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MARK ANDREW O'REGAN.

THE ECONOMIC TORTS: RECENT DEVELOPMENTS AND FUTURE TRENDS.

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At the outset of a paper like this it is necessary to establish what the law is in its present state before looking at its future. I intended to do this by looking at the traditionally accepted view of the law and showing the impact of recent decisions, before indicating some possible future developments which could lead to a streamlining of the law in this field.

THE TRADITIONAL DIVISION.

Traditionally the economic torts have been divided into three separate torts - Conspiracy, Interference in Contractual Relations and Intimidation. I shall deal with each in turn.

1) CONSPIRACY.

A comprehensive definition is given in Salmond [1]

"A combination wilfully to do an act causing damage to a man in his trade as other interests is unlawful, and if damage in fact is caused, is actionnable for conspiracy. To this there is an exception where the defendants' real and predominant purpose is to advance their own lawful interest in a manner which they honestly believe those interests would directly suffer if the action against the plaintiff was not taken...

.. A second form of actionnable conspiracy exists where two or more combine to injure a third party by unlawful means".

FOOTNOTE.

1. Salmond on Torts.by R.F.V. Heuston 16th Ed. P. 384.

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The defence of justitication-where the defendant is acting in his own interests, makes it extremely difficult to bring a successful claim for damages except, of course, where unlawful means are used. The defence is so wide that it is necessary to show that the defendant's predominat purpose was to injure the plaintiff.

A good illustration of this is the famous Mogul Steamship [2] case where a group of shipowners formed an association to secure for themselves exclusive trade in a certain area, offering a 5% rebate on charges to all shippers who shipped exclusively with members of the association. The plainitiffs sent ships to the port to get cargo. Association members immediately sent more ships to the port, underbid the plainitiffs and reduced rates to an unprofitable level. They also threatened to dismiss agents dealing with the plaintiffs and canced the 5% rebate for anyone trading with the plaintiffs. The plaintiffs sued for damages, alleging conspiracy to injure them.

They were, however, unsuccessful, because the defendants had done ~~on~~ no unlawful act, and what they had done was not done with an unlawful purpose - they were justified in what they had done by self-interest. Bowen.L.J. said:

> "they have done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interests of their own trade"

FOOTNOTE.

2. Mogul Steamship Co. v McGregor Gow & Co. (1889) 23QBD 598 (CA), (1892) AC 25 (HL).

Thus, in order to overcome the defence of justification the plaintiff must show an intention to injure him which is the dominant motive for the defendants' action, something which is very difficult to do.

If the combination had used unlawful means in order to further their own interests, it would have been a different story. Obviously it would be much more difficult to justify unlawful acts, and justification is not available as a defence where unlawful acts are used.[3]

2) INTERFERENCE in CONTRACTUAL RELATIONS:

Although there is no need for a combination, this tort requires the plaintiff to show interference with his contractual relations. There is no need to show actual breach of contract.[4] The defendant must have knowledge of the contract and intend the interference as a consequence of his action. Although he does not have to know the precise terms of the contract, he must know enough to recognise that his actions cause a breach (or interference.)

FOOTNOTES:

3. See discussion infra.

4. Torquay Hotel v Cousins (1969)2 ch 106 at 138 per Lord Denning MR - in that case the contract had a force majeure clause but the interference was nevertheless actionable.

The tort is divided into two categories - direct and indirect inducement. Although this distinction was said to be non - exstent by Lord Denning M.R. in Daily Mirror Newspapers Ltd. v Gardner [5] he later went back on this in the Torquay Hotel case. [6] There he admitted he had gone "too far" in Daily Mirror, and pointed out that the distinction is crucial, for if there is direct interference, the tort can lie even where lawful means are used, [7] but if there is only indirect interference there must be unlawful means used before an action can be successful. Speight J. reaffirmed the distinction in Pete's Towing Services Ltd. v Northern Industrial Union of Workers, [8] saying that in the case of an otherwise lawful strike, the result of which was a breach of contract by the employer -

> "such results I would hold to be indirect and not tortious where they are incidental and secondary to, and not the prime purpose of the action".

