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Torts—Misapplication of the Tort of Interference with Business Relations—Cherberg v. Peoples National Bank, 88 Wn. 2d 595, 564 P.2d 1137 (1977)

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TORTS—MISAPPLICATION OF THE TORT OF INTERFERENCE WITH BUSINESS RELATIONS—*Cherberg v. Peoples National Bank*, 88 Wn. 2d 595, 564 P.2d 1137 (1977).

Lessor, the Joshua Green Corporation, breached the covenant of quiet enjoyment by refusing to repair the outside wall of the building in which the Cherbergs were leasing space for their restaurant and by threatening to post the building as unsafe.¹ The Cherbergs sued the Green Corporation for breach of contract and for interference with business relations. The trial court sustained both causes of action. The jury awarded \$3,100 as contract damages and \$38,900 as tort damages for mental anguish.

The Washington Court of Appeals upheld the damage award for breach of contract but concluded that the tort of interference with business relations was not applicable when the defendant's breach of contract constitutes the alleged interference.² The Washington Supreme Court disagreed and reversed. *Held*: The Green Corporation was liable for interference with business relations because its intentional and unprivileged breach of contract interfered with the Cherbergs' relationship with third parties. *Cherberg v. Peoples National Bank*, 88 Wn. 2d 595, 564 P.2d 1137 (1977).

In *Cherberg*, the Washington Supreme Court applied the tort of interference with business relations in a manner for which there is no authority. Although the result reached is equitable, this note will set forth two significant reservations. First, the court's use of the tort of interference with business relations will cause unwarranted doctrinal distortion and confusion. The tort of outrage is much better suited to

1. *Cherberg v. Peoples Nat'l Bank*, 88 Wn. 2d 595, 598-99, 564 P.2d 1137, 1140 (1977). Demolition work on adjoining property revealed that one wall of the lessor's building was structurally unsafe and in need of substantial repairs to satisfy city building requirements. Upon learning of the structural defects, the lessor notified the Cherbergs that it would probably elect not to make these repairs and that the city might order the building closed. Subsequently, the lessor terminated the lease and notified the Cherbergs that it intended to post the building as unsafe. In response, the Cherbergs closed their restaurant for six or seven days. When the lessor failed, in fact, to post the building, they reopened the restaurant and resumed business.

2. *Cherberg v. Peoples Nat'l Bank*, 15 Wn. App. 336, 549 P.2d 46 (1976). The court of appeals stated that "one cannot be guilty of the separate tort of interfering with one's own contract." *Id.* at 345, 549 P.2d at 52. The court denied the award of damages for mental anguish on the ground that "to award such damages for a lessor's breach of covenant would be to allow punitive or exemplary damages, a result long since not countenanced in this state." *Id.* at 346, 549 P.2d at 53.

reach the activity which concerned the court. Second, whether the court uses the tort of interference with business relations or the tort of outrage, it must not sacrifice the certainty necessary to business planning in its effort to reach an equitable result.

I. INTERFERENCE WITH BUSINESS RELATIONS: THE TRADITIONAL SCOPE OF THE TORT

The doctrinal question which faced the Washington court was whether the tort of interference with business relations could properly be applied when the actions complained of constituted a breach of contract.³ In concluding that such application was proper, the *Cherberg* court took an unprecedented step that cannot be placed in perspective without examining the elements of the tort and the factual pattern for which it was intended.

The tort of interference with business relations covers a broad range of situations including interference with a presently existing contract, interference with a prospective contract, and interference with a relationship, such as that between a merchant and his customers, which will usually not be reduced to written form.⁴ The purpose

3. A second issue in *Cherberg*, the duty of the lessor to repair the unsafe condition of the building wall, will not be dealt with in this note.

4. The terminology is confusing in this area of the law. In the original *Restatement of Torts*, referred to by the *Cherberg* court, the subject of this note is subsumed under the general heading "INTERFERENCE WITH BUSINESS RELATIONS." III RESTATEMENT OF TORTS, Division Nine, at 519 (1938). In the *Restatement (Second)*, the general heading was changed to "INTERFERENCE WITH ADVANTAGEOUS ECONOMIC RELATIONS." RESTATEMENT (SECOND) OF TORTS, Division Nine, at 5 (Tent. Draft No. 23, 1977). The subheading in the original *Restatement* is "INDUCING BREACH OF CONTRACT OR REFUSAL TO DEAL." IV RESTATEMENT OF TORTS, at 48 (1939). Under this subheading, the general principle is set out in one section:

Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

(a) perform a contract with another, or
(b) enter into or continue a business relation with another

is liable to the other for the harm caused thereby.

