Singapore Journal of Legal Studies
[1996] 482 – 523

A PERSPECTIVE ON THE ECONOMIC TORTS

A unifying principle underlying the economic torts – interference with contract, conspiracy, intimidation and unlawful interference with trade or business – has yet to be authoritatively recognised by the courts. For this reason, the development of the underlying legal and policy bases of liability and non-liability with respect to these torts has been hindered to a considerable extent. The current boundaries of their operation are consequently also unduly restricted, and they co-exist somewhat uncomfortably with analogous and overlapping principles of liability in other areas of the law, principally equity. This article offers some suggestions as to the rationalisation and resolution of some of these issues and attempts to map what, in the writer's view, is the best way forward. In particular, it is submitted that a general principle of liability for intentionally-inflicted non-physical harm, subject to a sufficiently wide and pliable defence of justification, should be recognised by the common law.

I. INTRODUCTION

RECENTLY, one of the most frequently accepted and reiterated propositions in relation to the economic torts is, rather unfortunately, that they are in complete disorder.[1] It is difficult to disagree with this. While detailed rules have evolved with regard to each of the economic torts,[2] that is, interference with contract, intimidation, conspiracy and unlawful interference with trade or business, the same cannot be said with respect to the founding of a logical structure for the area as a whole. Still less has there been any judicial consideration of the relationship between these

1 They are in a mess and are of ramshackle construction: see Wedderburn, *Rocking The Torts* (1983) 46 MLR 224 at 226; Carty, *Intentional Violation of Economic Interests: The Limits of Common Law Liability* (1988) 104 LQR 250 at 250 and 278; Eekelaar, *The Conspiracy Tangle* (1990) 106 LQR 223 at 223. See also *Clerk & Lindsell on Torts* (17th Ed, 1995) at para 23-01.

2 These are comprehensively and lucidly treated in many of the leading tort texts: *Clerk & Lindsell on Torts*, *supra*, note 1, Ch 23; Rogers, *Winfield and Jolowicz on Tort* (13th Ed, 1989), Ch 18; Fleming, *The Law Of Torts* (18th Ed, 1992) at 689-709; *Salmond & Heuston on the Law of Torts* (20th Ed, 1992), Ch 16; Brazier, *Street On Torts* (9th Ed, 1993), Ch 7; Markesinis & Deakin, *Tort Law* (3rd Ed, 1994) at 375-397 and 401-2. For the Australian perspective, see Trindade & Cane, *The Law of Torts in Australia* (2nd Ed, 1993) at 208-236 and Balkin & Davis, *Law of Torts* (1991), Chs 21 and 22. Heydon, *Economic Torts* (2nd Ed, 1978) is an excellent specialist text on the economic torts.

torts and the incidence of liability in analogous situations in other areas of the law.

It is tempting to conclude that the economic torts are nothing more than disparate miscellany which are usually grouped together for reasons of convenience or neatness. Indeed, such a conclusion is not difficult to justify on the existing state of the authorities. The adoption of such a compartmentalised approach, however, ignores the undeniable congruence of policy concerns underlying the purpose and operation of this group of torts, which are admittedly sometimes obscured by inconsistent and anomalous rules. The factual similarities in the contexts in which they are usually invoked are also too obvious to brush away. On the other hand, to rationalise and modify the existing rules so as to fit them into a coherent structure is a daunting task which will take many years and many judicial decisions to try to accomplish. What this article hopes to achieve is merely to suggest a starting point for such reform, that is, the organisation of the economic torts under a single and coherent principle of causing intentional loss or injury to another person without lawful cause or justification. The relationship between the economic torts and other instances of liability in respect of intentionally-inflicted economic loss will also be examined.

