

The 'economic torts'

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Introduction

This online chapter discusses a group of torts that were established to protect the interests of businesses from unlawful interference by others. Unfortunately, in recent years, many books and law courses have neglected these so called 'economic torts' but, from the point of view of businesses, they can be extremely important.

Inducing breach of contract

The law does not readily tolerate interference with contractual relationships, and will hold liable those who interfere in the contracts of others via the tort of inducing breach of contract.¹ This tort occurs when the defendant intentionally causes someone who is a party to a contract to breach it. The requisite level of intention required has been the subject of a substantial body of case law. What is clear is that liability will not be imposed for negligently inducing another party to breach his contract;² and there is no need to establish that the defendant intended to harm the claimant. Lord Hoffmann has stated that '[t]o be liable for inducing breach of contract, you must know that you are inducing a breach of contract.'³, but what level of knowledge is required? Lord Hoffmann answered this question, stating:

Intentional interference presupposes knowledge of the contract. With that knowledge the defendant proceeded to induce the other contracting party to act in a way the defendant knew was a breach of that party's obligations under the contract. If the defendant deliberately turned a blind eye and proceeded regardless he may be treated as having intended the consequence he brought about.⁴

The tort can be committed in one of four ways, namely:

1. Direct inducement;
2. Direct intervention or preventing performance;
3. Indirect intervention; and
4. Inconsistent dealing.

¹ *Lumley v Gye* (1853) 2 E & B 216.

² *Cattle v Stockton Waterworks Co* (1875) 10 QB 453 (QB).

³ *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 [39].

⁴ *ibid* [192].

Direct inducement

Where the defendant, without lawful justification or excuse, directly and intentionally persuades someone (X) to breach his (X's) contract with the claimant, he will have committed the tort of inducing breach of contract.⁵

Direct intervention or preventing performance

The defendant does not have to directly persuade the third party to breach his contract in order to be liable. Any form of direct intervention that the defendant knows will prevent a party from performing his contractual obligations will constitute the tort of inducing breach of contract.

GWK Ltd v Dunlop Rubber Co Ltd (1926) 42 TLR 376 (KB)

FACTS: The claimant manufactured tyres. A car manufacturer (X) was exhibiting a number of vehicles at an upcoming car show. The claimant contracted with X that it would provide the tyres for the cars being exhibited. The defendant, a rival tyre company, removed the claimant's tyres from X's cars and replaced them with its own tyres.

HELD: The High Court held that the defendant was liable to the claimant for inducing breach of contract and to X for trespass to goods.

Indirect intervention

Indirect intervention occurs where the defendant persuades someone (Y) to do a wrongful act, usually breaching a contract to which Y is a party, in order to prevent performance of another contract. In order for liability to be established, it must be demonstrated that the defendant intended a specific contract to be breached.⁶

JT Stratford & Sons Ltd v Lindley [1965] AC 269 (HL)

FACTS: The claimant hired out barges to the public. Hirers were under a contractual obligation to return the barge to the claimant's moorings. This was achieved by sending individuals (known as 'watermen') to retrieve the barges and return them to the claimant. The defendants were officials of a trade union who were involved in a dispute with the claimant. This trade union also happened to represent the watermen. In order to place pressure on the claimant, the defendants instructed the watermen not to return the barges to the claimant. As barges were not being returned, the claimant's business soon came to a stop. The claimant sued.

HELD: The defendants had committed the tort of inducement to breach. By instructing the watermen not to return the barges, they had indirectly caused the hirers to breach their contract with the claimant.

Inconsistent dealing

This occurs where the defendant is aware of a contract between two other parties, and has dealings with one of those parties (Z), which he knows are inconsistent with their contract and which cause Z to breach his contract. The following provides an example of such inconsistent dealing.

Example - Inconsistent dealing

The Rolls Royce Owners Club Ltd wishes to sell a number of vintage Rolls Royces. It sells one to Keith. As the club is keen to ensure that the cars remain in the right hands, it is a term of the

⁵ *Lumley v Gye* (1853) 2 E & B 216.

