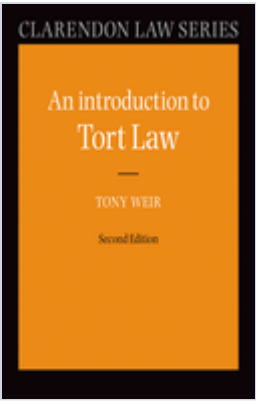

An Introduction to Tort Law (2nd edn)
Tony Weir

13. Economic Torts

Tony Weir, Fellow of Trinity College, Cambridge

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Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter deals with economic torts. Economic torts include deceit, malicious falsehood, passing-off, inducing breach of contract, intimidation, and conspiracy. The first three involve deception: deceit is telling lies to the claimant; telling lies to a third party is malicious falsehood; misleading a competitor's customers, even bona fide, is passing-off. The other three torts all involve collaboration, whether reluctant, as a result of threats, complaisant as a result of positive incentives, or spontaneous. The chapter discusses the nature of the harm; the defendant's conduct and purpose, anti-competitive conduct; and the various 'economic torts' in terms of their various components: intention, conduct, and wrongfulness.

Keywords: tort law, economic torts, deception, collaboration, competition, passing-off, breach of contract, anti-competitive conduct

We have seen that if purely economic harm is *unintentionally* caused, the victim who has no transactional connection with the defendant has considerable difficulty in obtaining damages 'in negligence', at any rate as compared with the claimant complaining of injury to person or property: while one is certainly under a duty to respect the integrity of one's neighbour's body and property, there is in general no liability for merely unreasonable conduct which causes harm to his pocket only. But what is the law to do when the economic harm is *intended* by the defendant, or virtually certain to occur as a result of his deliberate conduct? The

question of policy is not easy to answer. On the one hand, it seems morally objectionable to wish to visit harm of any kind on a fellow citizen, yet on the other, the economic field is one where liberty of action may well conduce to the public good, and practical considerations suggest moderation in constraining it by too ready an imposition of liability. It is therefore perhaps unsurprising that in English law the answer is far from simple.

One reason it would be impractical to hold that intended harm must always be compensated (and the defendant consequently enjoined) is that it would put an end to competition between tradesmen and to strikes by the workforce. These two types of economic warfare have something in common, but they also differ: competition hurts the competitor but benefits the customer, while strikes inconvenience the customer in order to force out of the employer a benefit which will eventually be paid for by the customer. The fact that competition must be encouraged and strikes permitted shows that there are at least some situations in which it must be lawful to cause deliberate harm. Commercial competition and labour disputes are not the only areas to consider, however. There are examples in daily life: the person who bids the most at an auction intends to deprive the underbidder of the item coveted by both, and the prize-fighter does his best to wrest the prize from his opponent. A moment's thought will therefore show that it would be impossible to impose liability on all those who can be said to be the knowing and deliberate cause of economic harm to others.

The choice for the legal system is therefore between saying that to cause such harm is *prima facie* actionable, but can be justified if the defendant had a good reason for doing what he did, and saying that the claimant must show more than the mere fact that the defendant intended to cause him harm. Against the first is that, given that there are so many justifications for committing trespasses to person or property, there must be so many more for invading less important rights or interests that the defences might eat up the cause of action. If the second is adopted, as really it must be in a free capitalist system, the question is what more must be shown. Some systems have adopted a general rule that the defendant must have acted deplorably (Germany), improperly (United States), or unreasonably (France). England's *residual* position is more restrictive of liability, more libertarian, than any of these, for it must be shown that the methods adopted by the defendant were actually unlawful, and not just deplorable, improper, or unreasonable. But this tort of deliberately causing harm by wrongful means is only the fallback position, not recognized until quite recently, though it may yet take over the other specific torts, as negligence tends to do as regards unintentional harm. Meanwhile, there are several different fact-patterns from which liability can arise. Hitherto our chapters have been devoted to a single tort, but now we must deal with a plethora of different torts, whose differing components make it difficult to present a simple picture. It is small comfort that if the position is difficult to understand, it is perhaps because it has not been understood.