II. Founding Concepts

1. *Bases of liability*

It hardly needs to be pointed out that tort law does not accord to economic interests the same level of protection as it extends to property rights and bodily integrity. It is well-entrenched law that recovery for pure economic loss is ordinarily denied by the law of negligence.[3] This is chiefly attributable to three risks: the escalation of the incidence and quantum of liability, disproportion between the fault of the defendant and the extent of his liability, and the use of tort law to outflank the limitations of contract law, in particular the doctrine of privity. None of these considerations apply with any significant force in cases of *deliberately*-inflicted damage to economic interests. There would be no risk of a wide field of plaintiffs

[3] The existence of special circumstances such as a relationship of reliance, a voluntary assumption of responsibility or some other specific relationship must be shown before there can be such recovery. No liability attaches for negligent infringement of economic rights in the absence of such factors: *Cattle* v *Stockton Waterworks Co* (1875) LR 10 QB 453; *Weller* v *Foot & Mouth Disease Research Institute* [1966] 1 QB 569; *Spartan Steel and Alloys Ltd* v *Martin & Co (Contractors) Ltd* [1973] 1 QB 27; *Candlewood Navigation Corporation Ltd* v *Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh & Sillavan Ltd* v *Aliakmon Shipping Co* [1986] AC 785. *Cf Nicholls* v *Township of Richmond* (1983) 145 DLR (3d)

in the economic torts if the plaintiff must in some sense have been specifically aimed at by the defendant.[4] The evident blameworthiness of a defendant who has intentionally injured another person's interests will also ensure that he does not attract or deserve much sympathy. Finally, while the law of contract is traditionally concerned with compensating financial loss, it is a mechanism which is neither appropriate nor frequently-invoked to protect against intentionally-inflicted financial loss.

Yet, it remains the law that a person's intentional conduct which damages the economic interests of another will not found liability generally. Perhaps this is because, unlike the law of negligence which is concerned with risk allocation, the economic torts are concerned with stipulating the limits of permissible economic behaviour.[5] The need to preserve freedom of trade and maintain a competitive market means that there cannot be liability for all intentionally-inflicted economic loss. Everyone has the right to conduct his own business upon his own lines and as suits him best, even though the result may be that he interferes with other people's business in so doing.[6] Conversely, the right to pursue one's trade is qualified by an equal right of others to do the same and compete with him, though to his damage.[7]

Clearly, this rationale does not support the full width of the proposition that intentional injury to economic interests will not found liability generally. There must be limits to the principle that a person is free to do whatever he likes to further his trade interests, and these are dictated by the public interest in maintaining a level playing field in the realm of economic activity. Two of the most obvious restrictions are, firstly, he cannot engage in unlawful conduct and, secondly, he cannot violate another person's legal right. It is thus not surprising that the bases of liability for the economic torts have traditionally been founded on the presence of one or both of these factors.

A possible third basis of liability is one which requires the court to balance the respective economic and moral claims of the parties. This is a task which the courts have on many occasions shunned; indeed, in the context of the economic torts, it has been said that to draw a line between fair and unfair competition passes the power of the courts.[8] On closer examination, however,

362.

4 Heydon, *supra*, note 2, at 9. See also Hepple & Matthews, *Tort: Cases And Materials* (4th Ed, 1991), at 673.

5 Carty, *supra*, note 1, at 277.

6 Lord Dunedin in *Sorrell* v *Smith* [1925] AC 700 at 718; Lord Pearce in *Rookes* v *Barnard* [1964] AC 1129 at 1233.

7 Lord Davey in *Allen* v *Flood* [1898] AC 1 at 173.

8 Fry LJ in *Mogul SS Co* v *McGregor, Gow & Co* (1889) 23 QBD 598 at 625-626, approved

this is hardly a convincing reason. In certain situations, the courts have deemed it proper to undertake the task of deciding whether competition is fair, the prime example being the determination of the validity of restraint of trade clauses.[9] It cannot be said that the need for such a exercise is any less in the context of intentionally-caused economic harm. Furthermore, such a task is in fact undertaken in the context of the economic torts itself, albeit in a more restricted sense, when the application of the defence of justification has to be considered.