If direct interference is shown and no unlawful means have been used, justification is a possible defence. However the defence is harder to establish than it is in the case of conspiracy, in that economic self-interest is not sufficient. As Speight.J. said in Pete's Towing case, [9]

> "the advancement of one's own interests, even with the highest and most altruistic motives will not suffice"...

FOOTNOTES.

5. (1968) 2 All ER 163 at168
6. Supra, note 4, at 140
7. Lumley v Gye (1853) 118 E R 749
8. (1970) N.Z.L.R. 32 at 47
9. ibid p.50

What will suffice is not entirely clear, as Speight.J. acknowledges, and it seems to be a matter for determination in the individual case. The factors to be taken into accounts were set out by Romer.L.J. in Glamorgan Coal Co. v South Wales Miners Federation[10] where he said -

"regaard must be had to the nature of the contract broken, the position of the parties to the contract, the grounds for the breach, the means employed to procure the breach, the relation of the person procuring the breach to the person who breaks the contract, and...to the object of the person in procuring the breach".

Speight.J. applied this test in Pete's Towing case and on the facts of the case found the action taken to be justified. Adefinitive test is impossible to formulate and to do so would be (in the words of Romer.L.J.) "mischievous"[11] because the facts of each case vary so much as to how serious the breach is compared to how laudable the motive is; a wide-ranging test like that set out above is far more appropriate.

If the inducement is indirect, of course, the tort does not lie unless unlawful means are used, and therefore justification is unlikely to be allowed as a defence.[12]

FOOTNOTES.

10. (1903) 2 KB 545 at 574

11. ibid

12. see discussion infra

3)INTIMIDATION.

Intimidation consists of a threat to take unlawful action against a third party with the intent of causing injury to the plaintiff. The most famous case is Rookes v Barnard[13] where the unlawful act threatened was a strike in breach of contract. The plaintiff's employer to whom the threat was made, lawfully dismissed him in order to prevent such a strike. The plaintiffs action was successful because the act threatened would have been unlawful in itself (i.e. a breach of contract.)

Whether justification in a case of intimidation is a defence is very much in doubt, because the essence of the tort is unlawful action threatened, and as pointed out in relation to conspiracy and interference in contractual relations, it seems that unlawful acts cannot be justified. However Lord Devlin. in Rookes v Barnard[14] left the question open, and Lord Denning M.R. in Morgan v Fry[15] thought it was a possible defence. Speaking obiter (because it had already been found that there was no intimidation, because there was no unlawful act threatened), he said....

"But I must say that if it and his friends (which included the plaintiff) were really troublemakers who fomented discord in the docks without lawful cause or excuse, then Mr. Fry (the defendant) and his colleagues might well be justified in saying the men would not work with them any longer".

FOOTNOTES.

13. (1964) AC 1129
14. ibid P.1206
15. (1968) 2 QB 718 at 729

The question is by no means settled, and it gives rise to the wider issue of whether unlawful means can ever be justified which is in the balance at the present time.[16]

RECENT DEVELOPMENTS.

It has been argued that besides the three 'traditional' economic torts, there exists a more general tort which includes elements of all three. For instance J.D. Heydon says..[17]

"Much more slowly and crudely, the Courts have been groping towards an embryonic innominate tort of causing international loss by unlawful means. They have done so in many ways..... ...And they have extended the area of inducing breach of contract and conspiracy by giving remedies against defendants who committed these torts while using independantly illegal means".

This new tort can be labelled "Intentional Interference with the Business Relations of Another by Unlawful Means".

In Torquay Hotel v Cousins,[18] Lord Denning M.R. stated obiter that he thought such a tort existed, and he repeated it subsequently in Acrow v Rex Chainbelt[19] where he said...

"I take the principle of law to be that which I stated in Torquay Hotel v Cousins,[20] namely that if one person without just cause or excuse, deliberately interferes with the trade or or business of another, and does so by unlawful means, that is by an act which he is not at liberty to commit, then he is acting unlawfully".