The different torts include deceit, malicious falsehood, passing-off, inducing breach of contract, intimidation, and conspiracy (in two forms). The first three involve *deception:* deceit is telling lies to the claimant; telling lies to a third party is malicious falsehood; misleading a competitor's customers, even bona fide, is passing-off. The other three torts all involve *collaboration,* whether reluctant, as a result of threats, complaisant as a result of positive incentives, or spontaneous.

Nature of the Harm

It might seem that the nature of the harm would be a unifying feature in this area, since the claimant is complaining that he would be better off had the defendant not acted as he did. But this is a unifying factor only at the factual level. At the legal level there are important differences. Part of the trouble is that the torts cover both harm caused and rights invaded, which, as we have seen in comparing the torts of negligence and trespass, involves differences in treatment. As to harm, though it is generally true that the claimant seeking damages must prove that he suffered loss, except where Parliament has said otherwise,[1] in many cases he seeks not damages but an injunction, and an injunction may be granted against the possibility that actionable harm might result. As to rights, in some cases the defendant has infringed a specific right of the claimant, for example a copyright, a patent right, or a registered trademark; at the other extreme it is merely the claimant's expectations that have been frustrated. In between, rather tiresomely, comes a contractual right, which is a stronger entitlement than a mere expectation of gain, but weaker than a registered trade-mark, for example, in that in principle it is good only against the other party to the contract; furthermore, despite what some contract lawyers seem to think, not all contracts are the same, for a distinction can surely be drawn between the individual who loses his job and the company that loses a deal. The interest in issue in the tort of passing-off is different again: it is said to be the claimant's 'goodwill', which is certainly more tradable than a mere expectation, yet the firm has no right to the loyalty of its clientele, for unlike the contractor, potential customers are free to choose whom to patronize, though preferably to choose lucidly, without being deceived by a competitor.

The Defendant's Conduct

The defendant's harmful conduct may take different forms. He may indulge in lies, threats, or bribes. Lies, characteristic of the torts of deceit and malicious falsehood, are always wrong; honesty is not only the best policy but an inflexible requirement in law, since lies disable freedom of choice. So, too, do threats. They are intrinsic to the tort of intimidation, but since the objective criterion of truth/falsehood is inapplicable and has to be replaced by the more subjective test of licit/illicit, threats are generally wrongful only if what is threatened is itself wrong (though a threat to tell the truth may make you guilty of blackmail). Bribes are distinguishable from other payments only as being offered for the commission of a wrong, notably to induce an act of disloyalty to his principal by an agent for purchase or supply.

The Defendant's Purpose

Usually in this area the defendant is out to acquire something for himself which the claimant would otherwise get, but he may want to inflict harm simply for kicks: he may be a robber or a wrecker. In one situation the distinction certainly makes a difference, for while people who cooperate in order to advance their own interests at the expense of another are not liable to the latter unless the methods they use are independently wrongful, it is tortious in itself to gang up simply to do someone down: 'It is unlawful to combine with others

with the sole or predominant object of causing injury to another person, even if the means used are not themselves unlawful'.[2] In cases other than conspiracy, however, where the defendant has behaved objectionably one might think there is no great difference between causing gratuitous harm and causing harm for one's own benefit: even Robin Hood could hardly deny that he caused harm and did so intentionally (his justification being another matter).