Id. § 766. The *Restatement (Second)* subheading, on the other hand, is "INTERFERENCE WITH PERFORMANCE OF EXISTING CONTRACT OR WITH PROSPECTIVE CONTRACTUAL RELATIONS." RESTATEMENT (SECOND) OF TORTS, ch. 37, at 6 (Tent. Draft No. 23, 1977). Here the general principle is divided into three sections, § 766, § 766A, and § 766B, entitled "INTENTIONAL INTERFERENCE WITH PERFORMANCE OF CONTRACT BY THIRD PERSON," "INTENTIONAL INTERFERENCE WITH ANOTHER'S PERFORMANCE OF HIS OWN CONTRACT," and "INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS" respectively. *Id.* §§ 766, 766A, 766B. Despite the requirement of a prospective contractual relationship, it appears that a merchant-customer relationship, such as in *Cherberg*, is covered by § 766B.

In *Cherberg*, the court used the term "interference with business relations." It is

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of the tort cause of action in each of these situations is to protect the business relationship against unjustified interference by an individual foreign to that relationship.⁵

Basically, a prima facie case is established by showing an intentional interference with a contractual relationship or valid business expectancy.⁶ Upon such a showing, the burden of persuasion shifts to the defendant, who then must show that his actions were privileged.⁷ For example, one has a qualified privilege to compete for business,⁸

presumed that the term was used in the generic sense of the original *Restatement* and was not intended to restrict the scope of the holding to cases involving a breach of contract which interferes with the nonbreaching party's merchant-customer relationship.

5. The original *Restatement*, upon which the *Cherberg* court relied, states that the defendant may be liable for inducing or otherwise causing a *third* person not to perform a contract with another or not to enter into or continue a business relation. *RESTATEMENT OF TORTS* § 766 (1939), *quoted at note 4 supra*. The seminal case is *Lumley v. Gye*, 2 Ell. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853). There, a singer under a contract to perform at the plaintiff's theater was induced by the defendant, who operated a rival theater, to breach her contract with the plaintiff. The court held that the defendant was liable for interference with contractual relations.

6. The leading Washington case is *Calbom v. Knudtson*, 65 Wn. 2d 157, 396 P.2d 148 (1964). *Calbom* involved a defendant who interfered with a contract between a client and an attorney-plaintiff. The court set out the prima facie elements of the tort as "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damages to the party whose relationship or expectancy has been disrupted." *Id.* at 162-63, 396 P.2d at 151.

7. The *Cherberg* opinion lists the factors necessary to establish privilege listed in the original *Restatement* § 767, 88 Wn. 2d at 604-05, 564 P.2d at 1143-44. That section provides:

In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors:

- (a) the nature of the actor's conduct,
- (b) the nature of the expectancy with which his conduct interferes,
- (c) the relations between the parties,
- (d) the interest sought to be advanced by the actor and
- (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.

RESTATEMENT OF TORTS § 767 (1939).

The *Restatement (Second)* provides a somewhat different list:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the proximity or remoteness of the actor's conduct to the interference and
- (f) the relations between the parties.

RESTATEMENT (SECOND) OF TORTS § 767 (Tent. Draft No. 23, 1977).

8. *RESTATEMENT (SECOND) OF TORTS* § 768 (Tent. Draft No. 23, 1977). A recent Washington Court of Appeals case is a good example of "improper means" nullifying the privilege to compete. In *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 566 P.2d 972 (1977), the defendant, operator of another airline service, obtained confidential information regarding the plaintiff's contract to deliver parcels for the limited purpose of

to protect a financial interest in the business of another,⁹ and to give honest advice.¹⁰ The *Restatement (Second) of Torts* identifies the issue as "whether in the given circumstances [the defendant's] interest and the social interest in allowing the freedom claimed by him are sufficient to outweigh the harm his conduct is designed to produce."¹¹ If his interference is found to be unprivileged the defendant may be liable for tort damages¹² including damage for mental anguish.¹³

II. THE REASONING OF THE *CHERBERG* COURT

The *Cherberg* court did not cite a single case from any jurisdiction which applied the tort of interference with business relations in situations in which the acts complained of constituted a breach of the defendant's contract with the plaintiff.¹⁴ Rather, the court cited cases involving the application of other torts to contractual relationships and cases decided under the distinct theory of prima facie tort.

considering his possible purchase of the plaintiff's airline. The defendant proceeded, however, to use that information to acquire his own contract to deliver the parcels.