⁶ *Mainstream Properties v Young* [2005] EWCA Civ 125, [2005] IRLR 964.

contract with Keith that, should he decide to sell the car, he must first offer it to the Rolls Royce Owners Club before offering to sell to anyone else. Lisa is fully aware of this term, but wishes to own the particular Rolls Royce and modify it by painting it pink, and adding spinning alloy wheels and a spoiler to the rear. She offers to purchase Keith's Rolls Royce for double its market value. Without first offering the car to the Club, Keith agrees and sells the car to Lisa.

In this case, Lisa would have committed the tort of inducing breach of contract through her inconsistent dealings with Keith. She was aware that her actions would cause Keith to breach the contract between himself and the Rolls Royce Owners Club.⁷

The court will only hold the defendant liable where his inconsistent dealing is the cause of the breach of contract. Thus, where a father sold a quarry and covenanted not to set up a rival quarry, but financially helped his sons in the setting up of a rival quarry, the father's dealings were not inconsistent, because the sons had decided to set up a rival quarry before their father provided financial assistance.⁸

Conspiracy

Conspiracy is both a tort and a crime, although the scope of the crime is much narrower than that of the tort. Tortious conspiracies are divided into two types, dependent upon whether the actions of the defendant were lawful or unlawful.

Conspiracy to injure

Conspiracy to injure (also known as 'lawful means conspiracy', or 'simple conspiracy') occurs where the defendant joins forces with a third party and both parties then act in a manner that predominantly aims to damage the business interests of another—this damage being their predominant purpose. The acts of the defendant and the third party need not be unlawful for the tort to be committed. Where the defendant and third party cause the claimant loss predominantly in order to protect or promote their own business interests, however, no liability will ensue.

***Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25 (HL)**

FACTS: Several shipowners formed an association. The association's purpose was to secure exclusive control of the China shipping market for tea by forcing rival companies out of the market by offering discounts to those parties who only ever transacted with the association's members, and by undercutting the rates of rival companies. As a result, the claimant (a former member of the association who had been excluded) was forced to transport cargo at a loss in order to attract any business. The claimant contended that the association's actions amounted to a conspiracy.

HELD: The claimant's action failed. The association was set up in order to protect and extend the scope of its members' trade, and to increase their profits. Although this had the effect of injuring the claimant, this was a subservient purpose of the association.

Whilst the existence of this tort is undoubted,⁹ it can be criticized on the ground that it appears questionable that parties who join together to cause loss to another can be held liable for acts that would not result in liability if they were to be committed individually.

⁷ See *British Motor Trade Association v Salvadori* [1949] Ch 556 (Ch).

⁸ *Batts Combe Quarry Ltd v Ford* [1943] Ch 51 (CA).

⁹ *Lonrho Ltd v Shell Petroleum Co* [1982] AC 173 (HL).

'Unlawful means' conspiracy

Where the defendant uses unlawful means to harm the claimant, it is irrelevant that the harming of the claimant was not the dominant purpose; all that the claimant need establish is that his injury is an intended consequence of the defendant's actions and that unlawful means were used to achieve this end.¹⁰

Today, unlawful means conspiracy is largely redundant, due to the fact that if unlawful means are used to interfere with another's trade, the tort of unlawful interference with trade will automatically be committed.

Passing off

The tort of passing off occurs where the defendant makes a misrepresentation aimed at damaging the claimant's business or goodwill. This usually takes one of the following forms.

