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The reception of the economic torts into New Zealand labour law: a preliminary discussion

Gordon Anderson*

This discussion raises a number of issues related to the introduction of the economic torts into New Zealand labour law during the 1970s. These include the question of whether such major innovations accorded with the principles normally accepted by comparative lawyers when considering legal transplants, and the basic question of whether the common law as developed in Britain is, in this case, suitable for New Zealand circumstances. The impact of the law in New Zealand is then outlined and the changes introduced by the Labour Relations Act are briefly considered.

Introduction

The award of $1.66 million in damages to the Ford Motor Co Ltd in the recent case of *Ford Motor Co Ltd v Northern Storepersons IUW* (1987), although shortlived, did focus attention on the potential impact that the common law economic torts could have for labour law and industrial relations in New Zealand. The scheme of the Labour Relations Act 1987 also makes the application of these torts in New Zealand labour law of renewed importance as they have now gained the imprimatur of statutory recognition and have become one of the two sanctions against unlawful industrial action and arguably by far the most effective of the remedies available to an employer to utilise if recourse is to be had to the law as a means of settling or combating strikes.

The one question that does not seem to have been seriously considered either in the 17 years since the common law was first utilised in 1970, or during the debate leading up to the 1987 labour law reforms is whether or not such an important aspect of New Zealand's industrial relations system should be governed by a system of law that has been developed in the very different environment of the United Kingdom and by a judiciary that had no reason to contemplate its effect in New Zealand, and who, even if the thought had occurred, would almost certainly have acted no differently.

Legal transplants

Comparative lawyers have long recognised that the transplantation of the elements of one country's legal system to that of another can cause difficulties for the recipient's legal system. For this reason caution and careful evaluation have been urged before any such transplant is carried out. A significant exception to this rule however, has been the reception of English common law throughout much of the Commonwealth. It seems to have been assumed that this law will remain compatible with the different political and social systems that make up the common law world and that local courts can make such adjustments as are necessary to accommodate peculiar local conditions. In most cases this has proved to be true, but in general it has also been the case that the common law arrived with the colonists of the various common law countries who largely adopted English law in its totality. Developments in the common law have thus been integrated into the local legal system as the local system itself developed taking the common law changes into account.

* Senior Lecturer in Commercial Law, Victoria University of Wellington.

The question that is raised by the introduction of the common law economic torts into New Zealand's labour law is whether an area of law that has developed in a direction quite different from that of Britain, and over the same time period, can readily receive a transplant of common law rules that have been developed essentially in the context of the British industrial relations system and in a foreign political and legal environment. It is suggested in this discussion that the reception of the economic torts into New Zealand's labour law should have been subjected to the same critical analysis that would have been expected of any other substantial legal change and that the principles that would apply to a statutory transplant are equally applicable to such a major change brought about by the courts through the application of the common law.

Problems with transplants

Warnings on the dangers of comparative work in labour law and industrial relations are not uncommon. Kassalow (1968) for example has said:

> Without a fair understanding of the social economic and political setting of the industrial relations system in a given country one can make errors of analysis or judgment, or, even more likely, learn only half truths about the significance of particular industrial relations policies or practices in foreign countries. (1968, p. 99).

Schregle (1981) has discussed the pitfalls of comparative studies in some detail and in particular draws attention to the issue of whether that which is being compared is in fact comparable. One particular danger he points out is that superficial similarities may be misleading and that the use of common terminology can conceal considerable variations in the underlying concepts and practices. This point is particularly valid in comparing common law rules where the terminology and concepts remain constant from country to country even though the underlying social system that supported the derivation of a concept may be quite different.

One of the leading comparative lawyers of recent times, Professor Kahn-Freund, has addressed the specific problem of legal transplants in labour law in an article, named appropriately *On uses and misues of comparative law* (Kahn-Freund, 1974). Kahn-Freund argued that the task of transplanting becomes more difficult as power relationships become more dominant:

> But there is a third political element, and in many ways from a practical point of view the most important. It is the enormously increased role which is played by organised interests in the making and in the maintenance of legal institutions. Anyone contemplating the use of foreign legislation for law making in his country must ask himself: how far does this rule or institution owe its existence or its continued existence to a distribution of power in the foreign country that we do not share? How far would it be accepted and how far rejected by the organised groups which, in the political sense are part of our constitution? (1974, p. 12)

These questions, while addressed to those contemplating legislative transplants, could equally have been addressed to those judges seeking to introduce major changes through the common law. Kahn-Freund stresses the perhaps obvious fact that collective industrial relations in particular are closely linked with the structure of social and political power in their own particular environment. His discussion was made in the particular context of the Industrial Relations Act 1971 (UK) and he attributes many of the failures of that Act to the failure of the government to appreciate the significant structural and legal differences between the United States and Britain which made the introduction of the more formal and legalistic United States models inappropriate.

