply morality; conversely, in tort law in Indonesia, judges are expected to use divine values and reason in applying morality.*

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A. Introduction

The relationship between morality and law has long been the issue being studied. Plato, Aristotle and naturalists maintain the idea that there is a relation between law and morality. According to proponents of natural law, law without morality makes the law not valuable and invalid, so it does not need to be obeyed¹. Therefore, the natural law values moral and presume as something that good therefore need to be obeyed. In present, the question that need an answer is whether morals still occupy a significant position. This legal issue is interesting to study because, in the legal system of civil law, such as in Indonesia, positivism becomes dominant, so the law is what it is that has been codified. At the same time, morals must be separated from legal norm². For adherents of positivism,

the law must be separated from morals and justice; the law is entirely understood as a set of regulations made by the authorities and carried out by an independent judge³. Judges, when deciding a case, must be based on law, not on moral values or justice⁴. If this is the case, is there no morality in the law, or are there still moral values that can be found in Indonesia's legal system? Then what about England? A solid common law country with the principle of binding precedent or judge-made law? For this reason, this paper found its urgency to find out the existence of particular morality in the system of actions against civil law in Indonesia and the England.

This paper complements Renaldi et al.'s research, which explores the value of morality in general law⁵ and Sofi Rahma Devi,

¹ Roscoe E. Hill, 'Legal Validity and Legal Obligation', *The Yale Law Journal* 80, no. 1 (November 1970): 47, <https://doi.org/10.2307/795096>.

² Achmad Achmad and Zakki Adlhiyati, 'Legal Reasoning: How Well-Known Marks Are Positioned Through Legal Positivism', *Jurnal Ilmiah Kebijakan Hukum* 17, no. 1 (31 March 2023): 59, <https://doi.org/10.30641/kebijakan.2023.V17.55-68>.

³ Joseph Raz, 'Legal Principles and the Limits of Law', *The Yale Law Journal* 81, no. 5 (April 1972): 848, <https://doi.org/10.2307/795152>.

⁴ Hans Kelsen, *General Theory of Law & State*, Law & Society Series (New Brunswick, N.J: Transaction Publishers, 2006), 441.

⁵ Renaldi Faturachman, Dava Muhammad Rizki, and Salman Al Faridzi,

who tried to study the relationship between law and morality in the enforcement of election ethics in Indonesia⁶. This paper will explore the value of morality in the act against the law in Indonesia and the England, which is the point of difference with previous studies. This paper includes legal research that uses a philosophical approach. In this legal study, several documentary sources were used from court decisions to other electronic sources⁷. Furthermore, the approach used is philosophical, emphasizing the philosophy of natural law to analyze the selected legal issues. The author will first describe morality in the natural law. Then, the general concept of tort law in Indonesia and England.

Morality in tort law will be elaborated as the final discussion. a special separate section to explain it.

B. Law and Morality

Morals can generally be used as a measure that makes one obedient to the law. The Indonesian Dictionary defines morals as (teachings about) good and evil generally accepted regarding actions, attitudes, obligations⁸. Alternatively, it could also be defined as something related to good or bad behaviour standards⁹. Morals from the definition above can be interpreted as teachings about good and bad behaviour by fairness.

Law can be described as natural, political, social, or moral principles that people universally follow. Violating the law means losing trust in the law. On the other

⁶ 'Dimensi Moralitas Terhadap Hukum', *Iblam Law Review* 2, no. 3 (30 September 2022): 1, <https://doi.org/10.52249/ilr.v2i3.73>.

⁶ Sofi Rahma Dewi, 'Relasi Hukum Dan Moral Dalam Sistem Penegakan Etika Penyelenggara Pemilihan Umum Di Indonesia', *Acta Law Journal* 1, no. 1 (12 November 2022): 35, <https://doi.org/10.32734/alj.v1i1.9898>.

⁷ Morris L. Cohen and Kent C. Olson, *Legal Research in a Nutshell*, 6th ed, West Nutshell Series (St. Paul, Minn: West Pub. Co, 1996), 2.

⁸ 'Kamus Besar Bahasa Indonesia' (Badan Pengembangan dan Pembinaan Bahasa, n.d.), <https://kbbi.web.id/moral>.