2. *Landmark decisions*

Consideration must start with the House of Lords' decision in *Mogul SS Co* v *McGregor, Gow & Co*[10] which established the uncontroversial proposition that it is not tortious for a group of traders to form a cartel for the purpose of advancing their own trade interests though it may incidentally injure the business of rival traders, provided that no unlawful means are used. It was in the Court of Appeal, however, that Bowen LJ formulated a general principle that it was a tort to intentionally engage in conduct which was calculated in the ordinary course of events to damage and which in fact damaged another person's property or trade, unless such acts were done with just cause or excuse.[11]

In *Allen* v *Flood*,[12] the House of Lords applied the principle established by the *Mogul* decision to competition in labour. The defendant, acting as the representative of Group X employees, told the employer that Group X employees would quit unless the employer terminated the employment of Group Y employees, the plaintiffs. The employer discharged the plaintiffs accordingly. It was found by the jury that the defendant had maliciously caused the employer to discharge the plaintiffs, that is, the defendant had injured the plaintiff out of spite and ill-will and not for securing any advantage to himself. The House of Lords held, however, that the presence of malice did not take the case out of the ambit of the *Mogul* decision. Despite the lengthy speeches delivered, this was all that was decided:[13] the fact that the defendant acts maliciously does not render a tort what is

by Lord Bramwell on appeal [1892] AC 25 at 49.

9 Heydon, *supra*, note 2, at 27.

10 [1892] AC 25.

11 (1889) 23 QBD 598 at 613-614. See also *Skinner & Co* v *Shew & Co* [1893] 1 Ch 413 at 422.

12 *Supra*, note 7.

13 Lord Macnaghten, *Quinn* v *Leathem* [1901] AC 495 at 508; *Brisbane Shipwrights Provident*

otherwise not a tort.[14] The general principle of liability suggested by Bowen LJ earlier was accordingly rejected.[15]

In the third House of Lords' decision in the series, *Quinn* v *Leathem*,[16] there was apparently a withdrawal from the position taken in *Allen* v *Flood*. In *Quinn* v *Leathem*, the defendants were union members who had a dispute with the plaintiff employer over his employment of non-union employees. After the plaintiff refused to discharge the non-union employees, the defendants forced the plaintiff's main customer to cease to deal with the plaintiff by threatening the customer that otherwise they would call out his employees. It was found that the defendants had acted out of spite and ill-will as opposed to protection of their self-interests. On such facts, the defendants were found liable for conspiracy, although no unlawful means had been used. The rule in *Allen* v *Flood* that the presence of malice could never make tortious an otherwise lawful act was thus shown not to be unqualified. The extent of the qualification on *Allen* v *Flood*, however, was not made clear by the speeches delivered. In particular, it was not clear whether their Lordships were deciding that the exception to *Allen* v *Flood* applied only in cases of malicious acts by a combination of persons or whether some broader qualification had been intended. One view which has been expressed subsequently is that the element of conspiracy was the 'very gist and substance' of the decision in *Quinn* v *Leathem* and that it would be the 'leading heresy' to suggest otherwise.[17] On the other hand, there have been statements of equal authority to the contrary.[18] The controversy has yet to be laid to rest. As Lord Devlin remarked more than 60 years after *Quinn* v *Leathem* was decided, he was not at all sure that it could be said even then with certainty what it decided.[19] It could thus be plausibly argued that, despite *Allen* v *Flood*, the principle of liability established in *Quinn*

Union v *Heggie* (1906) 3 CLR 686 at 695. See also Dicey (1902) 18 LQR 1.

14 See also *Stevenson* v *Newnham* (1853) 13 CB 297 and *Bradford* v *Pickles* [1895] AC 597. This principle has been accepted in Singapore: *Haron bin Mundir* v *Singapore Amateur Athletic Association* [1992] 1 SLR 18 at 31-32, affirmed [1994] 1 SLR 47.

15 See especially Lord Herschell, *supra*, note 7, at 138-9. But see how Lord Herschell's disapproval was treated in *Brisbane Shipwrights Provident Union* v *Heggie*, *supra*, note 13, at 695-696.