FOOTNOTES.

16. See discussion infra
17. (1970) 20 University of Toronto L.J. 139
18. Supra, note 4
19. (1971) 3 ALL ER 1175 at 1181
20. Supra, note 4

On the basis of the law as he expounded it there, he was prepared to ~~grow~~ grant an injunction to Acrow Ltd, finding that Rex Chainbelt, in obeying an order from their parent company not to supply Acrow in defiance of an injunction against the parent company, were using unlawful means because they were aiding and abetting the breach of injunction and so were acting in contempt of court.

Phillimore and Megaw L.J.J. agreed with the Master of the Rolls. Thus we have a unanimous decision of the English Court of Appeal[21] supporting the existance of the tort as the ratio of the case.

Another English case, Brekkes v Cattel[22] allowed an action for "interference with trade". There again it was found that unlawful means were present in that case an agreement by a Dealers Association which was likely to be declared void by the Restrictive Practices Court. However the facts of the case are similar to the Mogul case[23] - except that unlawful means were found - and thus it would seem to be a case of conspiracy under a different name.

More recently a New Zealand case has been decided on the basis of the existence of the tort. In Emms v Brad Lovett[24] Perry J. found there was a tort of 'unlawful interference with the business of another.' In fact the defence conceded the point but Perry.J. considered this to have been rightly done. He relied upon two authorities- Sorrell v Smith[25] where Lord Dunedin set out the requirements of such a tort, and Lord Denning's statement in Torquay Hotel v Cousins[26] referred to above, and repeated by Lord Denning himself in Acrow.[27]

FOOTNOTES:

21 See infra for academic opinion of Acrow.
22 (1971) 2 WLR 647
23 Supra, note 2
24 (1973) NZLR 282
25 (1925) AC 700
26 Supra, note 4
27 Supra, note 19

The facts of the case were that the defendant often stopped his mobile shop close to the plaintiffs-thus taking custom from the plaintiff. The defendants action was in breach of the licence which allowed him to run his mobile shop, a condition of which was that he should not stop, for the purpose of doing business, within 300 yards of any other shop, including other mobile shops. The judge found that since the defendant breached this condition, he was operating without a licence and therefore breaching a by-law. Thus his action was unlawful. The judge found there was interference it was by unlawful means, and the plaintiff could therefore recover damages.

The paucity of authority as to whether such a tort exists is unfortunate, but quite understandable, because it has not really been necessary for the Courts to consider the point. Usually an unlawful act done intentionally to cause economic loss will come within one of the three main headings of conspiracy, interfence with contractual relations or intimidation. Lawyers quite justifiably prefer to bring their action under the traditional headings rather than allege a tort whose very existance is in doubt. A good example of this is Pete"s Towing[28] case where the plaintiff brought an action alleging all three of the 'traditional' torts. Another reason for doing this is that the action doesn't necessarily fail in conspiracy or direct interference with contractual relations if the plaintiff fails to establish unlawful means, because the torts still lie as one can show lack of justification (although they failed to do so in Pete's Towing case).

FOOTNOTE.

28. Supra, note 8

As the great majority of Cases are likely to come under one or more of the traditional actions, even where unlawful means are used, the action is brought in that form. This means that cases like Acrow[29] and Emms[30] only arise where the traditional actions are not available.

Having considered these recent developments, one is now in a position to come to a conclusion as to how the law stands at the present time. I would adopt the summary given by Professor K.W. Wedderburn who put it this way -[31]

"An action will lie -

(a) Where a direct inducement causes a breach of contract knowingly and intentionally or recklessly (including in the 'breach' situation where a contract exempts one or both parties from liability in damages but does not excuse him totally from the obligation unperformed). In this case only a third party, not the inducee may sue.