9. RESTATEMENT (SECOND) OF TORTS § 769 (Tent. Draft No. 23, 1977). See, e.g., *O'Brien v. Western Union Tel. Co.*, 62 Wash. 598, 114 P. 441 (1911), cited in RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 769, at 78 (Tent. Draft No. 14, 1969).

10. RESTATEMENT (SECOND) OF TORTS § 772 (Tent. Draft No. 23, 1977). The Washington Supreme Court in *Calbom v. Knudtson* held that this privilege does "not justify officious, self-serving, or presumptuous [*sic*] assumption of responsibility." 65 Wn. 2d 157, 166, 396 P.2d 148, 153 (1964).

11. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 766, at 11 (Tent. Draft No. 23, 1977).

12. There is a split of authority between those jurisdictions which have adopted a contract measure of damages and those which have adopted a tort measure of damages. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 774A, at 86 (Tent. Draft No. 14, 1969). The *Restatement (Second)* adopts the latter view. RESTATEMENT (SECOND) OF TORTS § 774A (Tent. Draft No. 23, 1977). In *Calbom v. Knudtson*, the Washington court utilized the tort measure of damages in holding that the plaintiff was not required to deduct costs saved through nonperformance. 65 Wn. 2d 157, 167, 396 P.2d 148, 154 (1964).

13. The *Restatement (Second)* endorses an award of damages for "emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference." RESTATEMENT (SECOND) OF TORTS § 774A(1)(c) (Tent. Draft No. 23, 1977). The cases cited by the *Restatement (Second)* which awarded damages for mental anguish all involved interference with contracts of employment. See, e.g., *United States Fidelity & Guar. Co. v. Millonas*, 206 Ala. 147, 89 So. 732 (1921); *Doucette v. Sallinger*, 228 Mass. 444, 117 N.E. 897 (1917), both cited in RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 774A, at 87 (Tent. Draft No. 14, 1969). *Cherberg* is the first Washington case to allow mental anguish damages under the tort of interference with business relations.

14. Dean Prosser states, "The defendant's breach of his own contract with the plaintiff is of course not a basis for the tort." W. PROSSER, TORTS 934 (4th ed. 1971). See note 5 *supra*.

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First, the court cited a Washington case, *Seidel v. Taylor*,¹⁵ as authority for the proposition that “a landlord may be liable for the tort of interfering with his lessee’s business.”¹⁶ *Seidel* involved a landlord who entered upon his tenants’ bakery and beat them with a heavy iron instrument. Despite the obvious breach of the covenant of quiet enjoyment, the tenants chose to sue only for assault, and judgment was rendered in their favor on that basis. *Seidel* indicates that an action for assault is not precluded by the fact that the defendant’s conduct also constitutes a breach of contract. It does not support the proposition that the same acts which constitute a breach of contract may also give rise to the tort of interference with business relations.

Liability for assault, as with most other torts, is determined without regard to the existence of a contractual relationship between the plaintiff and defendant. The tort of interference with business relations, however, is an exception to this principle. It is designed to apply only when there is no contractual relationship between the plaintiff and the defendant¹⁷ or when the defendant’s actions do not constitute a breach of contract.¹⁸ Essentially, it is an interstitial tort designed to provide a remedy only when none is available under contract law.¹⁹ In *Cherberg*, the tort of interference with business relations ordinarily would have been unavailable because the failure to repair the wall and the threat to post the building as unsafe constituted a breach of contract. Furthermore, the defendant’s acts, unlike the assault in

15. 86 Wash. 645, 151 P. 41 (1915).