⁹ 'Cambridge Dictionary' (Cambridge University Press & Assessment, n.d.), <https://dictionary.cambridge.org/dictionary/english/moral>.

hand, obeying the law can make society more orderly.¹⁰

The study of the relationship between law and morality cannot be separated from the natural law. The natural law school argues that law and morals are related¹¹. Consequently, moral validity is a mandatory condition for the validity of law and also, the moral order is part of the natural order¹². Thomas Aquinas, a naturalist, stated that laws that do not contain moral values are wrong, so they are not suitable to be made into laws. The idea that unjust laws are not laws arises from the idea that laws are derived from general moral principles and rules that apply universally regardless of various cultures¹³.

General moral principles are found in natural morality originating from natural principles with an eternal and permanent character¹⁴. Namely, those that come from God, the universe and human logic¹⁵. Therefore, moral principles have a higher position than positive law. Consequently, positive law must not conflict with morals, which derive from eternal natural law¹⁶. In line with this, the position of natural law is higher than positive law. Positive law needs to be based on the principles of natural law in order to have a just legal status¹⁷. The idea that natural law originates from God is an irrational school of natural law, with St. Augustine and Thomas Aquinas as its supporters. On the

¹⁰ Dinebari D. Varaba and Charles N. Berebon, 'The Philosophy of Law of Immanuel Kant', *Tamaddun* 20, no. 2 (19 January 2022): 271, <https://doi.org/10.33096/tamaddun.v20i2.166>.

¹¹ Arletta Gorecka, 'On the Nature of Law: The Relevance of Deontological Natural Law Perspective in Modern Times', *International Comparative Jurisprudence* 6, no. 1 (2020): 1, <https://doi.org/10.13165/j.icj.2020.06.001>.

¹² Mahrus Ali, 'Pemetaan Tesis Dalam Aliran-Aliran Filsafat Hukum Dan Konsekuensi Metodologisnya', *Jurnal Hukum IUS QUIA IUSTUM* 24, no. 2 (15 April 2017): 216, <https://doi.org/10.20885/iustum.vol24.iss2.art3>.

¹³ Ali, 217.

¹⁴ Salman Luthan, 'Dialektika Hukum Dan Moral Dalam Perspektif Filsafat Hukum', *Ius Quia Iustum* 19, no. 4 (2012): 512, <https://media.neliti.com/media/publications/84461-none-1a1b134d.pdf>.

¹⁵ Ali, 'Pemetaan Tesis Dalam Aliran-Aliran Filsafat Hukum Dan Konsekuensi Metodologisnya', 217-18.

¹⁶ Luthan, 'Dialektika Hukum Dan Moral Dalam Perspektif Filsafat Hukum', 512.

¹⁷ Achmad Soeharto, 'Keadilan Dalam Optik Hukum Alam Dan Positivisme Hukum', *Pena Jurnal Ilmu Pengetahuan Dan Teknologi* 36 (18 April 2022): 63, <https://doi.org/10.31941/jurnalpena.v36i0.2013>.

other hand, the rational natural law school emphasizes that natural law originates from human reason. The second was introduced by Grotius, Immanuel Kant and others¹⁸.

For Saint Augustine, a morally good life is a life that places happiness as the goal of life. To achieve this goal, ethics is a tool or guide that can be used. Ethics, for him, is the teaching of a happy life¹⁹. For him, transcendence ethics places God as the main principle. Therefore, it is unsurprising that he makes God the final principle of morals²⁰. According to him, the moral law is an eternal divine law that exists in

the human heart, so obedience to the moral law is an impulse of the human heart²¹. Naturally, in humans, there is an urge for the good to act following moral values²². Therefore, it can be seen that Saint Augustine emphasized morals on the transcendental side, independent of the interference of reason. This differs from the opinion of Thomas Aquinas and several other naturalists who place reason as a means of moral interpretation.

Thomas Aquinas stated that morals are one of the reasons for obeying the law²³. According to him, the law binds the subject if the law can touch the subject's

¹⁸ Syofyan Hadi, 'Kekuatan Mengikat Hukum Dalam Perspektif Mazhab Hukum Alam Dan Mazhab Positivisme Hukum', *Legality* 25, no. 1 (2017): 88, <https://ejournal.umm.ac.id/index.php/legality/article/view/5992>.

¹⁹ Bisri, 'Perennialisme Pemikiran Etika Santo Augustinus (Dari Theologi Ke Filsafat Keabadian)', *Yaqhan* 4, no. 2 (Desember 2018): 318, <https://jurnal.syekhnurjati.ac.id/index.php/yaqhan/article/view/3550/1920>.

²⁰ Bisri, 139.

