The current state of the law of economic torts.

Law

Introduction

The three appeals considered by the House of Lords under the lead name OBG Ltd. v Allan [1]were concerned with claims in tort for third party economic loss caused by intentional acts and were heard consecutively because the legal issues overlapped. [2] The current state of the law of economic torts [3] has been described as “ ramshackle”.[4] Some commentators have suggested this is because this area of the law lacks the kind of general principle applied by Lord Atkin in Donoghue v Stevenson [5]which successfully unified the law of negligence. [6] Others believe that such generalization is neither possible nor desirable [7] and that there is no ‘ genus’ tort that provides a base for all the economic torts. [8] The grounds for action presented in these three cases were: [9] (1) interference by unlawful means with contractual relations; [10] (2) interference by unlawful means with contractual or business relations; [11] (3) wrongfully inducing breach of contract. [12], [13]

The issue which the Lords took this opportunity to address was whether three such separate heads of tort exist or whether they might be rationalized within a ‘ unified theory’. Most publicity surrounding the case centered on the celebrity wedding and much of the expectation in the legal journals was focussed on right to privacy issues. [14] In the event the House effectively erased all of twentieth-century caselaw from the three-party economic torts.

The key dicta were:

1. inducing breach of contract should continue to be considered a distinct category of tort and not be subsumed within the general category of unlawful interference with business, [15] and;
2. unlawful interference with contractual relations should not be a separate head of tort but should be considered under the conditions of liability for unlawful interference with business.[16] To understand the significance of this decision we must review the history of the economic torts to discover how we got into " our present pickle?" [17]

Economic losses are a difficult area of law in a free market since one business may suffer losses, or even be put out of business, by the lawful competition of a rival. The courts have no role to play in this normally, and economic orthodoxy considers there are consequent gains for consumers, producers, and workers.[18] Historically in English common law unlawful interference in trade was actionable. Lord Hoffman [19] cites Garrett v Taylor [20]where a business was harmed because the defendant " imposed so many and so great threats upon … all comers … threatening to mayhem", and Tarleton v M'Gawley [21], where the tort lay in " firing a cannon at negroes and thereby preventing them from trading with the plaintiff." [22] Thankfully, by the turn of the century, in Carrington v Taylor, [23] it was only ducks that were being shot at in a dispute over wildfowling rights: where a violent…act is done to a man's … livelihood; there an action lies in all cases. [24]

Such cases are straightforward because the defendant's liability is primary. The respective acts of threatening mayhem and discharging ordnance at potential customers are clearly in themselves unlawful. But the law of torts

has inevitably grown and been modified over the centuries, in response to changing conditions within society, [25] and as the ingenuity of the industrialists and entrepreneurs of Victoria's Empire developed more subtle ways of influencing the customers. The courts' attitude to the nineteenth-century free-market was crystallized in Mogul Steamship Co Ltd v McGregor, Gow & Co [26], which established the boundaries of lawful competition as whatever is " neither forcible nor fraudulent." [27] A number of ship owners had entered into a league and had applied " sharp practices and power plays" [28] in seeking to control the tea trade from certain

Chinese ports, but nothing that was actually unlawful:

To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen…would be a strange and impossible counsel of perfection. [29] The authority for all inducing breach of contract cases is Lumley v Gye. [30] Two rival theatre owners were vying for the services of the opera diva Johanna Wagner, niece of the famous composer. Lumley had contracted Wagner to sing twice a week at Her Majesty's Theatre for payment of 100 per week.[31] Wagner subsequently agreed with Gye that she would sing at Covent Garden for a " larger sum." [32] Lumley raised an action against Gye for " maliciously procuring" a breach of contract. [33] The case which completed the triangular foundation on which twentieth-century economic tort law was to be constructed was Allen v Flood. [34] In essence this case simply extended the principle of Mogul Steamship Co. to labor disputes. In the same way that rival businesses are free to cause harm to one another in lawful pursuit of their own interests, so too is an employee free to cause economic harm to a rival employee (by

getting him laid off) as long as no unlawful means are employed.[35] Such an analysis seems perfectly reasonable with a century of hindsight but the social mood of the time was perhaps less comfortable with it. [36] The Lords specifically rejected the proposition that liability might arise whenever one person did damage to another wilfully and intentionally without just cause and excuse. [37]