16. 88 Wn. 2d at 603, 564 P.2d at 1142-43. The court also cited three cases from other jurisdictions which permitted tort recovery for an act which was also a breach of contract. Each of these cases involved torts which are designed to overlay contractual relations and none dealt with the tort of interference with business relations. *Acadia v. Herbert*, 54 Cal. 2d 328, 353 P.2d 294, 5 Cal. Rptr. 686 (1960) (tort damages for failure to deliver water under contract; jury found intent to oppress and the court analogized to trespass or nuisance); *Jones v. Kelly*, 208 Cal. 251, 280 P. 942 (1929) (landlord who terminated water supply to tenants with intent to oppress, liable for tort damages for trespass); *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952) (retailer who repossessed gas heater and accused plaintiff of missing payments when plaintiff had in fact not missed payments held liable for negligent infliction of emotional distress).

17. See *Lumley v. Gye*, 2 Ell. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853), discussed at note 5 *supra*.

18. *Pacific Typesetting Co. v. International Typographical Union*, 125 Wash. 273, 216 P. 358 (1923) (members of defendant union, under contract terminable at will, struck plaintiff’s company in order to interfere with plaintiff’s relations with customers).

19. Cf. *Canister Co. v. National Can Corp.*, 96 F. Supp. 273, 274 (D. Del. 1951) (“one contracting party does not have a cause of action against the other . . . for inducing the breach if there has been breach and suit brought for such”). See also note 5 *supra*.

Seidel, did not constitute a tort cause of action designed to apply regardless of the availability of a contractual remedy. The Cherbergs, therefore, would ordinarily have been limited to a cause of action for breach of contract.

In the second portion of its discussion, the court cited *Schisgall v. Fairchild Publications, Inc.*,²⁰ for the proposition that a breach of contract coupled with a motive to destroy some interest of the non-breaching party results in tort damages.²¹ This case, which involved a publisher who breached his contract with an author for the purpose of harming him, was decided under the prima facie tort doctrine.²² This doctrine requires that the acts complained of not constitute a traditional tort and that the defendant act for the purpose of harming the plaintiff.²³

The *Schisgall* case supports *Cherberg* in the sense that it allowed recovery of tort damages for breach of contract. The *Cherberg* result, however, could not have been reached under the prima facie tort the-

20. 207 Misc. 224, 137 N.Y.S.2d 312 (1955).

21. The *Cherberg* court quoted the following passage from *Schisgall*:

"If the defendant acted merely as a contracting party (at legal liberty perhaps to breach its agreement upon payment of damage), that is one thing. But if the defendant went further, and acted with intent to inflict injury beyond that contemplated as a result of the mere breach of contract, I would hold that the contract does not grant the defaulter immunity from tort liability."

88 Wn. 2d at 603, 564 P.2d at 1143 (quoting *Schisgall*, 207 Misc. at 232, 137 N.Y.S.2d at 319 (1955)). The *Cherberg* court also cited *Peitzman v. City of Illmo*, 141 F.2d 956 (8th Cir. 1944) (tort damages awarded where defendant used contractual relationship as means of gaining access to, and intentionally destroying, plaintiff's property); *Taylor v. Atchison T. & S.F. Ry.*, 92 F. Supp. 968 (W.D. Mo. 1950) (motion to strike claim of punitive damages denied because plaintiff pleaded failure to carry out duty arising from contract); and *Wampler v. Palmerton*, 250 Or. 65, 439 P.2d 601 (1968) (advice to breach contract was privileged where defendant business advisor acted for benefit of breaching corporation).

22. This doctrine, recognized in the states of New York, Connecticut, and Massachusetts, among others, is based on the idea that the traditional tort categories are not exclusive and that a changing society benefits from the flexibility of an interstitial cause of action. Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465, 471-73 (1957). See Annot., 16 A.L.R.3d 1191 (1967); 32 ST. JOHN'S L. REV. 282 (1958).

Prosser implies that the prima facie tort cause of action is the New York equivalent of the tort of interference with business relations. "Proof of the intentional interference and resulting damage establishes what the New York courts have called a 'prima facie tort,' casting upon the defendant the burden of avoiding liability by showing that his conduct was privileged." W. PROSSER, *supra* note 14, at 953 (footnotes omitted). This is misleading because the prima facie tort in New York requires additionally that the defendant act solely for the purpose of harming the plaintiff. Forkosch, *supra* at 477-78. This significant element is not required under the tort of interference with business relations.