16 *Supra*, note 13.

17 Lord Dunedin, *Sorrell* v *Smith*, *supra*, note 6, at 719-720. See also Lord Porter, *Crofter Hand-Woven Harris Tweed Co Ltd* v *Veitch* [1942] AC 435 at 487. Lord Dunedin's statement was recently endorsed in Ontario in the decision of *Daishowa Inc* v *Friends of the Lubicon* (Ontario Court of Appeal, unreported, 23 January 1996).

18 Lord Loreburn Viscount Cave LC (with whom Lord Atkin concurred) and Lord Sumner, *supra*, note 6, at 713 and 739 respectively. See also Lord Lindley, *Quinn* v *Leathem*, *supra*, at 537; Stirling LJ, *Giblan* v *National Amalgamated Labourers' Union Of Great Britain And Ireland* [1903] 2 KB at 623; Hodges J, *Bond* v *Morris* [1912] VLR 351 at 360.

v *Leathem* may extend to malicious acts by a single individual.

It is significant to note that *Allen* v *Flood* has been rejected by the American courts, which have instead adopted Bowen LJ's general principle of liability for intentional harm caused without just cause or excuse.[20] This is now known in America as the *prima facie* tort doctrine.[21] Under this doctrine, for example, a wealthy defendant who set up a rival hairdressing business and under-cut the rates of the plaintiff barber for the sole purpose of driving him out of business would be liable.[22]

The position in Australia is less certain. Early this century, there was some disapproval of *Allen* v *Flood*.[23] In *Brisbane Shipwrights' Provident Union* v *Heggie*,[24] the Australian version of *Quinn* v *Leathem*, the High Court of Australia heavily qualified *Allen* v *Flood*. The material facts in *Brisbane Shipwrights* were virtually identical to those in *Quinn* v *Leathem*, and the court came to the same ultimate conclusion that the defendants were liable. However, in contrast to the diversity of approaches seen in *Quinn* v *Leathem*, the High Court adopted, with qualifications, Bowen LJ's formulation of the general principle of liability. Griffith CJ, delivering the judgment of the Court, laid down the basic rule that any interference with the rights of another, *including the right to trade and seek employment*, which in fact occasions damage to him is actionable, unless the interference is authorised, justified or excused by law.[25] However, interference which results merely from the exercise of free competition in trade, such as the acts in the *Mogul* case and *Allen* v *Flood*, or from the exercise of a right of property,[26] is not actionable. This is because these are rights given by law.[27] Other types of interferences, which are neither authorised by law nor expressly forbidden by law, are *prima facie* neutral and, therefore, justified or excused, unless the victim can show that the interference was

[19] Lord Devlin in *Rookes* v *Barnard*, *supra*, note 6, at 1215-1218, especially at 1216.

[20] See *Aikens* v *Wisconsin* 195 US 194 at 204.

[21] However, it appears that this doctrine is seldom invoked in America. For further discussion, see Heydon, *Economic Torts* (2nd Ed, 1978) at 28 and 128-129.

[22] *Tuttle* v *Buck* (1909) 107 Minn 145, 119 NW 946.

[23] Madden CJ thought that it should be overruled: *Martell* v *Victorian Coal Miners' Association* (1903) 29 VLR 475 at 508. In *Bond* v *Morris*, *supra*, note 18, *Allen* v *Flood* was followed but on the basis that the defendant in that case (*ie*, *Allen* v *Flood*) did not act maliciously.

[24] *Supra*, note 13.

[25] *Supra*, note 13, at 697-698 (proposition I).