The Basic Rule

The basic proposition is that it is not of itself enough to render one liable that one deliberately caused even serious economic harm to another. This was affirmed by the House of Lords in 1897 in *Allen v Flood,*[3] which a distinguished writer has termed 'the most important decision in the law of tort'. The events happened in a shipyard. While work on the wooden and metal parts of a vessel was being done by woodworkers and ironworkers respectively, all of whom were employed by the day, the ironworkers discovered that two of the woodworkers had previously done ironwork on another vessel in a different port. The defendant, the ironworkers' union official, went to the harbourmaster and said that unless the two woodworkers were shown the door, his men would not turn up for work the next day. The submissive harbourmaster told the woodworkers not to return. A majority in the House of Lords, reversing the courts below, held that the woodworkers had no claim against the union official, despite the fact that he had encompassed the harm to them, the loss of their job, quite deliberately and perhaps even 'maliciously', since it was done not in order to obtain their present jobs but to punish or make an example of them for what they had previously done.

In order to understand the scope of this important decision, it is essential to appreciate that all the workers involved were employed by the day: they were neither entitled nor bound to work the next day. Otherwise liability could be imposed under one or other of the specific torts; had the woodworkers had a contractual right to continued employment, the defendant would have been liable under the already established tort of 'inducing breach of contract', and if the metal workers had been bound to return to work the following day and threatened not to do so unless the woodworkers (even if merely day labourers) were fired, that would have been actionable under the subsequent decision of the House of Lords in 1964, extending the tort of 'intimidation'.[4]

Favourable though it was to the union official, *Allen v Flood* had little effect in the industrial area, for when workers obtained the greater security of longer-term contracts, the existing tort of inducing breach of contract made it unlawful for anyone to persuade them to go on strike during the currency of their employment. Parliament, therefore, not only conferred on trade unions an immunity in tort equalled only by (and prolonged beyond) that of the Crown itself, but also granted immunity to individuals who, in furtherance of a trade dispute, committed the tort of inducing breach of a contract of employment. This statutory immunity was progressively extended to cover the new heads of liability, such as ' intimidation', which the courts invented purely in order to sidestep it.

Competition

The commercial field differs from the industrial scene in that the customers one seeks to wean away from one's competitor are not usually bound to him by a long-term contract. Accordingly, fierce competition does not necessarily involve inducing breaches of contract, though of course it does so if one bribes one's rival's agents or otherwise suborns his staff. Here there was no tension between the courts and the legislature. The courts decided that they would not police competition simply on the ground that it was unfair, saying 'To draw a line between what is fair and unfair competition... passes the power of the Courts' and asking 'What is unfair that is neither forcible nor fraudulent?'.[5] Nevertheless the courts did have at their disposal a special tort by means of which they were able to stop tradesmen using practices which were apt to mislead the plaintiff's clientele as regards his goods, even if that were not his intention.

Passing-Off

Since competition does not work properly if customers are misled and consequently unable to make an informed choice, it is wrong to make your goods look so like those of a competitor that the customer who thinks he is buying your competitor's wares is actually buying yours: you thereby get the profit that your competitor would otherwise have obtained, and the customer gets something other than what he thought he was buying. This tort is called 'passing-off. As a form of competition it is obviously unfair, and though a generalized tort of unfair competition has never developed in Britain, in contrast with other systems of law, passing-off has been much expanded from the classic case where the defendant pretended that the goods he himself made were made by the plaintiff. Thus a manufacturer of egg-flip who sold it under the misnomer 'English Advocaat' and thereby damaged the market for those like the plaintiffs who made genuine advocaat was held liable, though there was no suggestion that the defendant's drink was made by the plaintiffs: customers thought they were getting advocaat when they were actually getting egg-flip, and this hurt the plaintiffs.[6] In one puzzling case, producers of Scotch whisky were permitted to try to enjoin the defendant from selling as 'Welsh Whisky' what was actually Scotch whisky, purchased quite lawfully from a Scottish producer, with some herbs added. Here, though the defendant was doubtless telling lies, it is difficult to see either that customers were misled at all, since there is no such thing as Welsh whisky, or that the producers themselves, who had been paid for what was being sold, had suffered any harm.[7] Then there were the relentless efforts of the producers of Parma ham to enjoin British supermarkets from selling authentic Parma ham packaged in England, on the ground that under Italian law it must be packaged in Parma (a city notorious for its commercial integrity), efforts which were eventually successful because of a silly EU law.[8] This flexible tort has also been used to enjoin persons who registered as internet domain names which they then offered for sale the trade names of well-known firms such as Marks & Spencer.[9] The peculiarity of the tort is that whereas competition is really for the benefit of the customer, it is the competitor, not the customer, who sues, just as the Office of Fair Trading is much more concerned with firms than individuals.