(b) Where by threat (intimidation), combination (conspiracy), individual act or even omission (as in Acrow but rarely), the defendant has threatened or made use of unlawful means deliberately to interfere with the trade, business or other economic interests of the plaintiff (including indirect procurement of breach of contract where unlawful means remain of the essence[32]). In this case any party aimed at and suffering (or likely to Suffer) damage may sue as Plaintiff"

FOOTNOTES.

29. Supra, note 19
30. Supra, note 24
31. Casenote on Acrow v Rex Chainbelt (1972) 35 MLR 184
32. See discussion Supra.

The only modification I would add to this is that a conspiracy may be actionnable where there is no unlawful means, as long as it can be shown that the defendant was not acting justifiably. The above is a full statement of the law as it stands after the recent developments I have outlined.

The Defence of Justification - an aside.

The existance of the tort of intentional interperence with the business of another by unlawful means raised the difficult question of whether ~~such~~ such acts can be justified - the same problem already encountered in relation to conspiracy and interference with contractual relation where unlawful means are used, and intimidation which, like the 'new' tort is dependant upon unlawful means.

Authority on the point is meagre, although it is interesting to note that in giving his definition of the law in Acrow [33] used the phrase 'without just cause or excuse' which seems to imply that justification would be a defence, but unfortunately he does not elaborate on this.

J.D.Heydon in his article 'Justifation In Intention & Economic Loss' discusses at some length the question of whether unlawful means can be justified. [34] He points out that although there is a dogma that unlawful means cannot be justified, there is no adequate basis for such a rule. [35]

FOOTNOTES.

33. Supra, note 19
34. Supra, note 17, p. 178-182
35. Ibid p. 178

He points out the various reasons given for the rule, the main ones being that the Courts see " something particularly harmful with illegality so that it ought not to be held capable of justification"[36] and that there is a need for certainty in the law.[37] However the first reason is an opinion which does not stand too close a scrutiny because in some circumstances, (admittedly rare) there may be unlawful means which are relatively minor which are done for an extremely laudable purpose - where the end may justify the means. Yet under the law as it presently stands the defence of justification would be immediately ruled out becouse unlawful means were used. The second reason, as Heydon points out, is not backed up by the facts. The definition of what amounts to unlawful means is uncertain itself, so that a dogma that unlawful means cannot be justified does not in itself lead to any great certainty.

It is extremely difficult to define conclusively what "illegal" or "unlawful" means are. In his article Heydon shows this in his glossary of what have been accepted as unlawful means in individual cases.[38] The decision in Rookes v Barnard[39] is a good example of the uncertainty of the law - in that case a threat to strike in breach of a contract was considered an unlawful act for the purposes of intimidation-an entirely unpredictable result[40] Breckes v Cattel[41] and Acrow[42] are also examples of this point.

FOOTNOTES.

36. Ibid p. 179
37. Ibid
38. Ibid p. 172-175
39. Supra, note 13
40. Supra, note 17 p. 180
41. Supra, note 22
42. Supra, note 19

The unwillingness of the Courts to rule out justification as a defence to intimidation as shown above is evidence that if there was an extreme enough case the possibility of justifying unlawful means would not be lightly dismissed.

Any major changes in regard to justification may be dependant upon changes in the law in this field as a whole as will be shown.

FUTURE POSSIBILITIES.

In the light of the extension in the law resulting from the decisions in Acrow [43] and Emms [44] it would seem that the law is now in a position from which greater development could be made. The logical step would be for the three separate traditional torts, plus the additional, more general tort recently established, to be amalgamated into one all-encompassing tort of intentional interference in anothers business or trade. This proposition was considered by Phillip Raynor in his casenote on the Acrow decision.[45] He considered the statement of Lord Denning M.R. in Torquay Hotel v Cousins [46] to the effect that threats to interfere in future contracts may be tortious and added -

> "There is not a great deal of difference between the proposition that a man is to be protected against interferences in the execution of his existing contracts and the proposition that he is to be protected against those who interfere in his business in any way".[47]

FOOTNOTES.