²¹ Franz Magnis-Suseno, *13 Tokoh Etika Sejak Zaman Yunani sampai Abad ke-19*, 5. Aufl (Yogyakarta: Kanisius, 2001), 70.

²² Bisri, 'Perennialisme Pemikiran Etika Santo Augustinus (Dari Theologi Ke Filsafat Keabadian)', 322.

²³ Thomas Aquinas differentiated law into several things, namely *lex aeterna*, *divina*, *naturalis* and *humana*. *Lex Aeterna* is the divine mind that guides all movements of the universe whose scope is so broad that it is difficult for humans to understand. Humans can only understand part of the divine mind, called the *lex naturalis*. On the other hand, the *lex naturalis* is a guide to what is good and bad for humans. This is different from *lex divina*, which is a unique guidance from God regarding how humans should live their lives according to the provisions of the holy scriptures. Meanwhile, *lex humana* is a more concrete provision, a derivative of *lex divina*. (Otje Salman and Anthon F Susanto, 'Memaknai Kembali Konstitusi Kita', *Jurnal Sosiohumaniora* 7, no. 2 (2005): 127.)

moral feelings²⁴. Furthermore, Aquinas stated that human reason is used to understand divine teachings, which produce natural laws known as *lex naturalis*. So here, reason and divine wisdom (*lex divina*) are used to interpret natural law into human law or *lex humana*. Based on this, Aquinas places *lex divina* and reason to rationalize the relationship between morality and law²⁵.

At the turn of the Middle Ages, Grotius experienced a shift in thinking from the humanization of natural law to secularization by limiting the dominance of religion to the authority of those holding power. As a result, lawmakers also experienced a shift from God to

human reason²⁶. He emphasized the importance of human reason by stating that maintaining social order in line with human reason is the source of law²⁷. According to him, it is not enough to be fair based on morals; common sense is needed to turn these values into law²⁸.

Regarding the relationship between morals and common sense, Immanuel Kant also highlight that moral have a basis in common sense²⁹. Immanuel Kant introduced the concept of deontology in his moral philosophy. The philosophy of deontology emphasizes that an obligation is a necessity³⁰. Obligations are the basis for good

²⁴ Elia Gerungan, 'Penerapan Prinsip Syariah Di Bidang Kredit Perbankan Ditinjau Dari Teori Hukum Kodrat Menurut Thomas Aquinas', *Lex Privatum* 1, no. 3 (2013): 159, <https://ejournal.unsrat.ac.id/v3/index.php/lexprivatum/article/view/3048>.

²⁵ Victor Imanuel W. Nalle, 'Konstruksi Moralitas Yang Rasional Dalam Hukum', *Sapientia Et Virtus* 2, no. 2 (1 March 2015): 125, <https://doi.org/10.37477/sev.v2i2.61>.

²⁶ Aulia Rahmat, 'Rasionalisasi Hukum Alam Oleh Hugo Grotius: Dari Humanisasi Menuju Sekularisasi', *Undang: Jurnal Hukum* 2, no. 2 (24 March 2020): 434, <https://doi.org/10.22437/ujh.2.2.433-470>.

²⁷ Hugo Grotius dalam Randy E Barnett, 'A Law Professor's Guide to Natural Law

and Natural Rights', *Harvard Journal of Law & Public Policy* 20, no. 3 (1997): 657, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2245&context=facpub>.

²⁸ Hugo Grotius dalam Rahmat, 'Rasionalisasi Hukum Alam Oleh Hugo Grotius', 449.

²⁹ Immanuel Kant et al., *Critique of Pure Reason*, The Cambridge Edition of the Works of Immanuel Kant (Cambridge; New York: Cambridge University Press, 1998), 67.

³⁰ Agus Hamzah and Septiana Dwiputri Maharani, 'LGBT DALAM Perspektif Deontologi Immanuel Kant', *Jurnal Filsafat Indonesia* 4, no. 1 (3 May 2021): 100, <https://doi.org/10.23887/jfi.v4i1.30335>.

and bad behaviour. If something is good, then there is an obligation to do it. Contrarily, if something is bad, we are prohibited from doing it³¹. He believes morals must be universal because they can apply anywhere and anytime. Besides that, morals can also be changed³².

Therefore, it is foreseeable that according to this school of thought, judges must apply moral principles to every decision-making³³. This is none other than to achieve justice. The natural law assumes positive morals as something right. This positive moral can be reflected in the universal principles of justice and truth³⁴.