23. Forkosch, *supra* note 22, at 475-77.

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ory, because the Green Corporation breached for the purpose of increasing profits and not for the purpose of harming the Cherbergs.²⁴ Furthermore, because *Schisgall* was decided under this distinct theory, it offers no support for the Washington court's application of the tort of interference with business relations to arrive at the outcome in *Cherberg*.

In the third step of its analysis, the *Cherberg* court distinguished one of the cases relied on by the court of appeals, *Glazer v. Chandler*,²⁵ from *Schisgall*. In *Glazer*, the defendant breached his contract to sell certain sewer connection permits to the plaintiff, thereby precluding the plaintiff from reselling the permits before they expired.²⁶ The *Glazer* court held the defendant liable only for the breach of contract because the interference with business relations between the plaintiff and third persons was merely an "incidental consequence" of the breach.²⁷ The Washington court focused on the "incidental conse-

24. The *Schisgall* court stated,

Even though the act would not be actionable in tort if the defendant "elected" to breach its contract in furtherance of its legitimate business interests, it is tortious (as well as a breach of contract) if there be no self-interest involved, but rather the sole purpose be that of injury to another.

137 N.Y.S.2d at 319. Because the Green Corporation acted in self-interest and its sole purpose was not to injure the Cherbergs, it would not have been liable for tort damages under the prima facie tort doctrine.

25. 414 Pa. 304, 200 A.2d 416 (1964). The *Cherberg* court also cited the Washington case of *Hein v. Chrysler Corp.*, 45 Wn. 2d 586, 277 P.2d 708 (1954). In *Hein*, defendant Harrison, a regional manager for the Chrysler Corporation, breached a contract with the plaintiff auto dealer to deliver 45 cars. The purpose of the breach was to force the plaintiff to sell his dealership so that Harrison could install his son-in-law in the position of dealer. Harrison also instructed an employee to send false and derogatory reports to Chrysler concerning plaintiff's operation of his dealership and forced the plaintiff to purchase unwanted sales aids. Despite these facts, the *Hein* court denied recovery under the tort of interference with business relations specifically because the harm complained of did not result from interference with the relationship between the plaintiff and a third party. *Id.* at 596-97, 277 P.2d at 714-15. Thus, because the actions by the defendant in *Hein* were as reprehensible as the actions of the Green Corporation, the only significant distinction between the two cases seems to be that in *Cherberg* the court implied that the harm resulted from interference with the relationship between the Cherbergs and third parties. 88 Wn. 2d at 601, 564 P.2d at 1142. Considering that the *Cherberg* court did not discuss the identity of the third party or emphasize the necessity thereof, it is questionable whether this distinction will have continued vitality. If the gravamen of the Washington court's new application of the tort is the interference, then *Hein* is still good law. However, if the gravamen is the conduct of the defendant, the requirement of a third party will probably atrophy in future cases.

26. The contract also included an agreement to sell certain land. The failure to deliver the deeds caused the city to deny Glazer building permits. 200 A.2d at 417.

27. *Id.* at 418. The *Cherberg* court quoted the following passages from *Glazer*: "[W]here, as in this case, the allegations and evidence only disclose that defendant

quence" language and thereby distinguished *Glazer* from *Schisgall*, in which the interference was the purpose of the breach.²⁸ The court then concluded that application of the tort of interference with business relations was proper in *Cherberg*, apparently because the facts presented bore a closer resemblance to the facts in *Schisgall* than to those in *Glazer*.²⁹

In arriving at this conclusion, the *Cherberg* court apparently placed considerable reliance on the fact that the Green Corporation directly interfered with the relationship between the Cherbergs and their customers³⁰ by threatening to post the building as unsafe. The court determined that the essential similarity between *Cherberg* and *Schisgall* was the nature of the harm inflicted. In both cases, the harm was more than an "incidental consequence" of the breach.³¹

The court then addressed the question of privilege.³² Noting that the Green Corporation breached the contract, not to terminate an unprofitable relationship, but to clear the way for a new, more profitable venture, the court held that such a breach was not privileged: "Proof of a breach based on such a motive demonstrates a failure to make a good faith effort to meet obligations under the lease and may give rise to liability in tort."³³

breached his contracts with plaintiff and that as an incidental consequence thereof plaintiff's business relationships with third parties have been affected, an action lies only in contract for defendant's breaches, and the consequential damages recoverable, if any, may be adjudicated only in that action."