Kahn-Freund's views have however been challenged, particularly by Watson (1976). Watson argues that successful transplants depend not on the power structure of the donor country but on that of the recipient and he states:

> What, in my opinion, the law reformer should be after in looking at foreign systems was an *idea* which could be transformed into part of the law of his country. For this a systematic knowledge of the law or political structure of the donor system was not neccessary . . . . (1976, p.79)

Watson does not however advocate uninformed transplants; he rather places a different emphasis on the country that should be studied to ensure the viability of the transplant. In countering Kahn-Freund's example of the Industrial Relations Act, Watson blames its failures not on its United States origins but on the power structure in British industry.

The particular point to be derived from the introduction of the economic torts into New Zealand's labour law is that not only were the considerations outlined above unheeded but they do not seem even to have been considered as particularly relevant, such is the mystique of the universal applicability of the common law.

The reception of common law into New Zealand

The extent to which the New Zealand courts can regulate the transmission of the common law as developed outside New Zealand or modify it for New Zealand conditions is a question that, in recent times, has become somewhat controversial. In a recent discussion of the position, McHugh (1987) argues that the local courts have only a limited ability to develop the law in a way unique to New Zealand. On the basis of a recent Privy Council decision, *Hart v O'Connor* (1985) McHugh concludes:

> There is only a distinct, unique "New Zealand common law" in those matters where our "local circumstances" set us apart from other common law jurisdictions . . . Do we think it right our Judges should have to prove their view of "local circumstances" to a tribunal in London? (1987, pp. 27-28)

The preference of the Privy Council for English law was also made clear in a decision subsequent to *Hart v O'Connor*. In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* (1985) the Privy Council said:

> It is of course open to the Judicial Committee to depart from a House of Lords decision in a case where, by reason of custom or statute or for other reasons peculiar to the jurisdiction where the matter in dispute arose, the Judicial Committee is required to determine whether English law should or should not apply. (p. 958)

The Judicial Committee went on to justify its decision in *Hart v O'Connor* on the basis that "the duty of the New Zealand Court of Appeal was not to depart from . . . the settled principle of law".

These decisions seem to heavily qualify the extent of the discretion that the New Zealand courts have to depart from "English" law and it would seem that until appeals to the Privy Council are abolished New Zealand law will be forced to develop in the shadow of the English common law. The Court of Appeal has however demonstrated a willingness to depart from the common law on some occasions when it believes that significant differences exist in New Zealand conditions. One clear example in labour law was in *North Island Wholesale Groceries Ltd v Hewin* (1982) where the English rules on taking account of tax in computing damages were held to be inappropriate in New Zealand.

In the cases introducing the economic torts into New Zealand labour law the question of local circumstances did not arise and it is only recently that the courts seem to have considered them an issue. Even had the question arisen, however, there would seem to be only limited room for an independent development of the law, should the courts have chosen to pursue such a development. As is discussed below, any change in the economic torts to adapt to industrial conflict would almost certainly need to go to the root of their underlying principles.

The development of New Zealand and British strike law

When New Zealand adopted a system of compulsory conciliation and arbitration in 1894 labour law in the two countries began to diverge and to develop on quite different patterns and with quite different philosophies of the role of law in industrial relations. The New Zealand system is one that derives all of its essential form from its statutory base; the bargaining system is laid down by statute, unions derive both their existence and legal status largely from statute and the enforcement of the system is laid down by statute. The law, and in particular statutory law, permeates the whole system while the common law has been largely peripheral.

By contrast the British system of industrial relations has been characterised as one of legal abstentionism. Its procedures, its organisation and its practices have been developed by the parties largely without government intervention and it is only in the last two decades that statutory intervention has assumed major importance. Until recently the major intervention by statute was intended to protect the industrial relations system from the potentially devastating intrusion of the common law.