Unlike the natural of law school of thought which considers an inseparable relationship between moral and law in any kind of situation, the legal positivism

demands that the moral value only exist during the making of law in legislature. The discussion of what is right and wrong must be finished when the law is promulgated. Thus, the legal enforcement should only have one goal which is legal certainty. Laws are rules that have been made by the authority, have imperative characteristic and implemented by the independent court³⁵. Furthermore, Han Kelsen also stated that judge's ruling should only be based on the rule, not moral, not justice³⁶.

The discourse on the relationship between law and moral will never end. I believe that a good law is a law which contains moral values and justice. In addition, this law also needed to be implemented by the morally law enforcer. Hence, law capable to become a mean to give justice to

³¹ Mohammad Maiwan, 'Memahami Teori-Teori Etika: Cakrawala dan Pandangan', *Jurnal Ilmiah Mimbar Demokrasi* 17, no. 2 (1 April 2018): 207, <https://doi.org/10.21009/jimd.v17i2.9093>.

³² Ghufran Hasyim Achmad, 'Pemikiran Filsafat Etik Immanuel Kant Dan Relevansinya Dengan Akhlak Islam', *ALSYS* 2, no. 2 (1 March 2022): 330, <https://doi.org/10.58578/alsys.v2i2.310>.

³³ Gorecka, 'On the Nature of Law: The Relevance of Deontological Natural Law Perspective in Modern Times', 1.

³⁴ Ali, 'Pemetaan Tesis Dalam Aliran-Aliran Filsafat Hukum Dan Konsekuensi Metodologisnya', 218.

³⁵ Raz, 'Legal Principles and the Limits of Law', 848.

³⁶ Kelsen, *General Theory of Law & State*, 441.

society. The application of moral to the legal system, including to the court is a form of reform contribution. It will change the mechanically, technically and soulless legal system to the legal system that prioritize morals, wisdom, guidance and dispute resolution³⁷. Presumed everyone has moral obligation to ourselves and to others, then law enforcers also have moral obligation in carrying out their work. Judges, prosecutors, lawyers and police certainly have moral obligation to enforce moral law. Eventually, moral consideration needs to be present on every legal-decision making³⁸. Lady Hale in her writing mentions that every judge must have moral courage³⁹. It is a behavior that dares to apply social norms and ethics without considering one's own social cost⁴⁰.

Moral courage is an important judicial attribute in decision-making, which can conflict with political interest or people in power. Nevertheless, moral courage will create a good character that will stand up for what is right. Judge who has a good character must demonstrate moral courage when making difficult decisions.

C. Indonesian Tort Law

In orthodox way, tort is an act that violates regulations. In the civil domain, unlawful acts can be based on the provisions of Article 1365 of the Civil Code. This article determines that every unlawful act that harms another person requires the perpetrator to pay for the loss. From this article, we can also see the elements of unlawful acts, namely the existence of elements of unlawful acts,

³⁷ Thane Rosenbaum, 'The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right', *Cardozo Public Law, Policy and Ethics* 4, no. 3 (2006): 3, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1487&context=faculty_scholarship.

³⁸ Thane Rosenbaum, *The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right*, 1st ed (New York: HarperCollins, 2004), 231.

³⁹ Lady Hale, 'Moral Courage in the Law', 21 February 2019, <https://www.supremecourt.uk/docs/speech-190221.pdf>.

⁴⁰ Silvia Osswald et al., 'What Is Moral Courage? Definition, Explication, and Classification of a Complex Construct.', in *The Psychology of Courage: Modern Research on an Ancient Virtue.*, ed. Cynthia L. S. Pury and Shane J. Lopez (Washington: American Psychological Association, 2010), 149-64, <https://doi.org/10.1037/12168-008>.

mistakes, injury and a causal relationship between injury and acts⁴¹.

In the context of unlawful acts, acts can be meant in an active or passive sense. Active is defined as carrying out specific actions, and passive is defined as an act of omission that results in loss⁴². Furthermore, related to the element of act against the law, there is a generalization of the meaning of act. It is no longer limited to act against the law but also against legal obligation, subjective right of others, rule of decency, and the propriety of thoroughness and prudence found in society⁴³. The broader meaning of tort occurred since the Hooge Raad decision between *Lindanbaem v Cohen* was issued in 1919. *Lindanbaem* and *Cohen* both owned printing companies. *Cohen* persuaded *Lindanbaem* employees

to divulge company secrets, which resulted in *Lindanbaum's* printing company losing money. *Lindanbaum* then sued *Cohen* based on tort. The lawsuit was granted by Hooge Raad, that considers unlawful actions, including actions or failure to act which violate other people's rights and legal obligations or are contrary to decency or propriety towards oneself or others⁴⁴.

