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REASONS AND CONTEXT IN  
COMPARATIVE LAW

Essays in Honour of John Bell

Edited by

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## A Comparative Reflection on Chilean Economic Torts

CRISTIÁN A. BANFI

Unfair competition law belongs to the realm of private law. Its concern is to protect individual business adversaries from abusive and wrongful acts through preventive remedies and secondarily via tort compensation.

This study is written in gratitude for Professor John Bell, who wisely, generously and kindly taught me, as a postgraduate student in Cambridge, how to do comparative law seriously.

The chapter analyses Chilean tortious (extracontractual) liability for pure economic loss (PEL) caused by unfair commercial practices from an Anglo perspective. It shows that the general rules on tort, enshrined in the Civil Code of 1855 (CHCC), proved insufficient for prospective competitors to bring tort law suits: they had to wait until the Unfair Competition Act 2007 (UCA) was passed. Although the parties can choose between a claim in tort or under UCA, the case law on tortious liability for unfair competition is conspicuously missing; instead, case law under the UCA rapidly developed after its enactment. Chilean courts have not displayed the level of creativity characteristic of English judges when deciding on unfair competition, yet they have interpreted the UCA in a way that attracts the comparatist's attention.

I will argue that, rather than denying compensation for negligently inflicted PEL for lack of causation and uncertainty of damage, consistency with the existing law and legal policy requires that Chilean courts weigh against the wrongdoer's right/freedom of competition the victim's right to redress for harm caused by business rivalry. This can be done in different ways. First, trade opponents do not owe one another a duty of care, hence carelessly caused PEL is a side effect of legitimate commercial strife. Second, although competitors often injure one another intentionally,

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accept tortious liability for carelessly caused PEL but often condition tort actions and remedies in kind on proof of the defendant's knowledge, or intention to harm the claimant, or intention to procure the breach of contract. The outcome is analogous to that achieved in England. More importantly, it is a sound approach: a mental element stricter than bare negligence is what makes unfair competition abusive and wrongful. As business adversaries owe one another no duty of care at all, liability should hinge on that intention, reckless or grossly negligent disregard of the competitor's interest.

Only a few claims under the UCA have been successful. This is partly due to the intricate proof of intention and causation. It has been hard for claimants to show unfair conduct worth a punishment targeted at deviating a rival's clientele. First, the courts have imposed an unusually high standard of proof in civil proceedings, as if misbehaviour were to be shown beyond any reasonable doubt, whereas the evidence should be weighed on the balance of probabilities. Second, the courts seem to expect that the mental element which defines unfair competition must be proved directly, whereas, in truth, intention can only be inferred from the evidence gathered at trial.

Occasionally, Chilean courts have understood unfair practice objectively, namely without requiring intention – as an act inconsistent with good faith or good commercial customs. With respect to these cases, it has been argued that this interpretation is flawed. Indeed, intention to harm, reckless indifference or at any rate gross negligence is the gist of commercial misconduct. Unfair practices cannot be perpetrated 'accidentally', hence the victim's right to be compensated must be balanced against the tortfeasor's liberty to compete. In sum, a mental element more stringent than simple carelessness is a reasonable qualification of the overarching principle of *culpa* in commercial competition. Merely suffering harm – even if it is negligently inflicted – is just a side effect of legitimate business struggle. Intentionally, recklessly or grossly negligently caused harm reveals abusive, wrongful, unfair behaviour.