A point that should be kept in mind is that the development of British strike law was contemporaneous with that in New Zealand. In moving to its statute-based arbitration system New Zealand did not displace a matured system of common law rules. In 1894 the common law had only just began to develop a response to the emergence of industrial unionism. In 1894 it was less than 20 years since British unions had gained protection from the criminal law of conspiracy and the cases defining the liability of unions in tort for strike action had yet to be decided. The common law as it affects strikes is not only a peculiarly British development and a reaction to British circumstances but it is an area of law that entirely postdates the separation of New Zealand's law from that of Britain.

Strike law in New Zealand

In 1894 the New Zealand legislature passed the Industrial Conciliation and Arbitration Act which signalled a major break with not only the British pattern of industrial relations but also with its law governing industrial relations. In the period since 1894 New Zealand has evolved its own system of law and practice to deal with the problems of industrial conflict. For most of this period strikes have been proscribed by statute but after the problems of enforcing anti-strike law were demonstrated during the 1908 Blackball strike, the attempt to enforce legal sanctions against individual strikes or strikers was gradually abandoned. An acceptance or at least tolerance of strikes developed with state sanctions being reserved for significant threats to the system such as occurred in 1912-13 and 1951.

When concern with the number of strikes emerged in the 1960s the solution was seen not in terms of penal measures but in improved procedures to enable the peaceful settlement of industrial disputes. The Industrial Conciliation and Arbitration Amendment Act 1970 introduced simple procedures for the settlement of disputes of rights and set up the mediation service to aid peaceful settlements, reforms that were consolidated in the Industrial Relations Act 1973. In 1976 however penalties were reintroduced into the Act by the National Government. The final act in the saga of criminal sanctions for strikes came in 1977-78 when the lessons of Blackball were learned again in the Ocean Beach prosecution debacle (see Walsh, 1983). The subsequent Dunlop Report (1978) recommended that all strike penalties be made a civil matter, a recommendation that was speedily adopted in the Industrial Relations Amendment Act 1978.

It was in this decade, when statutory strike law was beginning to assume a rational form, that the economic torts made their entry into labour law and over the next decade and a half became an increasingly important factor in many industrial conflicts. This development occurred moreover without any real consideration of the nature of what was happening. In the period between 1970 and 1987 the Court of Appeal has considered the issue of economic torts in labour law only twice, both on interlocutory applications rather than full hearings.

The Labour Relations Act 1987 has continued the legislative trend of the 1970s and all direct penalties for striking have been removed from the Act. The remedies available to an employer are either a compliance order or an action in tort for an injunction or damages or both. Thus, from being outside the mainstream of labour law in New Zealand, the economic torts have become a centrepiece of the new legislation. The unanswered question remains however; what is the nature of this law and what is its suitability for New Zealand conditions?

Strike law in Britain

To understand the common law economic torts as they apply to industrial conflict in the later part of this century one must go back to developments in the period leading up to the Trade Disputes Act 1906 (UK). In 1875, at the time of the removal of the last remnants of direct criminal penalties against unions for striking, the modern economic torts barely existed. Thirty years later the British judiciary had developed the law to a position that threatened both

the effectiveness and continued viability of the trade union movement in Britain. Jenks (1928, p. 337) summed up these developments in saying that the judges "first invented a new civil offence and . . . then created a new kind of defendant against whom it could be alleged". Clark & Wedderburn (1983, p. 141) make the point in a different way: "in the face of common law liabilities trade unions have no right to function or even to exist". In 1875 the only one of the economic torts to have clearly developed was inducement to breach of contract which was established in *Lumley v Gye* (1853). The major developments occured in a trilogy of cases in the House of Lords between 1892 and 1901[1], and in the case of intimidation, not until *Rookes v Barnard* (1964). The response to these earlier developments, particularly after the *Taff Vale* case, was the development of the statutory immunities in the Trade Disputes Act 1906.[2] This Act created a statutory system of immunities from actions in tort for activities carried out in the course of a trade dispute; the so-called "golden formula" that in various forms has been the basis of British trade union viability ever since.