On the other hand, an act contains fault if there is intention or negligence (negligence, culpa), and there is no justification or excuse⁴⁵. Furthermore, unlawful acts recognize material and immaterial losses for the injury element. Material losses are losses that are suffered and can be valued in money, for example, medical costs and car repairs. On the other hand, immaterial losses are losses that cannot be recovered or result

⁴¹ Indah Sari, 'Perbuatan Melawan Hukum (PMH) Dalam Hukum Pidana Dan Hukum Perdata', *Jurnal Ilmiah Hukum Dirgantara* 11, no. 1 (2020): 55.

⁴² Moegni Djodirdjo, *Perbuatan Melawan Hukum*, Pradnya Paramita (Jakarta, 1979), 13.

⁴³ Rachmat Setiawan, *Tinjauan Elementer Perbuatan Melawan Hukum* (Alumni, 1982), 8.

⁴⁴ Setiawan, 10-11.

⁴⁵ Prihati Yuniarlin, 'Penerapan Unsur-Unsur Perbuatan Melawan Hukum Terhadap Kreditur Yang Tidak Mendaftarkan Jaminan Fiducia', *Jurnal MEDIA HUKUM* 19, no. 1 (June 2012): 6, <https://journal.umy.ac.id/index.php/jmh/article/view/1973>.

in a temporary loss of enjoyment of life⁴⁶. Immaterial losses presented in death, severe injury, humiliation and disappointment. Based on jurisprudence, judges can grant immaterial lawsuits in cases against the law on the grounds of avoiding arbitrary actions and based on the values of appropriateness and justice⁴⁷.

D. Tort in England

In England, unlawful acts are termed with "torts" or "wrongs." Tort law can be interpreted as a system for resolving disputes arising from social norm violation⁴⁸. F Pollock gave examples of several types of torts, including assault, libel, deceit, trespass to land, and conversion (wrongful dealing with goods by trespass)⁴⁹. Pollock then classified them into three types of

torts: personal wrongs, wrongs to property, person, estate and property generally.

Personal wrongs can be further classified into four, namely wrongs affecting the safety and freedom of the person (for example, assault, battery, false imprisonment); wrongs affecting personal relationships in the family (for example, seduction, enticing away from servants); wrongs affecting reputation (for example slander and libel); wrongs affecting estate generally (for example deceit, slander of title, malicious prosecution, conspiracy)⁵⁰.

Wrongs to property are further grouped into two: trespass to land and goods and interference with rights analogous to property, such as franchises, patents and copyrights. Meanwhile, wrongs to

⁴⁶ Rai Mantili, 'Ganti Kerugian Immaterial Terhadap Perbuatan Melawan Hukum Dalam Praktik: Perbandingan Indonesia Dan Belanda', *Jurnal Ilmiah Hukum DE'JURE: Kajian Ilmiah Hukum* 4, no. 2 (30 March 2022): 305, <https://doi.org/10.35706/dejure.v4i2.6460>.

⁴⁷ Riki Perdana Raya Waruwu, 'Perluasan Ruang Lingkup Kerugian Immaterial' (Kepaniteraan Mahkamah Agung, 12 September 2017), <https://kepaniteraan.mahkamahagung.go.id/artikel-hukum/1458-perluasan-ruang-lingkup-kerugian-imma>

terial-oleh-dr-riki-perdana-raya-waruwu-s-h-m-h.

⁴⁸ Steven D Smith, 'Critics and the Crisis a Reassessment of Current Conceptions of Tort Law', *Cornell Law Review* 72, no. 4 (1987): 798, <https://core.ac.uk/download/pdf/73975436.pdf>.

⁴⁹ Frederick Pollock, *The Law of Torts*, Fourth Edition (London: Stevens And Sons, 1895), 1, https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2123/Pollock_1428_Bk.pdf.

⁵⁰ Pollock, 7.

person, estate and property are further divided into nuisance, negligence and breach of absolute duties⁵¹.

In contrast to Indonesia, England is a common law country which places previous court decisions (jurisprudence) as binding law for judges in making decisions. Therefore, in this article, we will describe one of the essential cases related to unlawful acts, namely the case of *Donoghue v. Stevenson* or the famous "snail in the bottle" case.