Cherberg, 88 Wn.2d at 604, 564 P.2d at 1143 (quoting *Glazer*, 200 A.2d at 418).

28. The *Cherberg* court stated that "[t]he distinguishing feature between the two lines of cases [*Glazer-Hein* and *Schisgall*] would seem to be whether the interference with business relations was a mere incidental consequence of the breach or a motive or purpose therefor." 88 Wn. 2d at 604, 564 P.2d at 1143.

29. *Id.* The court did not explicitly conclude that the facts in *Cherberg* bore a closer resemblance to the facts in *Schisgall* than to the facts in *Glazer*. However, such a conclusion is easily inferred from the fact that the court drew a distinction between the two cases and held that recovery in *Cherberg* was proper.

30. See note 25 *supra*. Despite some ambiguity, this note will assume that the third parties referred to by the court were the Cherbergs' customers.

31. See note 28 *supra*. The court appeared to conclude that the "incidental consequence" rule does not preclude recovery where there is purposeful interference (*Schisgall*) or interference as a result of extreme conduct (*Cherberg*).

32. On appeal, the Green Corporation maintained that the tort required interference by a third party and never reached the privilege issue. Brief of Appellant at 13-17. *Cherberg v. Peoples Nat'l Bank*, 15 Wn. App. 336, 549 P.2d 46 (1976). The Cherbergs simply argued that the Green Corporation "deliberately endeavored to force respondents to vacate the leased premises and lose their restaurant business." Brief of Respondents at 19. This may explain the Washington court's cursory treatment of the privilege issue.

33. 88 Wn. 2d at 605, 564 P.2d at 1144.

III. AN ALTERNATIVE APPROACH

The potential reach of *Cherberg* is immense. It could be used to award tort damages for any intentional breach of contract. It is likely, however, that the conduct and motives of the defendant in *Cherberg* will make it distinguishable from most future cases involving breach of contract.

In its discussion of the privilege issue, the court stated that an intentional breach of contract is not justified when performance is "economically feasible"³⁴ and that the conduct of the Green Corporation was sufficient to draw an inference of "bad faith."³⁵ It is suggested, however, that these conclusions do not warrant a finding that the Green Corporation committed the tort of interference with business relations. The court could have found the defendant liable without having to resort to doctrinal distortion if the Cherbergs had pleaded the tort of outrage. That tort requires a finding of outrageous conduct which intentionally or recklessly causes severe emotional distress.³⁶

34. The court commented,

A party to a lease or contract should not be held liable in tort for a willful breach of an agreement which it is no longer *economically feasible* for the party to respect. . . . But here, the record fails to indicate that the Lewis Building would not provide the lessor with a satisfactory return if the wall had been repaired by the lessor and the lessees' rights under the lease respected.

Id. (emphasis added).

35. The court listed a number of factors from which an inference of bad faith might be drawn:

The respondent's efforts to purchase petitioners' leasehold interest were halted almost immediately upon discovery of the structural defect in the wall. Some of respondent's conduct during negotiations could be argued to be an effort to intimidate the petitioners in such a way as to force abandonment of their position. The respondent's assertion that it would be posting the building as unsafe, followed by the failure to do so once the petitioners closed their business, coupled with the evidence that repair of the wall was feasible and was in fact accomplished at considerably lower cost than the lessor's original estimates, is also damaging to the lessor. The lessees could also argue that the respondent showed an unusual lack of concern for the effect of demolition and construction adjacent to and underneath the Lewis Building upon the petitioners' business, and failed to use its best efforts to minimize the disruption to the lessees' business.

Id. at 606, 564 P.2d at 1144.

36. RESTATEMENT (SECOND) OF TORTS § 46 (1965) reads, in part: "Outrageous Conduct Causing Severe Emotional Distress: (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." A recent opinion written by Justice Utter concerned the tort of outrage. *Contreras v. Crown-Zellerbach Corp.*, 88 Wn. 2d 735, 565 P.2d 1137 (1977) (defendant corporation liable under tort of outrage for failing to curb use of racial slurs by employees in presence of Chicano employee). See *Grimsby v. Samson*, 85 Wn. 2d 52, 530 P.2d 291 (1975) (in which Washington court adopted the tort of outrage); *Prosser, Insult & Outrage*, 44 CALIF. L. REV. 40 (1956).