The subsequent developments in both the common law and in statute after 1906 are well known and will not be discussed here (see Elias & Ewing, 1982 and Davies & Freedland, 1984a for a discussion of the modern position). What is of interest for this discussion is the effect that these and subsequent developments have had on the shape of the common law. It will be suggested that the modern common law is the result of a particular and peculiar set of historical and ideological circumstances unique to Britain, and that as a consequence, this law must be treated with great caution in any other legal system.

The structure of British strike law

Modern British strike law consists of two distinct parts and without an appreciation of this the common law cannot be placed in its proper perspective. The two parts are:

(1) The common law which, through the economic torts, contains a set of rules which in certain circumstances render one person liable for economic damage inflicted on another. The fact that these torts have developed largely in cases involving industrial conflict, and in an atmosphere of judicial hostility both to unions and to industrial conflict has resulted in those carrying out industrial action being particularly vulnerable to an action in tort.

(2) The statutory immunities which protect those engaged in industrial action from liability in tort regulate liability rather than the common law and changes in policy towards industrial conflict are implemented through changes to these immunities. Thus the Thatcher Government's restrictions on the right to take industrial action have been implemented through narrowing the immunities and thus allowing an increased scope for the application of the common law.[3]

These two elements interact to form the modern law governing strikes, and the responses of both Parliament and the judiciary have reflected developments by the other.

The development of the common law

Since 1906 the common law has been able to develop on the premise that the limits on a union's ability to strike are principally a question for Parliament to decide, although on occasions the judiciary has attempted to narrow the immunities by giving them a restrictive interpretation. The most recent attempts, primarily by Lord Denning in the 1970s were however firmly repulsed by the House of Lords (see Davies & Freedland, 1984b, pp. 399-405). The common law itself has seen a gradual broadening of the scope of liability over the years, the most spectacular example being the "rediscovery" of the tort of intimidation in *Rookes v Barnard* (1964), a case whose only rationale seems to have been to avoid the statutory immunities.

What the judiciary has not had to do in its common law jurisidction is to consider to what extent industrial action should form a defence to an action at common law. Without statutory

1 *Mogul Steamship Co Ltd v McGregor Gow & Co Ltd* (1982); *Allen v Flood* (1898); *Quinn v Leathem* (1901)

2 Now in the Trade Union and Labour Relations Act 1974

3 Employment Acts 1980 and 1982.

intervention it is inconceivable that this issue would not have become significant over the last 80 years. The question of defences to the common law has arisen on some occasions and in particular in the *Crofter*[4] case where the industrial objects of a trade union were accepted as providing a defence of justification to an action in tort, although a similar defence had long been available where business motives were at issue. This case is however something of an exception and in general; "Instead of drawing a line between justifiable and unjustifiable pressure the common law has prefered the less controversial distinction between what is lawful and what is unlawful" (Elias & Ewing 1982 p. 326).

Statutory immunities have skewed the development of the common law so that the balanced law that one might have expected to see emerge has, except in the case of conspiracy, failed to materialise. It is this skewed development, in particular, that is of concern when the law is transplanted to New Zealand. The statutory immunities have meant that the judges have not had to face the difficult questions.

It is interesting, by way of contrast, to compare the development of the law in the Federal Republic of Germany which is based on provisions in the Civil Code analogous to the law of tort. German law has never been particularly tolerant of strikes but it has nevertheless been left to the courts to determine the parameters of lawful strike action. The solutions may be regarded as unduly legalistic and restrictive, but the courts have had to attempt to construct a system of law that takes a reasonably realistic view of industrial realities. (see Mueckenberger, 1986 on the German system).

Judicial attitudes

The hostility of the British judiciary to trade unions, to collective ideals and to industrial conflict has been described so often that it may almost be regarded as a truism of labour law. The myth of judicial impartiality has been severely shaken if not destroyed by Griffith (1985). His book, which generated considerable hostility at the time came, according to Clark & Wedderburn, as no shock to labour lawyers. Clark & Wedderburn have also argued that:

> the traditional hostility of the working class to the judiciary has in fact been soundly based. The repressive judgments of the nineteenth century were matched for the most part in the twentieth by "startling innovations in trade union law" and the generally negative attitudes towards strikes. (1983, p. 166).

The reasons for this hostility seem generally to be attributed to two causes, the first being the class origins of the judges and their acceptance and support for the values and prejudices of that class (see Griffith, 1985). Several writers in recent years have attempted to show that the whole of labour law, both individual and collective, is affected by a particular judicial view of the employment relationship and one that is generally hostile to workers and their organisations (see for example Forrest, 1980; Griffiths, 1985).