43. Ibid
44. Supra, note 24
45. (1972) 88 LQR 177
46. Supra, note 4
47. Supra, note 45p.179

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But is such an extension possible? There are various reasons why it would be avoided, and if it was allowed, some problems would arise, but in the writers opinion, none of these would be insurmountable.

The famous case of Allen v Flood[48] would be the first bar to such an extension. In that case the House of Lords found that there was no action for interference in another's economic interests unless there were other circumstances involved (breach of contract an unlawful act, a combination etc). Of course in England the House of Lords could now reverse the decision and in New Zealand a court need not follow it.[49] It is interesting to note that when the case was heard before 9 Law Lords,8 judges were also summoned. The judges voted 6-2 to uphold the decision of the Court of Appeal, finding for the plaintiff, but this was rejected 6-3 by the Lords themselves.[50]

As stated above, the decision would not have to be followed in New Zealand, and a decision to reverse it (or rather, not to follow it) would allow the law to develop in a much more logical way. The result would be that there would be one tort of intentional interference with the business or economic interests of another to which others factors, like unlawful acts, conspiracy etc, would be incidental. The defence of justification would still apply and the 'incidental factors' would be of crucial importance in deciding whether acts could be justified.

FOOTNOTES.

48. (1898) AC 1

49. See Bognuda v Upton & Shearer (1972)NZLR 741 at 757 per North.P.

50. A Second Miscellany-at-Law by R.E. Megarry(now Megarry J. P.62

As Heydon points out in his article,[51] such an approach would lead to a new approach to justification. The means used would become only of secondayy importance to the purpose for which the act was done. The Courts would be in the position which was envisaged by Bowen L.J. when he said obiter in the Mogul Case -

> "intentionally to do that which is calculated in the ordinary course of events to damage, and which in fact does damage another in that other's property or trade, is actionnable if done without just cause or excuse".[52]

The difference would be that whereas in the present circumstances there are different tests for justification for conspiracy (where economic self-interest is enough) and interference with contractual relations (where something more than that is required),[53] if there were one tort the defence of justification would be more a question of public policy rather than a specific test. This would not necessarily lead to uncertain law. It would be a matter of balancing the act done against the purpose envisaged, thus the present situation would essentially be retained because a breach of contract resulting from the act done would be harder to justify than action short of this, and unlawful means would be virtually impossible to justify unless there were extreme circumstances.[54]

FOOTNOTES.

51. Supra, note 17

52. (1889) 23 QBD 598 at 613

53. See discussion Supra

54. See discussion Supra, and C.F. Lord Denning's dictum in Morgan v Fry supra, note 15

The result of the extension proposed would amount to conspiracy without the need for a combination. Referring to the present requirement of a combination, J.G. Fleming said

" Under modern social and economic conditions there is no inherent magic in numbers and it is unrealistic to assume categorically that it is easier to resist the coersive power of one person than of several"[55]

Salmond on Torts[56] echoes this sentiment and both Fleming and Salmond subscribe the reason for the requirement of a combination to the historical basis of the tort in the old common law crime of conspiracy. It is hard to justify such a requirement on practical or logical grounds as is illustiated by the American case of Tuttle v Buck.[57] In that case a wealthy man set up a rival business to a hairdresser in a small town for the express purpose of putting him out of business. Although he used perfectly lawful means (undercutting prices etc.) his action was entirely without justification in the sense of economic self-interest and the Court found the plaintiff had an action. In England or New Zealand such an action would not be possible unless the wealthy man had combined with another in order to achieve his purpose, unless the extension of the proposed was effected.

Another way of looking at the result of the extension proposed is to see as an extension of the tort of interference with contractual relations with the need for the relations the be 'contractual' somewhat relaxed so that any business or economic relationships would be protected. This is what Raynor[58] envisaged as a possibility as a result of Lord Denning's statement in Torquay v Cousins.[59]

FOOTNOTES.

