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Economic Torts and Economic Wrongs. Edited by JOHN ELDRIDGE, MICHAEL DOUGLAS and CLAUDIA CARR. [Oxford: Hart Publishing, 2021. xiv + 344 pp. Hardback £85.00. ISBN 978-1-50993-475-1.]

Writing extrajudicially, just a few years after delivering his leading speech in *OBG Ltd. v Allan* [2008] 1 A.C. 1, Lord Hoffmann suggested that, in the wake of that decision it was now fair to say that "the economic torts have run their course". But despite their Lordships' best endeavours in *OBG* to render the economic torts an area of interest to legal historians alone, cases involving these torts have continued to trouble courts all over the Commonwealth. Accordingly, in spite of what Lord Hoffmann hoped for in the wake of *OBG*, there is still a good deal of life left in these torts; and they continue to pose puzzles a-plenty.

Against this background, a new book dealing with these actions was always destined to be eye-catching, especially when one bears in mind that the economic torts have been largely overlooked by most torts scholars. Furthermore, an especially attractive feature of this book is that it offers a collection of essays that is properly representative of the makeup of the private law community: there is none of the familiar dominance of contributions from male scholars based in England and Wales. However, as Shakespeare warned us several centuries ago, "all that glisters is not gold". And that, I am afraid, is my overwhelming view of *Economic Torts and Economic Wrongs.*

To be clear: the book is by no means a disaster. It comprises a collection of essays written by academics and practitioners located in various different jurisdictions and it undoubtedly contains some very worthwhile contributions. The problem, however, is that these are outnumbered by others that, for all their novelty, seem somehow to be misplaced.

Before addressing the particular merits of some of the key essays in this volume, I think it is worth flagging up from the start what I take to be a serious omission in the editors' introductory chapter. For this, instead of supplying a road map to the essays that follow, and a brief account of the arguments they advance, provides the reader with, in essence, a very swift (and therefore not very detailed) account of the way the economic torts have developed over the last century or so. Reference is made to a number of the landmark cases, and this is all well and good. But the reader is offered no guide to the particular conception of "economic torts" adopted by the editors. This is a great pity because, without such a guide, it is hard to fathom why quite a few of the essays that appear in this book should be thought to belong here. For all that there is well-known disagreement around the margins about just which torts comprise this particular family of actions, most torts scholars would consider some of the essays in this book as being fish out of water. There is, for example, an essay on defamation; and there are two on private nuisance. There is an essay concerned with "an award of equitable compensation against a defaulting fiduciary" (p. 232) and a related one entitled "Misfeasance by Directors". There is also a contribution dealing with lawful act duress (which many readers would doubtless consider a topic associated with contract, not tort, law).

True: some of the authors responsible for these far-from-obvious inclusions offer explanations of why they think their essays belong in this volume – a book that the editors repeatedly describe in their "Introduction" as being about *the economic torts*. But this only reinforces the case for their provision (and preferably defence) of a particular conception of "the economic torts". For them merely to assert (but not unpack) the claim that "'the economic torts' is a wider and more diverse legal category than has heretofore been acknowledged" (p. 7) is plainly not enough.

For, naturally, simply saying something does not make it so; and I, for one, remain unconvinced. But then, in the absence of anything designed to convince me of the hitherto unrecognised breadth and diversity of this legal family, how could I feel otherwise? Even the title of the book prompts a fundamental question about what the editors mean when they speak of "economic torts". For many scholars, *a tort* is *a species of wrong*. So a book entitled *Economic Torts and Economic Wrongs* is baffling. It surely would have been better to have given the book the title *Economic Torts and Other Economic Wrongs* and offer some explanation of these terms.

Anyway, because I do not think that that they are economic torts, and because I expect readers of this review will have anticipated discussion of the economic torts, I will say only a little more about the essays just mentioned. It is not, after all, as if their authors hold a radically different view to me about their status as essays concerning the economic torts. For instance, in his essay on "Defamation as an Economic Tort" (ch. 3), Michael Douglas concedes that "defamation may be anomalous as an economic tort" (p. 40) and that "the thesis of this chapter is against the grain of countless dicta" (p. 56). Equally, Paula Giliker's essay on "Economic Wrongs and Private Nuisance" (ch. 7) contains the concession that "it would be misleading to claim … that it is an 'economic tort'" (p. 162); while Claudia Carr in Chapter 12 recognises the problems that beset any acceptance of lawful act duress as a tort. But instead of tackling this problem head on she contents herself with the less-than-satisfactory assertion that, because "lawful act duress … involves the wrongful application of economic pressure … it is not necessary to determine whether lawful act duress ought to be characterised as a tort" (p. 258).

