RMM LAW COLLEGE SAHARSA

LAW OF TORTS

IIIrd Part

Paper -V

TOPIC- The Economic Torts

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Passing Off

Though the origin of passing off are 'doubtful', by the nineteenth century the tort was seen as originating in the tort of deceit. However, unlike deceit, it gives the trade rival, rather than the deceived customers, the right to sue. The classic case involves a trader, innocently or otherwise, 'passing off' his goods as the goods of the claimant. Lord Diplock noted in Erven Warnink BV v. Townend (J.) & Sons (hull) (Advocate) that the particular setting for the development of the tort was the defendant's improper use of trade marks or their equivalent 'so as to produce in potential purchasers the belief that his goods were those of a rival trader'.

Ingredients:

The modern definition of the tort was considered by Lord Diplock in Warnink (Erven) BV v. Townend and Sons Ltd., the 'Advocate' decision. He presented his definition part of an analysis of the English law on unfair trading and certainly on the facts of the case itself sought thereby to expand the scope of the tort. For Lord Diplock five characteristics provide the essence of the tort: a misrepresentation; made by a trader in the course of trade; to his prospective customers; calculated to injure the business or goodwill of another; and which does so injure or possibly will do so. The reformulation has been followed in some leading cases, sometimes amalgated with aspects of Lord Fraser's case-based test in Advocate, which emphasized the need for goodwill in the jurisdiction.

Misrepresentation:

The importance of misrepresentation in the tort was reaffirmed by the Privy Council in Pub

Squash. They held that there must be a misrepresentation, not merely misappropriation of a trade value. So when the plaintiffs opened up the market for a 'macho' soft drink, they could not allege passing off against the defendants using the same idea and advertising theme. Lord Scarman also noted that any deception must be more than momentary and inconsequential. Of course, as Spalding acknowledged, the misrepresentation must relate to the claimant's goodwill.

The Future of Passing Off

Some might argue that a general tort of misappropriation/ unfair competition should take the place of the tort of passing off. Logically this would eliminate the claimant's need to establish either a misrepresentation or goodwill. However, for the foreseeable future such a development is unlikely. The fear is that the balance must not be titled too far away from encouraging competition. This was noted by Jacob J in Hodgkinson & Corby Ltd. v. Wards Mobility Ltd: 'at the heart of passing off lies deception or its likelihood never has the tort shown even a slight tendency to stray beyond cases of deception. Were it to do so it would enter the field of honest competition, declared unlawful for some reason other than deceptiveness.

For the courts, the choice is between a tort of limited application, bounded by the certainty of the classic trinity and a wide tort, based on trade misrepresentation, without a clear public interest being served. With an extended unfair trading action the judicial role would be greater, the court having to decide whether to protect on the basis of policy considerations. The obvious danger with the later choice is that the tort could then constitute an undue constraint on the competitive process.

Negligence And Pure Economic Loss

The main concern of the economic torts is to protect the claimant's economic interests in the sense of his existing wealth or financial expectations. Negligent interference with economic interests as such can be actionable. But to label the tort as an economic tort is rather misleading. Rather, in exceptional circumstances, it performs the functions of an economic tort. It is obviously important to consider when those circumstances arise and how the tort of negligence

relates to the established economic torts.

Actions on the case for negligence became common from the early nineteenth century onwards 'no doubt spurred on at first by the increase in negligently inflicted injuries through the use of the new mechanical inventions such as the railways and later by the abolition of the forms of actions'. The importance of Donoghue v. Stevenson, was the recognition that the categories of negligence are never closed. Lord Atkin's neighbour principle meant though this was not immediately acknowledged that the tort was not limited to special categories of duties of care but rather became 'a fluid principle of civil liability'.

The courts have not allowed the tort of negligence to become a mainstream economic tort. There appear to be two main policy reasons for this. Most evident is the fear of disproportionate and limitless liability, mirroring the fear raised by Cardozo J in Ultramares Corp. v. Touche of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'. Thus Lord Pearce noted in Hedley Byrne & Co. Ltd. v. Heller & Partners that: 'economic protection has lagged behind protection in physical matters where there is injury to person and property. It may be that the size and the width of the range of possible claims has acted as a deterrent to extension of economic protection.'

The Hedley Byrne Principle

The true width of the Hedley Byrne principle was obscured until recently by the facts and background to the case. A case of pure economic loss, it also involved careless advice. As such, liability had to be reconciled with the decision in Derry v. Peek. At the end of the nineteenth century, Derry v. Peek put the brake on developments in equity that might have led to liability for careless misrepresentations. The decision in Derry v. Peek, according to Lord Bramwell, represented the victory of general principle over 'the desire to effect what is or what is thought to be, justice in a particular instance.'

In the decision itself the court stressed the need for a 'voluntary assumed responsibility' as between the defendant and plaintiff - in what was de facto a two-party scenario - and a foreseeable and reasonable reliance by the plaintiff on the advice or information that resulted.

However, it is clear from the judgments of Lords Devlin and Morris that the assumption of responsibility and reliance could also apply to negligent acts or services. This is hardly surprising, given there may be a fine line between words and acts, as is evidenced by the American case of Glanzer v. Shephard.

So Hedley Byrne accepted that there may be a duty to take care to avoid pure economic loss but in so doing made it clear that such liability would not be founded on the same basis as the duty to avoid physical harm. The key factor in the principle was the presence of a 'voluntary assumption of responsibility'.

The Basis of Liability

Ever since Hedley Byrne, the perceived need to set limits to liability for negligent misstatements (and now services) that cause pure economic loss, on a narrower basis than the principle of Donoghue v. Stevenson, has dominated this area of tort law. Something more than 'mere foreseeability' was required.
However, it is clear from cases such as Smith v. Bush and Spring v. Guardian Assurance that, in determining the imposition of liability, it is not a test of universal application. So in Smith v. Bush there was no voluntary assumption of liability, given the presence of an express disclaimer and in Spring v. Guardian Assurance the court was faced not with the two-party Hedley Byrne scenario but rather with advice about the plaintiff to a third party. Yet in both the cases, the plaintiff succeeded in negligence.

Conclusion

As the discussion in the preceding chapters has revealed, the economic torts are indeed a 'difficult if not to say obscure branch of the law of tort'. The economic torts are in a mess is due to the lack of coherent framework for their development.
What is the proper role for the common law in this area? For Heydon, Allen v. Flood denied the economic torts theoretical consistency and the courts a practical weapon against intolerable conduct. He argues that the law would be on a much sounder theoretical basis if defendants were liable on the basis of 'damage caused intentionally and without justification'. Such a view finds echoes in the analyses of Fleming, Salmond, and Finnis.

The thesis of this project is that a framework for the economic torts can be constructed. It should be based on the policy that economic behaviour should only be controlled by the common law on a narrow basis. The greater the flexibility of the economic torts, the greater the incentive to litigate rather than compete, an outcome not in the public interest. Such a policy is also consistent with the wider principle of freedom of speech which may be relevant where these torts take place within peaceful protest or commercial debate. As Weir comments: 'economic torts have something to do with liberty.' Though there has been statutory intervention to allow peaceful protest where industrial action is involved, these torts may arise in other protest situations – such as the consumer picket or within rigorous debate over the claimant's commercial or professional activities. The above framework provides a clear basis for liability while allowing both freedom to complete effectively and freedom of expression.