On 26 August 1926, May Donoghue, a shop assistant and her friend stopped by The Wellmeadow cafe in Paisley, Scotland. Then, her friend ordered ice cream and a bottle of ginger beer for May. The cafe owner poured the beer into a container containing ice cream, which May then drank. When his friend

poured the remaining beer into the ice cream, a slug emerged from the beer bottle. After this incident, May suffered from pain both physically and psychologically. May then sued the owner of the beer company, David Stevenson, on the grounds of negligence⁵².

The judgment on this case was issued by the House of Lords in 1932 after being previously examined by the Court of Session⁵³. Lord Atkin, a judge in the House of Lords, stated that there was an element of "duty of care" in negligence. Attached to the duty of care is the neighbour principle, which needs to be explained when the duty of care arises⁵⁴. Whether or not there is a duty of care is determined by the foreseeability of the injury, the level of closeness of the relationship between the plaintiff and the defendant, and the

⁵¹ Pollock, 7.

⁵² Gavin Murphy, 'The Snail and the Ginger Beer: The Singular Case of *Donoghue v Stevenson*', *Commonwealth Law Bulletin* 37, no. 1 (March 2011): 214, <https://doi.org/10.1080/03050718.2011.548163>.

⁵³ The Supreme Court in Scotland that has the competence to resolve civil cases ('About The Court of Session' (Scottish

Courts and Tribunals, n.d.), <https://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session#:~:text=The%20Court%20of%20Session%20is,deputise%20for%20the%20Lord%20President.>)

⁵⁴ 'Donoghue v Stevenson', n.d., https://www.scienzejuridiche.uniroma1.it/sites/default/files/docenti/alpa/Donoghue_Stevenson.pdf.

existence of justice and reasonable reasons for determining liability⁵⁵.

Responsibility for tort is based on the moral that the perpetrator must compensate for losses as a right given to the victim. The two principles above require caution in both active and passive actions that can be predicted to occur. The question is, to whom does this duty of care need to be applied? Namely to people connected and directly affected by each active or passive action⁵⁶. Lord Atkin stated that every company must be careful (have a duty of care obligation) in every product it produces⁵⁷. Furthermore, Lord Thankerton, a judge in the House of Lords, also considered that there was a legal relationship between the Plaintiff and the Defendant even though the two of them were not bound by a contract. The relationship between the two is formed after knowing

that other people cannot damage the product. In this case, consumers can hold the manufacturer responsible for ensuring the product is not dangerous.

Lord Macmillan also considered that the defendant (Stevenson) had been negligent in allowing the slug to enter the bottle. Therefore, as the company producing the drink, he had a duty of care towards the plaintiff (Donoghue). Furthermore, what the plaintiff suffered was a foreseeable loss.

On the other hand, Lord Buckmaster considered that it was impossible to investigate or guarantee that the manufacturer could provide for every product, so asking the defendant to be responsible for every bottle produced was too much⁵⁸. Not much different, Lord Tomlin stated

⁵⁵ Ekaterina Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction', *Utrecht Law Review* 14, no. 2 (2018): 7, <https://storage.googleapis.com/jnl-up-j-ulr-files/journals/1/articles/444/submission/proof/444-1-1183-1-10-20180614.pdf>.

⁵⁶ Ken Dalling, *Donoghue v Stevenson-The Immortal Snail-90th Anniversary*

Conference Papers, First Edition (The Continuing Legal Education Society of British Columbia, 2022), v, <https://www.cle.bc.ca/wp-content/uploads/2023/02/Donoghue-v.-Stevenson-The-Immortal-Snail-90th-Anniversary-Conference-Papers.pdf>.

⁵⁷ 'Donoghue v Stevenson'.

⁵⁸ 'Donoghue v Stevenson'.

that, in general, the defendant does not have a duty of care, which could make him responsible for the losses suffered by the plaintiff⁵⁹.

From the presentation of the case above, three of the five judges stated that the defendant had the responsibility to compensate for the losses suffered by the defendant. It is interesting to note that in the case above, Lord Atkin emphasized the neighbour principle, which is the basis for the emergence of the duty of care. In the neighbour principle, a person must be careful not to carry out actions that could harm other people, in this case, taking all actions that can be foreseen to prevent such losses. A person has a duty of care (obligation to act carefully) to avoid causing harm to other people who might be affected by their actions⁶⁰. Just like the concept of unlawful acts in Indonesia and England, it also recognizes the existence of passive and active unlawful acts. In the snail in the bottle case above, the

defendant who was not careful in ensuring the safety and health of the product he produced was considered a passive illegal act. If the defendant took active action to ensure the safety of its product, of course, the plaintiff would not suffer any losses.