As regards the essays that are on message, my overall view is that they comprise a fairly mixed bag. The first such essay is the one by Zhong Xing Tan (ch. 2). It is entitled "The 'Property' Paradigm in Torts Protecting Contractual Interests" and it contains, as one might predict, a fair amount of discussion devoted to the question of whether proprietary ideas can help make sense of inducing breach of contract. A sizeable array of other scholars' analyses of this issue is revisited at length and subjected to a measure of critical review. But the essay, ultimately, comes across as rather lacklustre because *so much time* is spent going over familiar ground. By contrast, the discussion of a matter of real importance gets truncated to a little under one page. This is the question of whether the tort of conversion can be extended from the protection of chattels to the protection of contractual rights (which, in turn, are presented as a form of intangible property). It is a pity. For although Sarah Green and John Randall made a spirited defence of the potential application of conversion to intangible property in *The Tort of Conversion* (Oxford 2015), its being put to such use continues to strike many tort law purists as being a bit like trying to eat soup with a fork. Had there been more of the "new" and less of the "familiar" in Tan's contribution, it would almost certainly have been a much more rewarding read.

Another essay, the one by Katy Barnett (ch. 5), achieves a much better balance between the familiar and the new. In her chapter – entitled simply "Inducing Breach of Contract" – the reader is reminded at length of the tort's historical origins. But in addition the essay contains a novel, normative claim about its proper scope. For Barnett, "it is only where the 'performance interest' is of sufficient importance to warrant specific relief [i.e. where what is at stake is non-substitutable]… that accessorial liability should be considered" (p. 105). In advancing this claim, Barnett adds very valuably to the existing literature on this tort, not merely because she offers a new, prescriptive rationale, but also because

she provides evidence of the tort's hotly debated capacity to provide a remedy for losses of a non-economic kind. The evidence she supplies of its being used to recover for mental distress helps rock the boat of economic torts orthodoxy that a number of scholars have started to question in recent years.

Equally useful, though in a rather different way, is the essay by Andrew Stewart and Shae McCrystal (ch. 4). It supplies highly informative empirical data concerning the modern-day uses of the economic torts in the regulation of industrial relations in Australia. The footnotes in this contribution constitute a veritable treasure trove, at least for anyone (like me) who is largely unfamiliar with the Australian jurisprudence.

A similarly informative, but altogether more thought-provoking essay, is the one written by Elise Bant and Jeannie Paterson on "Developing a Rational Law of Misleading Conduct" (ch. 13). Not only does this study guide the reader with exemplary clarity through the details and shortcomings of the main statutory provisions in Australia addressing misleading commercial conduct, it also examines what the authors take to be a fundamental problem of incoherence that has crept into the law because the "interaction of statute and general law has become almost unmanageably complex" (p. 276). They make a good point. For even if one puts aside the role of statutes like the Australian Consumer Law and its UK counterpart, the Misrepresentation Act 1967, the law in this field would still be labyrinthine. It is an area in which the general law (as the authors like to call it) would still comprise a complex mish-mash of rules drawn from the economic torts of deceit, injurious falsehood and passing off, as well as the law on negligent misrepresentation. Accordingly, there is much food for thought in their proposal of how things could usefully be changed in order to ensure that "related statutory and general law principles can evolve in a mutually supportive manner and reinforce, rather than obscure … the law's foundational prohibition on misleading conduct" (p. 301).