- **The defendant uses the trade name¹¹ or trade mark¹² (or a similar name or mark) of the claimant** The purpose behind this is to make the claimant's customers believe that the defendant's product was manufactured by the claimant, thereby taking advantage of any goodwill attached to the claimant's reputation.
- **The defendant manufactures goods that imitate the appearance of the claimant's goods** In *Reckitt & Colman Products Ltd v Borden Inc*,¹³ the claimant had, for over thirty years, sold lemon juice in a distinctive yellow plastic container that was shaped like a lemon. The defendant began selling its lemon juice in a similar container and the House of Lords held that this constituted passing off.
- **False advertising** Where a biscuit manufacturer advertised a chocolate biscuit called 'Puffin' that was packaged in a similar manner to the leading biscuit 'Penguin', the court held that this constituted passing off.¹⁴
- **Exploitation of popular characters** Bootleg or unlicensed products created to cash in on a character's popularity can constitute passing off (for example, printing the Teletubbies onto T-shirts and then selling them to the public without the appropriate permission).¹⁵

Unlawful interference with trade

The economic torts discussed thus far are relatively specific. There also exists a much more general economic tort—namely, the tort of 'interfering with the trade or business of another person by doing unlawful acts'.¹⁶ For this tort to occur, the claimant will need to establish that the defendant intended to injure him, as *dicta* in the following case suggest.

***Douglas v Hello! Ltd (No 3)* [2007] UKHL 21¹⁷**

FACTS: Michael Douglas and Catherine Zeta-Jones signed an exclusive deal with *OK!* magazine to publish their wedding photographs. Photographs were covertly taken by a freelance photographer and published in *Hello!* magazine. The owners of *OK!* sued the owners of *Hello!* for, *inter alia*, interference with trade by unlawful means. The Court of Appeal dismissed the claim on the ground that *Hello!* had not intended to cause harm to *OK!*. The claimant appealed.

¹⁰ *Lonrho plc v Fayed* [1992] 1 AC 448 (HL).

¹¹ *Powell v Birmingham Vinegar Brewery Co* [1897] AC 710 (HL).

¹² *Millington v Fox* (1838) 3 My & Cr 338 (Ch).

¹³ [1990] 1 WLR 491 (HL).

¹⁴ *United Biscuits (UK) Ltd v Asda Stores Ltd* [1997] RPC 513 (Ch).

¹⁵ *BBC Worldwide Ltd v Pally Screen Printing Ltd* [1998] FST 665 (Ch).

¹⁶ *Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570 (HL) 608 (Lord Diplock).

¹⁷ On this case, see G Black, 'OK! for Some: *Douglas v Hello!* in the House of Lords' (2007) 11 Edin LR 402.

HELD: The appeal succeeded. Lord Hoffmann stated that '[t]he injury to "OK!" was the means of attaining [*Hello!*s] desired end and not merely a foreseeable consequence of having done so'.¹⁸ The defendant's gain and the claimant's loss were 'inseparably linked',¹⁹ in so much as '[t]he defendant cannot obtain one without bringing about the other'.²⁰

COMMENT: The claimant actually succeeded on the ground of breach of confidence, not unlawful interference with trade, the House of Lords holding that the level of interference was insufficient to establish the latter tort. The comments mentioned above, however, do apply to the tort of unlawful interference with trade, but because liability was established based on another tort, Lord Hoffmann's comments are merely *obiter*.

Examples of the types of unlawful act that could establish the tort include (i) violence or the threat of violence;²¹ (ii) threatening to breach a contract, or inducing breach of contract;²² and (iii) committing a misrepresentation that interferes with the business interests of another.²³

CHAPTER CONCLUSION

- Liability can be imposed upon parties who intentionally induce others to commit breach of contract.
- Liability can be imposed where two or more parties conspire to cause injury to the business interests of others. Where the parties use unlawful means to harm another, it is irrelevant that the injury to the claimant was not the principal purpose of the unlawful act.
- Where a defendant makes a misrepresentation designed to damage another's business or goodwill, the tort of passing off may be committed.
- A person who uses unlawful acts with intent to interfere with the trade or business of another may be liable in tort.

¹⁸ [2007] UKHL 21, [2008] 1 AC 1 [134].

¹⁹ *ibid* [167] (Lord Nicholls).

²⁰ *ibid*.

²¹ *Messenger Group Newspapers v NGA* [1984] ICR 397 (QB).

²² *JT Stratford & Son v Lindley (No 1)* [1965] AC 296 (HL).

²³ *National Phonograph Co Ltd v Edison Bell Co Ltd* [1908] 1 Ch 335 (CA).