55 The Law of Torts by J.G. Fleming 4th ED P.615
56 Supra, note 1, p.387
57 (1909) 107 Minn 145
58 Supra, note 45
59 Supra, note 4

Professor Wedderburn also refers to this possibility in his casenote on Acrow[60], but he sees the clear indication in Acrow[61] that unlawful means would be necessary in a tort of interference with anothers business relations as laudable. He argues that unless unlawful means are a prerequisite for such a tort, capitalist society, based as it is upon competition, could not function, because all businessmen try to improve their trade and this can involve damaging a competitor's interests. He sees the possibility of the 'floodgates of litigation' being thrown open if actions are allowed in such situations. In the writer's opinion the argument holds no water, because it fails to take account of the fact that the acts must be done with the intention of injuring another and that they must be incapable of justification. If his hypothesis is correct, why has there not been a "flood" of cases alleging conspiracy? The obvious answer is that, as in the Mogul case[62], action calculated to injure another is not tortious if it is done in the furtherance of a legitmate trade or business interest.

Wedderburn also argues that if such a tort existed the Courts would be involved in deciding broad questions of public policy as to what action was justified and what was not, something which is undesireable, especially in view of the fact that legislatives have endeavoured to take this jurisdiction away from the Courts by Trade Practices Legislation[63].

FOOTNOTES.

60. Supra, note 31
61. Supra, note 19
62. Supra, note 2
63. In New Zealand-Trade Practices Act 1958 and now Commerce Bill 1975

That endeavour resulted in part from the Courts' unwillingness to become too involved in public policy decisions. The same counter-argument can be raised here. The Courts have faced the same problem with reguard to conspiracy and have not been unequal to the task, mainly because of the wide interpretation given to justification. A sensible approach to the problem was taken in Brekkes v Cattel.[64] In that case it was found that a restrictive trade agreement which was likely to be found void by the Restrictive Practices Court in England constituted unlawful means. Thus the question of justification didn't really have to be considered at all.

Another possible argument against the extension of the law is that it would pose an added ~~threat~~ threat to the freedom of the trade union movement. This is simply not true. The main problem confronting unions in this field is the difficulty in justifying their actions if they are found to be unlawful. The extension proposed would not affect this at all, any case, even where there are no unlawful means, trade union action would normally constitute conspiracy ~~or~~ or one of the other traditional torts under present law, so the position would be no different.

The conclusion is that there is no logical reason why the law should not allow conspiracy without a combination which would lead to a general tort of intentional interference with another's business or economic interests. This would effectively amalgamate the three traditional torts and the recently established tort into one action.

FOOTNOTES.

64. Supra, note 22

The extension in the law is really quite small. The effect is more a streamlining of the law so that there is one form of action to which other circumstances, now the bases of the separate torts, would be relevant only to determine whether the action could be justified. This would possibly lead to the Courts becoming involved in public policy questions but this is not an overwhelming problem. As Raynor says [65] -

> "To those who say this would lead to ex post facto and unclear law, the simple answer is that the defence does not seem to have been productive of abuse in the simple conspiracy sphere".

The Courts have coped in the conspiracy sphere, as Raynor rightly points out, and it is also worth noting that in cases of direct interference with contractual relations without unlawful means (as in Pete's Towing case [66]) the Courts decide the question of justification without any specific tort. The way they decide is essentially by balancing the interests of the two parties- the interferer and the sufferer of the breach of contract. This has not led to any problems. [67]

FOOTNOTES.

65. Supra, note 45 at p. 179

66. Supra, note 8

67. See discussion Supra.

The main problem in this field is that, while cases continue to be pleaded in terms of the traditional torts the question of amalgamating them as suggested will not arise. It will require a fact situation where the traditional pleadings are not appropriate for the question to be brought to Court. If this happens there seems to be a good chance of a Court agreeing to the extension required and to the reversal of Allen v Flood[68] - especially in view of the fact that other fields of law (a good example is negligence) are opening up as new facts situations before the Courts demand such action.[69]

FOOTNOTES.

68. Supra, note 48

69. A good example of this-Hedley Byrne v Heller (1964) AC 465

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