The second reason however is more complex and relates to the structure of British labour law. This argument also has relevance to New Zealand particularly in view of the recent legislative changes. The argument is essentially that the statutory immunities place unions above the law and so give them a privileged position. This argument, as Clark & Wedderburn point out (1983, p. 168), depends on a particular view of the law that sees legislation as intruding on the "real" law and as restricting the legal rights of employers. This argument is not confined to Britain or to labour law. Barton A C J for example used this argument to justify a restrictive interpretation of the Conciliation and Arbitration Acts (Australia) in 1913.[5] A similar attitude is also apparent in the submissions of the New Zealand Business Roundtable on the Government's Green Paper (1986, pp. 5,31,41). In this submission it is argued that a return to "simple and intelligible law" would solve many of the problems that the Roundtable perceives in industrial relations, an argument that not only seems to imply a vision of some "golden age" of the common law but which, more importantly, also ignores its complexity and its unpredictability.

This argument contains a number of flaws both in principle and in fact. The first is the notion that common law has some special character that places it above mere "political" (ie legislated) law. Such a view not only attacks the concept of democratic government but is also a

4 *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* (1913)
5 *The Australian Tramways Employees' Association v The Prahan & Malvern Tramway Trust* (1913) (dissenting) at p 687

facade for the defence of a particular conception of rights that has been developed by the common law courts, a conception founded firmly on individual, property-based values and on a particular notion of freedom of contract. As Kahn-Freund has said, "Nothing is more misleading than the ambiguity of the word 'freedom' in labour relations" (1977, p. 12).

The argument that unions, are in some way above the law is also misleading although it has been raised ever since the original Trade Disputes Act (see for example Dicey, 1963, p. xlvi and the views of present judges quoted in Clark & Wedderburn, 1983, p. 170). The argument of course relates to the common law, not the law as a whole, and contrary to what is asserted, this is not a condition unique to unions. Investors of capital for example are given immunity from insolvency laws if they invest through a limited liability company. The fact is that the common law is not a perfect instrument and that the operation of society often requires particular rules for particular groups to be formulated in the light of changing social and economic conditions. The system of immunities in Britain is Britain's way of providing the legal basis for effective trade unionism and for protecting the collective rights of workers. It is unfortunate perhaps that this has been done by a series of negative immunities rather than a positive set of rights as is common for example in continental jurisdictions. The technique employed in Britain has had the unfortunate effect of distorting the debate on this aspect of labour law and shifting its focus away from the central issue of what are the legitimate rights of trade unions (see further Clark & Wedderburn, 1983 and Kahn-Freund, 1977). It is of interest that, while New Zealand has now also adopted a system of immunities, the statement of objects for the relevant part of the Labour Relation Act does state the positive object to "establish that . . . The right of workers to strike . . . (is) recognised." (s230)

The hostility generated by these beliefs has heavily influenced subsequent developments in Britain. Partly this has been seen in attempts to avoid the Trade Disputes Acts or to restrict their application (see Clark & Wedderburn, 1983 and Griffith 1985) but more importantly from the point of view of New Zealand labour law, it is one of the principal factors that has led to the skewed development of the common law.

Again from the New Zealand perspective one must ask whether it is appropriate in a New Zealand context to accept a system of law incorporating these attitudes.

The reception of the common law into New Zealand

One of the more interesting aspects of the introduction of the economic torts into labour law in New Zealand was that they could be received with virtually no judicial examination and with little or no debate by the courts of the issues raised above. Indeed such issues may as well not have existed, such is the mythology of the universality of the common law. The assumption was that the law was applicable, and neither courts nor counsel seemed prepared to argue to the contrary. Even in the most recent case, *New Zealand Baking Trades Employee's IUW v General Foods Corporation (NZ) Ltd* (1985), counsel were seemingly not prepared to advance the argument that the common law should not apply (p. 127 per Thorp J).