The utility of the common law was reduced somewhat when Parliament permitted the registration of trade marks, and reduced still further when the range of registrable marks was recently extended. Originally any unpermitted use of the registered trade mark was actionable. This meant that comparative advertising was

virtually impossible, since one can hardly compare without identifying the comparator. Nowadays comparative advertising is permitted provided that the use of the competitor's trademark is neither unfair nor deceptive.[10] The courts themselves had been indifferent to comparative advertising, and declined to decide, under the head of malicious falsehood, whether comparisons were accurate or not, unless spurious data were adduced in purportedly factual support of the defendant's claim to superiority.[11] The courts' desire to liberalize competition was praiseworthy, but unrestrained competition can destroy itself, so Parliament has rendered unlawful two kinds of competitive (or anti-competitive) conduct which the common law tolerated, namely agreements in restraint of trade and abuse of a dominant position.

Anti-Competitive Conduct

If an agreement unreasonably restrained a person's right to work or a firm's ability to trade, the common law simply refused to enforce it: one was free to leave a union or cartel, but those who stayed in were free to implement the agreement, even to the extreme disadvantage of the party who had jumped ship. That indeed was the famous decision in the *Mogul Steamship Co* case in 1892.[12] Nowadays even to make such agreements is prohibited.[13] Nor did the courts repress the singlehanded abuse of economic power, as the case of the woodworkers showed in 1897. However, given that 'it is excellent to have a giant's strength, but tyrannous to use it like a giant', it has been made unlawful to distort competition by abuse of one's dominant position in the relevant market (not an easy concept!).[14] The provisions follow European law, the right to damages of those adversely affected by infringements having been reinforced by the Enterprise Act 2002.[15] Even so, there is no reason to doubt that those targeted by such prohibited conduct, as opposed to mere incidental victims, may claim damages under the residual common law tort of causing harm by unlawful means.

Inducing Breach of Contract

It was in the field of competition that the common law tort of inducing breach of contract originated. In 1853 it was held that an impresario would be liable for persuading a prima donna to sing for him when he knew that she had promised to sing exclusively for the manager of the rival opera house.[16] The decision is susceptible of two analyses. This is due to the simple fact that a contract has two sides—a right in the creditor and a duty in the debtor. Was the defendant liable for deliberately interfering with the plaintiff's contractual *right* to have the singer perform for him, or was he liable for knowingly persuading the singer to breach her *duty* by doing something they both knew she was bound not to? The analyses lead in different directions. The former leads towards holding a person liable even if he made no direct approach to the intermediary, even if he provoked no breach, even if he did nothing independently unlawful, and even if the effect of what he did was not to deprive the plaintiff of what had been promised to him but to make it harder for him to render the performance he himself had promised, so that an action would be granted not only to the disappointed creditor but also to the discomfited debtor. This is surely to give too great a third-party effect to a private contractual arrangement. The courts were led into extending the proper tort of 'inducing breach of contract' into the false tort of 'interference with contract' as a means of sidestepping the immunities which Parliament

had conferred on trade unionists. This attempt was immediately thwarted by Parliament which forthwith extended the immunity to cover 'interference with contract', an act which the courts took as legislative confirmation of the existence of the tort! But this extended tort ought not to exist and if it does it should be abolished: it is quite enough if, in addition to being prevented from seducing the claimant's contractor by lawful means, the defendant is barred, as he is under the residual tort, from using unlawful means in order to hurt the claimant, whether or not that involves interference with any existing contract to which the claimant is a party.