[26] The example given was *Bradford* v *Pickles*, *supra*, note 14: see *supra*, note 13, at 700. In *Bradford*, the House of Lords held that a defendant who maliciously abstracted percolating underground water from his land for the purpose of preventing the water from reaching the plaintiff's land, so as to make it necessary for the plaintiff to purchase his land at a high price, was not liable as he was lawfully exercising a right of his property.

deliberate and the defendant was actuated by a desire to do harm to him.[28] On the other hand, if the interference is a direct result of unlawful conduct, the cause of action is complete as soon as there is actual damage.[29] These principles were declared by the High Court to be consistent with earlier authority, including *Allen* v *Flood*.

Surprisingly, *Brisbane Shipwrights* has been largely overlooked, although it is a decision of the High Court. It has hardly been discussed in subsequent decisions.[30] Indeed, the leading Australian tort texts advocate the adoption of a general principle of liability for intentionally-caused economic harm free from the constraints imposed by *Allen* v *Flood*,[31] without referring to the fact that much of the work was done by *Brisbane Shipwrights* 90 years ago. Subsequent decisions of the High Court of Australia have appeared, however, to be unwilling to adopt the position taken in *Brisbane Shipwrights*. In *McKernan* v *Fraser*,[32] Evatt J expressly stated that the English authorities did not support the proposition that all wilful injury is actionable unless justified or excused, although he recognised the logic of such a proposition. A similar view appeared to be favoured, *obiter*, by Dixon J in *James* v *Commonwealth*.[33] Significantly, *Brisbane Shipwrights* was not cited in either case. The conclusion, then, is that the position in Australia, probably even more so than in England, remains open.

More recent judicial discussion on the effect of *Allen* v *Flood* is largely non-existent. The law has developed by way of distinct, nominate torts.[34] Further, though the full width of the principle in *Allen* v *Flood* may in truth have been significantly restricted, it is frequently assumed by the courts to be good law. *Quinn* v *Leathem* has been regarded, accordingly, as merely introducing an anomalous exception in the case of lawful but

27 *Supra*, note 13, at 698 (proposition II) and 700.

28 *Supra*, note 13, at 699 (propositions III, IV and V).

29 *Supra*, note 13, at 700. This proposition requires qualification as to the requirement of sufficient intent in the light of *Northern Territory of Australia* v *Mengel* (1995) 129 ALR 1, but otherwise does not affect the present discussion.

30 *Brisbane Shipwrights* was referred to as authority for a general principle of liability for intentional harm by the Northern Territory Court of Appeal in *Northern Territory of Australia* v *Mengel* (1994) 95 NTR 8 but this decision was subsequently reversed by the High Court: see (1995) 129 ALR 1. The High Court did not mention *Brisbane Shipwrights* or the principle established therein. Apart from this, *Brisbane Shipwrights* has been briefly cited for other propositions in a handful of cases: see, *eg*, *Hay* v *The Australasian Institute of Marine Engineers* (1906) 3 CLR 1002 at 1010; *Transport Workers Union of Australia* v *Leon Laideley* (1980) 28 ALR 589; *Ansett Transport Industries (Operations) Pty Ltd* v *Australia Federation of Air Pilots* [1991] VR 637.

31 Balkin & Davis, *supra*, note 2, at 670; Trindade & Cane, *supra*, note 2, at 224.

32 (1931) 46 CLR 343 at 380-381.

33 (1939) 62 CLR 339 at 362-366.

malicious action by a combination of persons, that is, the tort of conspiracy by lawful means. Thus it has been remarked that the tort of conspiracy by lawful means is anomalous because its effect is that an act which is not actionable by one person becomes actionable when it is committed by two or more persons pursuant to an agreement.[35] Consequently, the analytical framework for the economic torts that has developed is one that rests on the assumption that the motive of the defendant is irrelevant, except in a conspiracy by lawful means, in determining whether he is liable for intentionally causing injury to the plaintiff's economic interests. In other cases, liability could be imposed only where a legal right of the plaintiff has been interfered, as in the case of interference with contract, or where the defendant has utilised unlawful means to cause injury to the plaintiff, as in intimidation, unlawful conspiracy and unlawful interference with trade or business. The law has thus adopted *formal* as opposed to *substantive* criteria for identifying illegitimate or unfair competition.[36]

This, however, must not obscure the fact that, until the question is directly and authoritatively addressed, the principle established by *Allen* v *Flood* is not beyond challenge.