Although some early cases involving inter-union disputes did invoke the common law, the first major attempt to raise the economic torts in an industrial dispute was in two cases in 1970, *Pete's Towing Services v Northern IUW* (the first, and one of the very few cases that went to a full trial) and *Flett v Northern Transport Drivers IUW* (the first use of an interim injunction). The law was consolidated a few years later in *Northern Drivers IUW v Kawau Island Ferries Ltd* (1974) when the Court of Appeal upheld an interim injunction issued against the union. In this case the appropriateness of the common law in the New Zealand industrial relations system was not even debated, except for the defensive comment reflecting British views that:

> The common law right to sue in respect of unjustified interference with contractual relations is not peculiar to industrial disputes; it is available in all circumstances and to all people providing the requisite interference and absence of justification exist. (p. 620)

With respect, it can be said that this case is remarkable for its industrial naivety in that it regards the union's defence of its members as a "moral" duty and contrasts that with the "legal rights" of the employer, even while seemingly admitting that such rights were a "contrivance" to reduce manning levels. What is equally remarkable in the first Court of Appeal case on the use of the economic torts in an industrial dispute is the Court's view that the substantive issues could be addressed at a full hearing, an event which the Court should have been aware was most unlikely to occur.

This case confirmed the availability of the common law remedies in tort and heralded the way for an increasing stream of interim injunctions being sought to inhibit strike action, particularly in the last few years. In the last year or so employers have realised the effect that an action for damages may have on a union and have now initiated several actions although none have yet gone to trial.

The effect of the law

To justify the above criticism of the Court of Appeal, it is worth outlining the impact that the economic torts had in labour law. As will be seen, the result was a major change throughout the system as a whole.

(1) The legislative policy of the last 8 years, that industrial disputes should be settled by a specialist court with a jurisdiction adapted specifically for such disputes was reversed. Industrial disputes henceforth were able to be litigated in two court systems. Moreover the dual system meant that the most effective remedies from an employer viewpoint were available in the court where, because of the nature of the usual remedy (an interim injunction) and the nature of the common law rules, the industrial relations merits of the case were unlikely to be considered in any depth.

(2) A new remedy, and one that particularly favoured employers, was made available, a remedy that had been restricted in other jurisdictions for this reason (see Anderson, 1975). This resulted in a major change in power relationships in industrial disputes (see Hughes, 1986 for a recent analysis of interim injunctions).

(3) The possibility of a potential conflict between the legislation and the common law arose. The best example of this was when the Industrial Relations Act 1973 removed legal sanctions from a limited range of strikes over disputes of interest. Such strikes however almost certainly remained unlawful at common law. A second example was the provisions of the Commerce Act 1975 to allow the Arbitration Court to deal with industrial action seriously affecting the public interest. The whole rationale of both the legislation and the policy contained in it, that the Arbitration Court should deal with such disputes, seems to be rendered superfluous by the parallel common law remedies.

(4) The potential of the common law for a concerted employer attack on not only the right to strike but on the right of an effective union to exist at all became apparent. The recent cases claiming substantial damages against unions clearly demonstrate this potential. The same threat also exists against union officials. These possibilities at best can have a major chilling effect once the threat becomes apparent and at worst threaten the viability of the union movement. In 1986 New Zealand law was in a similar position to that of Britain before 1906, only with a much more developed and sophisticated common law arsenal.

(5) The changes brought about seem to go against the trend of development particularly since 1951 which was one of *de facto* tolerance of strikes with a preference for solutions through industrial procedures.

It was only in 1985 in *New Zealand Baking Trades Employee's IUW v General Foods Corporation (NZ) Ltd* that the Court of Appeal finally began to consider seriously some of the issues raised and at a time when the proposed labour law reforms were about to render the discussion redundant. The Court of Appeal in this case did recognise that issues of labour law should primarily be resolved in the Arbitration Court, thus possibly limiting the trend towards seeking injunctions in the High Court to enforce the provisions of the Industrial Relations Act, but was not prepared to go further and exclude access to the common law remedies, in particular interim injunctions. Given the fact that the common law had been used in this way since 1970 the reluctance to make such a major change is understandable. The Court did however seem alive to the problems to a much greater extent that in 1974. Cooke J for example said:

> There is some attraction in the approach that . . . even though a tort action has been brought properly before it, the High Court should wash its hands of all responsibility for the time being, and withhold any remedy until any case which happens to be pending in the Arbitration Court and has some link with the subject-matter of the High Court action has been disposed of. But that would be a radical change, having the effect of altering existing rights quite radically. (p.118)

Cooke J went on to state that, given that the law has stood since 1974, any such change would be "unjustified judicial legislation". The majority judgments also leave no doubt that the High Court's jurisdiction to issue injunctions based on a tort remains intact. Indeed several of the judges explicitly state that the common law powers would not have been excluded without clear legislative wording (p. 118 per Cooke J and p. 125 per Somers J). It was also noted that counsel conceded that the Court had jurisdiction (p. 127 per Thorp J).

