Cambridge Law Journal, **82(1)**, March 2023, pp. 171–173 © The Author(s) 2023. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge
doi:10.1017/S0008197323000016

BOOK REVIEW

The Province and Politics of the Economic Torts. By JOHN MURPHY. [London: Hart Publishing, 2022. xxx + 287 pp. Hardback £85.00. ISBN 978-1-50992-731-9.]

Professor Murphy has in this book produced a powerful and original insight into the constitution and organisation of the economic torts. Ranging from existential questions about where the economic torts begin and end in classificatory terms, to a challenge to conventional attempts to identify a unifying theme, to a forecast of how their future is likely to unfold, this volume shies away from very little. As Murphy makes clear several times, modern juristic analysis of the economic torts (whatever they are deemed to be), is relatively rare. Whilst, therefore, confessing that the field is not as extensive as in some areas of tort law, he has nonetheless produced an opus that will be hard to rival: in scope, audacity and accomplishment.

To begin with, Murphy sets out his stall by listing the *dramatis personae* of the drama to follow. His list is far longer than those lists of "The Economic Torts" most of us are used to seeing. Perhaps the most unexpected cast members are those in the "Misrepresentation Torts" chorus: Passing Off, Injurious Falsehood and Deceit. To exclude these, Murphy says, would be to open himself to criticism for not acknowledging the contribution they make to maintaining "the integrity of the competitive process" (p. 14). Given his overarching aim of analysing the reach and conceptual integrity (or otherwise) of torts that have been said to protect economic interests as their principal aim, it is difficult to object to their inclusion here. That initial response is only substantiated by their targeted treatment in Chapter 6 in which, rather charmingly, their "vitality" is scrutinised: passing off is predicted a long if unpredictable life; injurious falsehood is deemed to be in active stasis; and deceit given a prognosis of rude, if unexciting, health.

The book's motif is that of disunity between those torts regularly referred to as "economic". The defence of this position is as rigorous as it is cogent. There is, according to Murphy, no "golden thread" that unites them; juridically, structurally or functionally. Juridically, so the argument goes, there is insufficient commonality between the mental elements and the nature of the unlawful means required for each tort for them to be classified in any homogenous category, despite the fact that it is these very aspects that have often been offered as unifying features of the torts in question. Not only does Murphy find this unconvincing; he considers these elements in fact to be the source of significant divergence. Drawing the actions together under the umbrella of intentionality would in his view have both under-inclusive and over-inclusive effects: assault and battery, for example, would fall outside of the bracket, despite being unquestionably intentional torts, whilst injurious falsehood and lawful means conspiracy, "enlivened by malice rather than intention" (p. 200), would be excluded from its reach. The strength of the former point is perhaps diluted by its flirtation with an undistributed middle fallacy, whilst the second depends on regarding malice and intention as distinct and independent concepts. The intention argument is developed in impressive detail in Chapter 7, in which a close analysis of the principal recent cases is conducted. This passage in particular will be of considerable use to anyone trying to navigate, to understand and (vainly perhaps) to reconcile *OBG v Allan* [2007] UKHL 21 and *Total Network SL v HMRC* [2008] UKHL 19. It is no mean feat, and certainly not one

for the faint hearted, and yet Murphy executes it with aplomb. Whether all readers will agree with the premise that intention as to differing ends is the same thing as a different means of intention is another question. Intention as a putative organising element of (at least some of) the economic torts has been the deserving focus of academic attention ever since Lord Hoffmann subjected the Court of Appeal's reasoning on the issue to extensive surgery in the House of Lords in *OBG*. The view that intention *divides* the torts of inducing breach of contract and causing loss by unlawful means by virtue of the ultimate objective to which it is directed (either harm *eo ipso* or breach of contract *simpliciter*) is a bold one, and is bound to provoke further analysis and discussion. The question remains whether the undoubtedly different ends that are the concern of each tort function also at the higher juridical level of taxonomical distinction.

Whatever one's views on this particular point, there is no question that the analysis is a highly thorough and sophisticated one. It gives rise to a broader question, the inquiry into which is intriguing. As the study makes clear at the beginning, the actions that are the object of the book's analysis have only been grouped together since the middle of the twentieth century, and then by authors trying to impose some order on their textbooks. Given the proximity of this development to the heady excitement that heralded the beginning of the tort of negligence's "staggering march", it is perhaps not too outlandish to suggest, as Murphy does, that any focus on the intention elements of these actions could well arise as much as a result of distinguishing them from negligence as it does from any more introspective pursuit. Such a means of distinction does not satisfy Murphy: it is, he says, negative rather than positive, and as such, an inapt taxonomical device. That may well be true, but, in a legal world in which chapter headings have an increasingly reflexive classificatory effect, it is arguably not real.

In Murphy's analysis, these torts also lack structural unity. In this, he refutes the claims of Carty, Weir and Beever before him. These actions, rather than coalescing around a three party structure, are actually a hybrid of two and three party relations. In other words, they are three party actions, except when they are not. This is therefore not an aspect of their existence that could be said to draw them into a common analytical group. This passage of analysis is particularly fine-grained, and draws on a knowledge and understanding of the relevant case law that is as deep as it is broad.

The final tenet to be disputed by Murphy in his concluding chapters is that of functionality, and the question of how far, if at all, the "economic torts" can in fact be justifiably aligned by virtue of the purposes that they serve and the interests that they protect. Apart from passing off, which is held out here as the only action concerned purely with the protection of business interests, the point is made with some considerable persuasive force, that these torts actually function to protect a far broader range of interests than the purely economic, and that they do more than attempt to balance desirable and undesirable competitive behaviour. Interestingly, Murphy states here that it is "leading, rather than minor, dubious or anomalous cases" (p. 217) that provide the pudding for his proof. The fact that it is not clear whether this is deliberately question-begging or not is tantalising. The section on functionality is probably the most compelling of the three parts to Chapter 7, and addresses a question that for too long has either been side-lined, or had its resolution presumed. The usefulness of the term "economic" in the legal context has never been free of doubt, not least because economists would balk at the way in which lawyers have come to use and understand it. "Economic" does not of course, in general terms, mean the same thing as

"financial" or "pecuniary"; it is broader than that. Used in its true sense, then, "economic" might actually better describe the range of interests protected by the torts dealt with in Murphy's book. As it stands, under its received meaning, it does not perform this description well. The point about the true meaning of the word is not one that Murphy makes. His argument is both more nuanced and more detailed, but it gets us to the same place: "economic" is simply not an adjective that covers the range of interests protected by the actions to which it has been applied since the middle of last century.

This is a book with an innovative thesis at its heart. It is lucid and accessible in form, and challenging in substance. It is a rare thing in that it is a theoretical monograph with a highly pragmatic bent, written in an engaging voice. There is much in terms of argument with which readers can take issue, not least because its topic is one for which consensus has long been elusive. But that is what makes it such a compelling read: echo chambers are reassuring, but they do not move anything on. This book will.

Sarah Green
Law Commission of England and Wales

https://doi.org/10.1017/S0008197323000016 Published online by Cambridge University Press