Even if properly limited, this tort remains perplexing. Is it for his own misconduct in bribing or otherwise inducing the intermediary to be false to his promise that the defendant is held liable, or should his liability be seen as secondary to the breach of contract, the wrong committed by the intermediary in acceding to his blandishments or bludgeonings? The second analysis has the advantage of doing away with 'interference with contract', for then there would be liability only if there was a breach and only the creditor would be able to sue, but has the disadvantage of making it more difficult to associate this tort with the residual tort of causing harm by wrongful means, of which it looks rather like a variant. Once again, as with the question whether a defendant is vicariously liable for his employee or personally liable for a breach by his delegate of a non-delegable duty, we see that even if there is no way to square a circle, there are two ways of going round a triangle.

The Various Torts

Intention

Let us now consider the various 'economic torts' in terms of their various components. In the residual tort it is fairly clear that the defendant must be shown to have intended to cause harm to the particular claimant, and the same seems to be true of the tort of intimidation: the victim must have been 'targeted'. This is the strongest intention requirement. In other torts it seems to be weaker. In the tort of inducing breach of contract, the defendant need not have intended to cause harm but must have intended to cause the claimant's contractor to act in breach of his contract with the claimant. In the tort of deceit the defendant need only intend that the claimant rely on the truth of what is falsely asserted, not that the claimant suffer harm; indeed the liar may well hope that no harm is done. Nor need the defendant sued for malicious falsehood have intended to cause harm: it is enough if his false assertion about the claimant was intrinsically 'calculated' to cause him harm. In the tort of passing-off the defendant need not have intended any harm to the claimant at all.

The question of the requisite intention in the economic torts was thoroughly investigated by the Court of Appeal when considering whether the trial judge, who awarded modest damages to Michael Douglas and Catherine Zeta-Jones for their distress at the publication by *Hello!* magazine of illicit photographs of their 'private' wedding, was correct to award much heavier damages to *OK!* magazine, to which the bridal pair had, for a considerable consideration, granted the exclusive right to publish photographs which met with their approval (see above p 184). The award to *OK!* was on the basis that *Hello!* had by wrongful conduct (breach of confidence) caused deliberate harm to their rival fanzine. The Court of Appeal reversed the award: 'The

essence of the tort is that the conduct is done with the object or purpose (but not necessarily the predominant object or purpose) of injuring the claimant or, which seems to us to be the same thing, that the conduct is in some sense aimed or directed at the claimant.' The court held that, on the facts as found by the trial judge, *Hello!* had no subjective intention of causing any harm: *Hello!* was doing itself good but not intending any harm to *OK!*, since the publicity pool would not be emptied by their scoop.[17] The House of Lords gave leave to appeal.

Conduct

Given that the defendant has the appropriate intention, what must he have done in order to be liable? In deceit and malicious falsehood the defendant must have communicated the falsehood to someone—in malicious falsehood to a third party, and in deceit to the claimant himself. In passing-off the defendant must have engaged in practices which were apt to mislead the claimant's clientele. In the tort of inducing breach of contract he must, in our view, have persuaded the claimant's contractor to act in a manner known to be inconsistent with his contractual obligations to the claimant. In the tort of conspiracy the defendant must have actively associated with others in causing harm to the claimant, with the additional requirement, if the group was seeking to promote its own interests, that unlawful means were used. In intimidation the defendant must have used threats to commit a wrong against a third party unless he agrees to and does cause harm to the claimant. Likewise in the residual tort it must be shown that the defendant himself did something unlawful or prompted others to do so.