Richardson J was however prepared to go further and hold that normally the High Court should decline to grant injunctions in cases concerning industrial disputes for the reason that the Arbitration Court had been entrusted with jurisdiction in this area and that it had the special expertise to deal with such disputes. He stated:

> the dominating consideration is that the underlying industrial relations issues can and should be determined first in the Arbitration Court. That Court has the expertise and, more importantly, it has been entrusted with that responsibility. (p. 121);

and added

> how unsatisfactory it is to have the determination of these important issues of industrial relations law dealt with under the adversary processes of the High Court which has no role in that regard under the Industrial Relations Act itself instead of leaving them to the Arbitration Court . . . Any intrusion by the High Court into industrial relations must determine to some extent the legislative policies underlying the Industrial Relations Act 1973. (p. 122)

The judgments of Cooke J and in particular Richardson J go some way towards recognising that the use of the common law does create problems in industrial relations. Neither judgment however questions the basic applicability of the common law, only the justification for granting injunctions in particular circumstances, a point that relates to judicial discretion rather than substantive law and only overcomes some of the problems listed above. The major potential problem of the impact of an award of damages would not be affected.

Courts and politicians

The discussion above tends to suggest that the courts should have resisted the introduction of the economic tort into New Zealand labour law. This point remains valid, but the extent to which the courts could have achieved this is limited. If the courts had used the reasoning of Cooke and Richardson JJ in 1974 they could have severely limited the availability of the interim injunction in industrial disputes and have thus forced the use of the remedies provided for in the Act. This would have been the most sensible and achievable measure and the one with the greatest practical impact in that it would have preserved the pre-1974 *status quo*.

Beyond this however, it is difficult to see how much more could have been achieved. The economic torts have general applicability and to suggest that they not apply in New Zealand is unrealistic. There is however considerable scope for the courts to act in developing the possible defences to an action in tort so as to take account of industrial relations reality. For example the defence of legitimate self-interest available in conspiracy could well have been generalised. Indeed in *Pete's Towing Services v Northern IUW*. Speight J did take some cognizance of the industrial relations realities in accepting a defence of justification to an action for inducement to breach of contract.

The difficulties in the way of such a development are however considerable and would require a major shift in the concepts underlying the economic torts. In particular the pre-eminence given to the lawfulness or unlawfulness[6] of the action complained of as the basis of liability would need to be re-evaluated and the emphasis shifted to the reasonableness of the action. Such a major change is extremely unlikely given the constraints that operate to limit judicial lawmaking. A complicating factor in New Zealand is that the unlawfulness would often be because the action was contrary to industrial relations legislation. A change as suggested would therefore seem to mean not abstentionism by the common law, but opposition to legislative policy which would be untenable.

Perhaps it is more sensible to ask why the Government did not act to deal with the problems raised. The answers are probably that it would have alienated government supporters, that the

6 Lawfulness can include a breach of contract, a tort or a breach of statute. It should not be equated with criminal conduct (although criminal conduct is also unlawful in this context).

possibility of an attack on strikes and unions was not an unwelcome development and partly that the mythology of placing a group "above the law" was sufficiently convincing to justify inaction. Such reasons are only rational in political terms and not in terms of coherent and sensible lawmaking or industrial relations policy. This is particularly so given the timing of the events which occurred at the same time as a general reform of labour law and, in some cases at least, seemed to be in conflict with it.

The Labour Relations Act

The Labour Relations Act 1987 has given statutory recognition to the place of tort in labour law and has moved it to centre stage in industrial disputes. These reforms do ameliorate some of the problems that have arisen since 1970 but the problems inherent in the common law have not been tackled and the new structure itself proceeds on some debatable assumptions.