Since Allen liability has turned on intentional procurement of an actionable wrong or the deliberate use, or threatened use, of illegal means directed against the claimant. [38] Inrespectof the House of Lord’s judgment in OBG, the law could have stopped here, but over the next century, several false trails were followed. The seeds of confusion, [39] were sown by Quinn v Leathem. [40] This case involved “ boycotting by trade unions in one of its most objectionable forms,” [41] but as ever it wasn’t the details of the fact that caused confusion but the details in the dicta. Two key passages were identified by Lord Hoffman, purporting to re-state the basis of Lumley v Gye: (1) “ it is a violation of legal right to interfere with contractual relations recognized by law” [42] and; (2) “ The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual.” [43] The problem with these respective passages is: (1) Lumley wasn’t founded on merely interfering with a contract but on inducing an actual breach of a contract and; (2) inducing a breach of contract isn’t of itself a wrongful act but only attracts secondary liability once there’s been a breach.

In Sorrell v Smith [44]Lord Dunedin was prompted to invoke the prayer of Ajax in an attempt to clear the “ fog of battle” from this area of law, but a ‘

penumbra of doubt’ [45] nonetheless continued to hang over cases where there was interference with contractual performance but no actual breach of contractual obligations. “ The muddle set in” [46] when DC Thomson & Co Ltd v Deakin [47]consolidated the unified theory that considered inducing breach of contract to be a species of the more general tort of unlawful interference with contractual rights. [48] Throughout the twentieth century, as the law worked to connect the various islands of the “ archipelago” that was the common law of economic torts [49] with stepping stones of case law, it was invariably in the trade union disputes that the lords ran the greatest risk of getting their feet wet.

In Torquay Hotel Co Ltd v Cousins [50] L. Denning declared:

The time has come when the principle should be further extended to cover deliberate and direct interference with the execution of a contract without that causing any breach. [51] The creation of this sort of interference with the contract has been much criticized and has not been supported by later authority. [52] Rather judges have stressed: “ the limits which as a matter of policy the court must place on the principle of Lumley v Gye”. [53] For Lord Hoffman all this confusion has arisen from attempts to apply the unified theory [54] and he thinks “ it is time for the unnatural union between the Lumley v Gye tort and the tort of causing loss by unlawful means to be dissolved.” [55]

He believes commentators like Tony Weir seek to confer too broad an ambit on the tort of causing loss by unlawful means, [56] and sides with those who are critical of Weir’s “ Herculean” ambition to unify the economic torts,

believing that “ clarity is not in itself sufficient reason for accepting a particular factor as a determinant of tort liability.” [57] Weir himself sees the “ illegitimate tort of interference with contract” [58] as the problem, and the confusion as arising from interpretations of Lumley that focus on the plaintiff’s rights rather than the defendant’s wrong. [59] This has got the law into the position where we see “ honest demonstrators enjoined from putting their views to the supermarketing public”, [60] and “ a singer sued for not singing by those for whom she never agreed to sing.” [61], [62] Some commentators have even suggested a possible analysis of Lumley in terms of “ ownership or possession” and “ rights in rem.”[63]Certainly some early Scottish cases based on the delict of harboring of employees have more of a feel of invasion of res corporales [64] than anything to do with the contract. [65] However almost everyone had long identified a pressing need for an authoritative definition of the tort of unlawful interference with trade. [66]

The House of Lords therefore took this belated opportunity to answer Ajax’s prayer and we can now say that following their decision in OBG the law is as follows:

To be liable for inducing breach of contract:

1. you must know you are inducing a breach and that the act you are procuring will have this effect, it is not sufficient that the breach was merely a foreseeable consequence of your action.
2. you must have knowledge not just of the existence of the contract but of the essential terms relevant to the breach.

3. the claimant must have been intentionally targeted, whether the breach was an end in itself or the means to some further end.
4. there must have been an actual breach: “ no secondary liability without primary liability.”

Liability for causing loss by unlawful means requires:

1. wrongful interference with the actions of a third party in which the Claimant has an economic interest.
2. intention thereby causing loss to the Claimant whether or not the loss was an end in itself or the means to an end.
3. wrongful interference would be any act actionable by that third party or which would have been actionable had he suffered loss by it, and would exclude acts which may be unlawful against a third party but which do not affect his freedom to deal with the Claimant.

Many of the journal articles about this decision focus on the confidence and privacy issues, [70] but the reaction to this clarification of the economic torts seem mainly positive, with the expectation that there should be fewer cases where claimants cherry-pick the most favorable features of each tort and ignore the requisite limiting features. [71]

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