Wrongfulness

Wrongfulness being a component in several of the torts, we must ask what, apart from force and fraud, is 'wrongful'? Criminal conduct would seem to be clearly wrongful, yet there is some doubt about it. We have seen, under the unsatisfactory rubric of 'breach of statutory duty', that the *unintended* victim of a statutory offence is very commonly unable to sue, partly because statutory offences may be committed without any fault. It certainly does not follow that the victim of a *deliberate* statutory offence committed with the *intention* of harming him should not be able to sue. Yet one can pause before endorsing the decision that demonstrators who deliberately held up the construction of a bypass could be subjected to a civil injunction in tort, whose breach would be punishable by imprisonment, on the basis that they were deliberately harming the Department of Transport by committing the offence of obstruction, for which they could be exposed to a paltry fine.[18]

The wrongfulness point was considered, *obiter,* by the Court of Appeal in *Douglas v Hello!* (see p 184), where it concluded that the conduct of *Hello!* would satisfy the requirement of wrongfulness, notwithstanding that it did not breach any duty of confidence owed to OK!, since it did constitute a breach of confidence owed to the Douglases: given the requirement of a strict intention to cause harm to the claimant, the use by the defendant of any means which are wrongful in any way would be sufficient, along with the causing of actual economic harm, to constitute the residual tort. That does not, however, mean that it was appropriate to issue an injunction against the demonstrators.

In Conclusion

It must now be very clear that an introductory book on tort cannot begin to cover the often subtle details of the various economic torts, but we may finally consider a case involving neither competition in trade nor industrial warfare.[19] A number of musicians contracted with Dreampace to do the backing for a recording of songs which Shirley Bassey had agreed to sing under a contract with Dreampace, her own production company. When she decided not to sing after all, she was sued by the musicians, who were unable to earn their fee. A majority of the Court of Appeal held that their case was arguable. Now the singer's refusal to sing as arranged with Dreampace certainly caused Dreampace to repudiate its contract with the musicians, but to cause a person to breach a contract (as opposed to persuading him to do so) is not a tort at all unless wrongful means are used, and even if they are, the defendant must be shown to have 'targeted' the claimant. The singer's deliberate breach of her contract with Dreampace might well count as wrongful means, but it was not suggested that the singer had the musicians in mind at all, much less that she had targeted them. Had she persuaded Dreampace to fire these musicians and hire others, then certainly she would be liable, possibly with a defence if they were incompetent, but it was surely an error for the majority of the Court of Appeal to hold it even arguable that the claimants might win simply by showing that the defendant had deliberately broken her contract with a third party with the foreseeable effect of causing the third party to break its contract with them to their pecuniary disadvantage. The decision is now recognised to have been aberrant, especially since the Court in *Douglas v Hello!* has emphasised that it is not enough that the defendant foresaw the harm or was even reckless as to its occurrence: he must actually have had a specific intent to harm the claimant (see further p. 184 above).

Notes

1 Defamation Act 1952, s 3.

2 *Lonrho v Fayed (No 5)* [1994] 1 All ER 188 at 208.

3 [18o8] AC 1.

4 *Rookes v Barnard* 1964] 1 All ER H29.

5 *Mogul Steamship Co v McGregor, Gow & Co* (1889) 23 QBD 598 at 626, [1892] AC 25 at 47.

6 *Erven Warnink BVv Townend* [1979] 2 All ER 927.

7 *Matthew Gloag v Welsh Distillers* [1998] FSR 718.

8 *Consorzio del Prosciutto di Parma v Asda Stores* (Case C-108/01) [2003] 2 CMLR 21.

9 *BT plc v One in a Million* [1998] 4 All ER 476.

10 See Unfair Commercial Practices Directive (2005/29/EC), Art 14.

11 *De Beers Abrasive Products v International General Electric Co* [1975] 2 All ER 599.

12 [1892] AC 25.

13 Competition Act 1998, s 2.

14 *Ibid*. s 18.

15 Enterprise Act 2002, s 18 ff.

16 *Lumley v Gye* (1853) 118 ER 749.

17 *Douglas v Hello!* [2005] EWCA Civ 595.

18 *Minister of Transport v Williams* [1993] TLR 627.

19 *Millar v Bassey* [1994] EMLR 44.