Jurisdiction in tort

The major problem the Act has solved is that of dual jurisdiction, as the Labour Court is given exclusive jurisdiction over the principal economic torts where an industrial action is involved (s242). While a potential residual jurisdiction remains with the High Court, it is unlikely that this will pose problems, and especially in interlocutory proceedings the High Court may now be reluctant to become involved given the adequacy of the remedies available in the Labour Court. The transfer of jurisdiction has not however been accompanied by any reform of the common law itself and as the Labour Court is unable to use its equity and good conscience jurisdiction in tort actions, the benefits of the transfer of jurisdiction may well be limited in that the specialised expertise of the Labour Court may not be able to be fully utilised (s 279(4). In both tort actions and in applications for a compliance order the Labour Court will consist of a judge sitting alone. In the former case however the Court will be required to observe the accepted legal principles relating to the granting of interim injunctions. A proposal that the equity and good conscience jurisdiction should apply to such actions was deleted by the Select Committee. The removal of this provision is significant as it would have allowed the Court considerably more discretion in deciding whether to issue an injunction and in particular a greater ability to consider the industrial relations issues which, although given some recognition in some cases, tend to be seen as subsidiary to the central question of whether an injunction should be issued. The equity and good conscience provision will apply to applications for compliance orders.

The second major reform in the Act is that the situation where a strike permitted by statute could well be unlawful at common law has been remedied. The Act now provides a definition of lawful and unlawful strikes (ss 233-234) and provides that no action founded on the listed torts may brought in respect of a lawful strike.

A balance of remedies?

The scheme of the new Act places a much greater emphasis on the economic torts as a primary remedy in industrial disputes, a policy that would seem to give a statutory recognition to one of the inherent features in the common law, its bias towards employers. This bias is apparent in two features of the law. First the tests used in deciding whether or not an interim injunction should be granted tend to favour the interests of the employer (see Hughes, 1986) and secondly the potential for damages gives the employer a sanction that is not available to unions and which threatens the effectiveness and viability of any union involved. It is interesting that the legislation has not followed the British scheme of setting limits on the damages that can be awarded which vary with the size of the union.[8] With small and relatively poor unions, the threat of the personal liability of union officials in New Zealand is also a real problem, a threat that would be inconceivable against an employer representative.

The issue of whether a union can in fact use remedies in tort is a third feature that should be considered. Even if an employer's action in a lockout is tortious, a debatable question, the

7 on which see Szakats, 1982

8 Employment Act 1982 s 16

availability of remedies is questionable. The major loss is likely to be wages but section 238 provides wages are not payable during a lockout, seemingly regardless of its lawfulness[9], and in any case this is a loss to the worker, not the union. In the absense of real loss neither an injunction nor damages would seem to be available.

In practice, a union will probably need to rely on a compliance order, an order where the Court's full industrial discretion is available. The real problem however relates to unlawful strikes where the lack of balance derives from a rigid adherence to dispute procedures which will usually favour the employer, partly because of the management values supported by the courts but also because such procedures usually confirm the employers actions until a dispute is resolved. Even where a union is successful the remedies will not usually fully restore its position and any success may be negatived by the "chilling" effect given by the initial advantage (on this effect in dismissal cases see Glasbeck, 1984, pp. 138-141). The essential fallacy in the new scheme is to equate strikes and lockouts. The major source of employer power lies in managerial prerogative and the new Act deliberately bolsters this power by reinforcing it with particularly powerful remedies through the law of tort.

Conclusion

This discussion has, it is hoped, demonstrated that the use of the economic torts in New Zealand is an area that poses serious theoretical questions for the overall structure of our labour law. These questions go not only to the root of labour law but to the way in which the New Zealand courts derive the common law from foreign sources. It is suggested that the techniques and principles of common law transplantability require judicial re-examination in areas where obviously different political and social factors are at work and that this is particularly so where there has been extensive legislative intervention in the area of law under examination.

More importantly, from an immediate point of view, is the suggestion that the economic torts have been used in a conscious or unconscious attempt to effect a major shift of power in New Zealand industrial relations so as to compel the union movement into a legalistic straitjacket that will seriously weaken their industrial power and consequently the protection they can give their members. The Labour Relations Act 1987 shows a major shift in preference towards legalistic solutions to industrial disputes accompanied by a weakening of the tripartite nature of the Court. There are few examples in the world to indicate that such trends will do anything other than weaken the position of workers.

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