The essay by Bobby Lindsay on "Cross Border Conspiracy" (ch. 6) is something of an oddity. It is undoubtedly built around a core economic tort – or pair of torts, to be more accurate. Yet it somehow falls flat. It is much too long for one thing. Indeed, it is nearly twice the length of several other contributions. More importantly, though, the essay lacks the author's own critical voice. Lindsay sedulously unpicks the elements of the conspiracy torts in the first half of the essay, before proceeding to explain carefully the relevant rules of private international law that must be applied when a cross-border element is involved in the commission of a tort. But in my view the essay is too descriptive, too textbook-like in its treatment of the subject. It does not, at least to my eyes, seem to add very much to what one could unearth if one were to consult a pair of decent textbooks on torts and the conflict of laws respectively.

For the most part, Hilary Young's essay on "Revisiting Injurious Falsehood" (ch. 8) is similarly descriptive in its treatment of the of the various elements of the tort. However, to Young's credit, the essay does contain valuable critical analysis of the relationship between injurious falsehood and defamation in Canada. And she unquestionably makes a very powerful argument for removing the facility for corporations to invoke the tort of defamation in that country, along with a companion argument against injurious falsehood being eclipsed by defamation or any other tort(s).

The final essay in this collection, written by Samuel Beswick, bears an intriguing title, namely, "Interference by Precedent" (ch. 14). Although it does not deal with any classic economic tort, it is worth special mention here because, in keeping with its title, its subject matter is no less intriguing. It deals with the idea that there might sometimes be "improper interference with … [people's] economic

interests *by courts*" (p. 303, emphasis in original). More fully: the concern at the heart of this contribution is the fact that the courts can by "overturning precedent, recognising novel rights of action, or disapplying statute … generate disruptive effects for past entitlements" (p. 303). And since past entitlements are likely to have economic worth, we find ourselves – so Beswick would have us believe – in the realm of a most unusual economic wrong; one that involves economic harm being wrought by virtue of courts' retrospective decision-making.

Beswick takes as his core examples cases drawn from (1) the law on unjust enrichment (i.e. *Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 A.C. 349), (2) the well-known cases in the UK and New Zealand that removed advocates' immunity in negligence and (3) cases in which the judiciary "make laws that eliminate previously established rights to property" (p. 320). His arguments are clever and extremely well-researched. They draw on cases decided, and academic literature produced, in an impressive array of common law jurisdictions. And yet the essay feels doubly flawed: first, because it is hard to see what wrong has been committed; and second, because (even if we accept that courts commit some kind of wrong when they hand down retroactive decisions) Beswick has missed the chance to invoke examples much more pertinent to this book. On the first point: it is, of course, hard to imagine what tort or other wrong a senior court commits when it settles a point of law that has arisen for determination in the litigation before it. That, after all, is exactly what the courts are supposed to do. On the second point, it is difficult to think of an area of the common law more replete with examples of the courts conjuring up, seemingly from thin air, hitherto unthought-of causes of action that have retrospective effect. For example, Beswick could usefully have examined economic torts cases like *Lumely v Gye* (1853) 118 E.R. 749, *Quinn v Leathem* [1901] A.C. 495 and *Rookes v Barnard* [1964] A.C. 1129 in all of which new causes of action were first formally minted. (They recognised actions for inducing breach of contract, simple conspiracy and intimidation, respectively.) He could even have considered the decision in *Revenue and Customs Commissioners v Total Network SL* [2008] 1 A.C. 1174 in which the bounds of unlawful means conspiracy were stretched beyond previously understood limits, and in which there was even specific discussion by their Lordships of the propriety of their making gap-filling decisions.

Overall, *Economic Torts and Economic Wrongs* feels, for the most part, like an opportunity missed. It is not so much that the essays it contains are without merit. It is rather that it fails to provide much critical discussion of some of the most pressing, outstanding issues in this area of the law, like whether the economic torts ought to be confined to a three-party paradigm, and whether the misrepresentation torts deserve to be treated as part of the "economic tort family", and whether there is anything left of two-party intimidation after Lord Hoffmann said cryptically of it in *OBG* that it "raises altogether different issues" than the other economic torts. While it does not, of course, fall to a reviewer to dictate the proper content of anyone else's book, it is, I think, fair to say that the non-inclusion of essays directed towards the matters just mentioned is likely to come as a slight disappointment to other readers, too; especially when one bears in mind the considerable amount of space devoted to (at best) tangential topics.

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