Abuse of a position or relationship which gives the defendant power to affect the interests of the plaintiff may be a contributing factor.³⁷ It is also proper to consider whether the defendant has merely insisted upon his legal rights or has abused his position in an extreme manner.³⁸

From this analytical perspective, the Washington court can provide a remedy in cases similar to *Cherberg* without creating the confusion attendant upon the court's use of the tort of interference with business relations. Such a holding would make it clear that the Washington court is not concerned with a breach of contract which interferes with business relations per se, but is instead concerned with the harm caused by overreaching, particularly when an adhesion contract is involved.³⁹ This new position would also allow the court to afford a remedy in instances when the breach does not affect the nonbreaching party's business relations but is nevertheless oppressive.

IV. THE COSTS OF A REMEDY

The *Cherberg* decision replaces the formal rule⁴⁰ denying tort dam-

37. The *Restatement (Second)* comments,

The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. . . . In particular police officers, school authorities, *landlords*, and collecting creditors have been held liable for extreme abuse of their position.

RESTATEMENT (SECOND) OF TORTS § 46, comment e (1965) (emphasis added).

38. The *Restatement (Second)* further comments,

The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

Id. § 46, comment g.

39. The Joshua Green Corporation is closely linked with Peoples National Bank. 88 Wn. 2d at 599, 564 P.2d at 1141. The Cherbergs, on the other hand, were an older couple who operated only one small establishment. The Green Corporation acquired the building subject to the Cherbergs' lease. *Id.* at 597, 564 P.2d at 1140. Thus the Cherbergs were dealing with a party not of their choosing.

40. "A formal decision uses less than all available relevant information by following a rule which screens from the decisionmaker's consideration all information not specifically invoked by the rule." Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27, 28 (1976). Thus, under the formal rule denying tort damages for breach of contract, a court will look only at the fact that a breach of contract has occurred and will not consider, for example, the emotional distress suffered by the plaintiff. *Cherberg* sets this formal rule aside and allows courts to embark on a close scrutiny of the motives and conduct of the defendant and the harm to the plaintiff.

ages for breach of a commercial contract with a policy that allows a close examination of the facts in each case before awarding or denying such damages. The advantage of this change in decisionmaking policy is that it permits a court to reach a result which it considers equitable under the specific facts presented.⁴¹ The disadvantage of this approach, within the context of contract law,⁴² is that it diminishes the certainty necessary for effective planning by disregarding the presumed intent of the parties to limit their liability to the risks specified in the contract. It has been argued that the need for certainty in business dealings outweighs an occasional inequitable result.⁴³ Perhaps, in an effort to reach an equitable result in the case before it, the *Cherberg* court did not adequately consider the advantages of the formal rule for the business community as a whole.

In considering future applications of the *Cherberg* rule, evidence of actual bargaining and of relative equality in the bargaining power of the parties should weigh heavily against an award of tort damages.⁴⁴ The advantages of certainty for the business community as a whole argue in favor of continued deference to the parties' expressed intent to limit the liability accompanying contractual agreements.

V. CONCLUSION

There is no authority for the *Cherberg* court's use of the tort of interference with business relations. Furthermore, given that the Washington court desires to provide a remedy in cases similar to *Cherberg*, the tort of outrage is much better suited to the purpose. Finally, regardless of the analytical tool used, the court should carefully

41. *Id.*

42. Of course, the *Cherberg* court could argue that, because the cause of action was in tort, any attempt to limit liability need not be heeded. But this would overlook the fact that the acts of the defendant essentially add up to a breach of contract, for which only contract damages should be paid. Changing the label from "breach of contract" to "tort" does not reduce the conflict between an attempt by commercial enterprises to limit their liability and the *Cherberg* decision.

43. One author has noted,

Uniformity is needed partly to provide certainty and predictability. Where rules of law are fixed and generalized, the citizen can plan his activities with a measure of certainty and predict the legal consequences of his behaviour. In some areas of law such as contract and property this need may outweigh all others, and fixed rules which work in some instances unfairly may be preferable to rules that are fairer but less certain.

J. SALMOND, SALMOND ON JURISPRUDENCE 65 (12th ed. 1966).

44. See note 39 and accompanying text *supra*.

consider the costs of awarding tort damages for what is essentially a breach of contract.

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