3. *A suggested formulation*

It is submitted that much of the reasoning in *Brisbane* v *Shipwrights* may be adopted as the analytical framework for a general principle of liability in respect of intentionally-caused economic loss. This may be stated thus. The general rule is that any intentional interference with the rights of another (including what should strictly be termed as economic expectations) which causes loss to him is actionable, unless the interference is authorised, justified or excused by law. Where unlawful means have been used, no justification is possible. On the other hand, in situations where a defendant is exercising an undoubted legal right, as opposed to merely exercising his liberty to do a neutral act, the defendant is never liable or, more appropriately, justification always applies. In a case where the defendant does a neutral act, the availability of justification depends on whether he is actuated by a desire to injure the plaintiff.

It is felt that one significant qualification is necessary. In the *Brisbane Shipwrights* formulation the scope of justification is too simplistically and strictly defined by reference to the presence of unlawful means and malicious

[34] See Rogers, *supra*, note 2, at 495.

[35] Lord Diplock, *Lonrho Ltd* v *Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 188; Lord Bridge, *Lonrho plc* v *Fayed* [1992] AC 448 at 307-309. See also Judith Prakash JC (as she then was) in *X Pte Ltd* v *CDE* [1992] 2 SLR 996.

intent. This tends to create a relatively inflexible concept which is not apt to deal with the innumerable ways in which intentionally-caused economic harm may be inflicted. As will be suggested later, no rule should be laid down that conduct involving unlawful means or malicious intent may never be justified. Further, the concept of justification should take into account the fact whether there has been a violation of the plaintiff's legal rights or merely an interference with his economic expectations, and, as contended earlier, whether the defendant's conduct passes the bounds of what is fair competition.

The resulting analytical framework is as follows. The starting point would, again, be the all-important principle enunciated by Bowen LJ: all intentionally-inflicted economic harm is actionable unless lawful cause or justification is shown. Where the defendant is acting pursuant to a positive legal right as opposed to exercising his liberty to do a neutral act, as in *Allen* v *Flood* and the *Mogul* decision, justification will always apply. In other cases, whether justification applies would depend substantially on the presence of at least three factors: the violation of a legal right as opposed to a mere expectation, the use of unlawful means and malicious conduct on the part of the defendant. In exceptional cases, there may be a residual fourth factor of reprehensible conduct which, although aimed at advancing the doer's interests rather than injuring any person, transgresses the boundaries of what is generally accepted by reasonable commercial men as fair competition. It should be remembered that these factors, of course, carry varying degrees of weight in different situations in relation to the imposition of liability. If none of the factors are present, justification will apply. However, if one or more of them are present, then all the relevant circumstances of each individual case will have to be considered in ascertaining whether the defendant's conduct should nevertheless be justified.

Admittedly, this formulation requires the drawing of a possibly difficult distinction between a positive legal right and a mere liberty; it could be argued that, whatever the law does not forbid, one has the right to do.[37] The force of this argument is much reduced, however, when one appreciates that the right-liberty distinction is not an absolute one. The real underlying question is whether the right claimed by the defendant as justifying his particular action is, as a matter of policy and the public interest, so revered that no limits may be placed upon its manner of exercise, not even the lowest form of restriction that he cannot abuse the right to maliciously injure others. A second argument against the suggested formulation would be the prospect of over-extensive liability, but again this is unconvincing. The only

[36] Markesinis & Deakin, *supra*, note 2, at 378.