E. Morality in Indonesian Tort Law

In Indonesia, every judge's decision contains the intention "For the sake of justice based on belief in the Almighty God." This indicates that there should be natural legal values, especially those that place divine values manifested in a decision. This includes when the judge decides on a dispute over an unlawful act. So, what is the value of morality in the concept of unlawful acts?

In the previous sub, it is explained that a person can be said to have committed an unlawful act if his actions, whether active or passive, violate legal obligations and the subjective rights of other

⁵⁹ 'Donoghue v Stevenson'.

⁶⁰ Laasya Sarojni, 'Case Comment: Donoghue v Stevenson (1932)', *Jus Corpus Law Journal* 3, no. 3 (May 2023): 21.

people, contrary to moral values and the values of propriety and prudence. Below, the discussion on where morality lies in each of these elements will be presented.

The broader meaning of tort, which places violation of morality as illegal act, indicates that moral values are recognized as a reference to determine whether someone has committed an unlawful act. Morality in the Indonesian dictionary is defined as morals related to manners and good manners, good norms, good behavior, and noble manners⁶¹. In line with this understanding, morals are also defined as teachings to do good. Therefore, morality and decency have one idea: the standard of good behavior. However, what is considered appropriate, morally acknowledged and has a sense of justice recognized in society varies from one region to another. Hence, what is considered unlawful in one

region, in another area may not be the same⁶².

The values of propriety and caution aim to ensure that our actions do not cause harm to other people. This is also intended to maintain good relationship with the people we interact with. Inappropriate and careless actions that cause psychological harm to others will cause us to feel guilty. Our conscience will determine whether our actions are wrong or not. Therefore, decency, propriety and carefulness emerge from a person's conscience⁶³. This is what differentiates legal obligations and other people's subjective rights. Legal obligations and subjective rights arise from a rule that originates from the authorities (in the case of an agreement, it arises from an agreement made by both parties, where an agreement must not conflict with the law). Rules are external, codified and contain moral values. Because law without

⁶¹ KBBI Kbbi, 'Kamus Besar Bahasa Indonesia (KBBI)', *Kementerian Pendidikan Dan Budaya*, 2016.

⁶² Putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006 (n.d.).

⁶³ Widowati Christiani, 'Hukum Sebagai Norma Sosial Memiliki Sifat Mewajibkan', *Adil: Jurnal Hukum* 4, no. 1 (2013): 152, <https://doi.org/10.33476/ajl.v4i1.31>.

morals is not a good law⁶⁴. If someone violates what is required by law, logically, he has violated morals, provided that the law is fair. However, if the law is unjust, there is no moral violation. An unjust law is invalid, so there is no moral obligation to obey it⁶⁵.

Furthermore, Article 1366 of the Indonesian Civil Code states that every person is also responsible for losses caused by negligence. This article focuses on passive torts⁶⁶. Furthermore, negligence makes an action contain an element of fault. The action contains a fault if there is an intention, negligence (*culpa*), and no justification or excuse. Negligence can occur if someone is careless in their action. Therefore, it is hoped that a person should be able to act carefully to ensure that other people do not suffer losses. This is what in England tort is

called a duty of care, the obligation to act carefully.

F. Morality in England Tort Law

It is interesting to quote the opinion of James Barr Ames that there is a desire to bring English law closer to moral values even though it has not yet reached perfection, "the spirit of reform which during the last six hundred years has brought our system of law more and more into harmony with moral principles."⁶⁷ This indicates a connection between the English legal system and morality. In terms of unlawful acts, the relationship between morality and tort in England can be seen through the logic of thinking about personal wrongs. An action that causes harm, whether intentional or not, thereby violating the rights or dignity of others, is an act that

⁶⁴ Cahya Wulandari, 'Kedudukan Moralitas dalam Ilmu Hukum', *Jurnal Hukum Progresif* 8, no. 1 (30 April 2020): 11, <https://doi.org/10.14710/hp.8.1.1-14>.

⁶⁵ Hill, 'Legal Validity and Legal Obligation', 47.

⁶⁶ Shidarta, 'Mengungkit Kembali Konsep Dasar "Perbuatan Melawan Hukum"' (Binus University, January 2015),

<https://business-law.binus.ac.id/2015/01/27/mengungkit-kembali-konsep-dasar-perbuatan-melawan-hukum/>.

⁶⁷ James Barr Ames, 'Law and Morals', *Harvard Law Review* 22, no. 2 (December 1908): 8, https://www.jstor.org/stable/pdf/1324144.pdf?refreqid=excelsior%3A9b652b8857371d8f4033c0342dda7761&ab_segments=&origin=&initiator=&acceptTC=1.

violates morals. Therefore, Posner also included negligence as moral transgression, negligence is an objective standard⁶⁸. Accordingly, intentional wrongdoing also catches the moral standard as Dorfman stated: wrongness in intentional or reckless disregard of others captures the core of our moral experience of one another⁶⁹.

Practically, Lord Atkin's consideration in the case of *Donoghue v Stevenson*, which places negligence, can be held liable based on morality, confirming that the English judicial system considers morals relevant to the provisions of unlawful acts⁷⁰. The relevance lies in the neighbour principle, which structurally gives rise to a duty of care. The idea of the neighbour principle is that when you are my neighbour, you are the person who needs my attention, so when I harm you, I

have wronged you. In this relationship between neighbours, I am obliged to act or carry out actions that can avoid causing harm to neighbours⁷¹. We can actually see the idea of Immanuel Kant's deontology, that if it is good, then we are obliged to implement it, the neighbour principle seen from the perspective above, which places an obligation to do good to neighbours because it is understood from the heart of conscience that morally we should do good to neighbours is a manifestation of this deontology.

Furthermore, the concept of duty of care is teaching to do good because, through duty of care, it is hoped that someone can prevent loss and damage to other people. Lord Atkin explicitly stated that his considerations were by common sense; "...is accordance with sound

⁶⁸ Richard A Posner, 'A Theory of Negligence', *Journal of Legal Studies* 29 (1972): 32.

⁶⁹ Avihay Dorfman, 'Can Tort Law Be Moral' (Tel Aviv University Law School, n.d.), 210, <https://law.bepress.com/cgi/viewcontent.cgi?article=1172&context=taulwps>.

⁷⁰ Erika Chamberlain, 'Lord Atkin's Opinion in *Donoghue v Stevenson*: Perspectives from Biblical Hermeneutics',

Law and Humanities 4, no. 1 (June 2010): 96, <https://doi.org/10.1080/17521483.2010.11423777>.

⁷¹ Christopher Essert, 'The Value of the Neighbour Relation', in *Private Law and Practical Reason*, ed. Haris Psarras and Sandy Steel, 1st ed. (Oxford University Press Oxford, 2023), 303, <https://doi.org/10.1093/oso/9780192857330.003.0017>.

common sense". Based on this, in principle, the morality of tort in England is based on reason

However, a person's background also influences a person's mindset, perspective and beliefs. Lord Atkin himself is a follower of the Christian religion. Therefore, Christian religious values also influenced his decision. Chris Armitage stated that the neighbour principle conveyed by Lord Atkin is a moral value from the Christian religion⁷² A person should pay attention to neighbours who are related parties and are directly affected by—our actions. "Love your neighbour as yourself" is one of God's commands to do good from a Christian perspective⁷³.

G. Conclusion

Morality exists in unlawful acts. Both in Indonesia and England presume morality as something that is considered to

determine whether someone commits an unlawful act or not. In Indonesia, morality colors the generalization of unlawful acts, whereas, in England, morality appears in the neighbour principle, giving rise to the duty of care. Interestingly, the duty of care also appears in the concept of unlawful acts in Indonesia, namely in the context of negligence. Empirically, by looking at the case of *Donoghue v Stevenson*, reason (and divine values for Lord Atkin) is used to apply morality in tort. In Indonesia, with the existence of the decision's title "Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa" (for the sake of justice based on belief in the Almighty God), it is hoped that judges in deciding cases will use their logical thinking, wisdom and divine values.

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⁷² Chris Armitage, 'Lord Atkin, the Snail and the Foreigner: Loving the Neighbour and Oppressing the Alien', *Law and Humanities* 16, no. 1 (2 January 2022): 123–44, <https://doi.org/10.1080/17521483.2022.2073524>.

⁷³ Satria Tenun Syahputra, 'The Anti-Violence Verses in The Ten Commandments of God From The Perspektive of Judaism, Chritianity and Islam', *El-Umdah* 4, no. 2 (2021): 115, <https://journal.uinmataram.ac.id/index.php/el-umdah/article/view/3709>.

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