[37] See, *eg*, Megarry VC in *Malone* v *Metropolitan Police Commissioner* [1979] 2 WLR 700

extension made to the present state of the law is that harm which is inflicted maliciously or by commercially reprehensible conduct which reasonable businessmen would term unfair would be actionable, notwithstanding that no unlawful means have been employed. Maliciousness is neither often encountered nor easily proved, while the concept of commercially reprehensible conduct sets a sufficiently high threshold to ensure that it includes only behaviour which is, according to minimum standards of commercial morality, manifestly unfair. Finally, it may be said, with some force, that the formulation would introduce an excessively wide justification defence the operation of which would create uncertainty. The answer to this is that any such uncertainty, if it exists, would not be very different from that encountered in the context of the existing justification defences to the specific economic torts. In any event, uncertainty in this branch of the law is probably inevitable; where legal rules have to cover an extremely wide field of activity, vagueness in the formulation of the rules and a resort to the court's sense of justice and common sense simply cannot be avoided.

It is submitted that the suggested formulation strikes the right balance between free trade and competition on the one hand and the protection of economic interests against intentional harm on the other. It gives adequate protection to economic interests but yet addresses the concern that the law should not unduly fetter freedom of trade and competition. Further, as will be seen, the authorities may be gradually moving to such a position, though in a frustratingly uncoordinated and piecemeal manner. The adoption of the formulation would also provide a much-needed theoretical platform on which to organise the existing authorities, map the way forward and explain the relationship between the economic torts and similar principles of liability in other areas of the law. Most importantly, it would make the law much more capable of handling bad behaviour and abuse of rights and of power, much more flexible and much more based on factors of substance rather than technicality.[38]

Consideration will now be made of each of the economic torts – interference with contract, intimidation, conspiracy, unlawful interference with trade or business – to determine if and how far the present state of the law is consistent with the above principles.

at 720 and *Abdullah* v *Regina* [1954] MLJ 195 at 196.

III. Interference With Contract

1. *General principles*

According to the original formulation of this tort in the leading case of *Lumley* v *Gye*,[39] if a defendant, without lawful justification, knowingly procures or induces a party to a contract to breach his contract with the plaintiff to the damage of the plaintiff, he is liable to the plaintiff for the resulting loss. There must be some act by the defendant which is capable in law of amounting to interference. Any *active step* taken by a defendant, having knowledge of a covenant, by which he facilitates a breach of that covenant is enough, such as when he takes a transfer of property which he knows is offered to him in breach of covenant.[40] On the other hand, no liability ensues if there is no sufficient act of interference, even if the value of the plaintiff's contractual rights are reduced by the defendant's acts.[41] It is also not enough to merely facilitate the commission of the act of interference.[42]

The defendant's conduct need not be aimed at the plaintiff and there need not be a desire to injure him;[43] malice in the sense of spite or ill-will is not required.[44] It is enough that the defendant knows of the existence of the contract and intends to procure the interference with its performance.[45] It has been held that the fact that the defendant knew that interference with the plaintiff's contract was an unavoidable by-product

[38] Heydon, *supra*, note 2, at 129.

[39] *Lumley* v *Gye* (1853) 2 E&B 216. The principle has since then been repeatedly approved by the House of Lords: see, *eg*, *Quinn* v *Leathem*, *supra*, note 13; *South Wales Miners' Federation* v *Glamorgan Coal Co* Ltd [1905] AC 239; *Jasperson* v *Dominion Tobacco Co* [1923] AC 709; *JT Stratford & Son Ltd* v *Lindley* [1965] AC 269; *Merkur Island Shipping Corporation* v *Laughton* [1983] 2 AC 570. The principle has also been accepted by the Malaysian Federal Court: *Loh Holdings Sdn Bhd* v *Peglin Developments Sdn Bhd* [1984] 2 MLJ 105. See also *Mok Tai Dwan* v *Kelang Pembena Kereta-Kereta Sdn Bhd* [1996] 1 MLJ 586. Note, in the context of trade disputes, s 10 of the Trade Disputes Act (Cap 331).

[40] *British Motor Trade Association* v *Salvadori* [1949] Ch 556; *Rickless* v *United Artists Corporation* [1988] QB 40; *Law Debenture Trust Corp* v *Ural Caspian Oil Corp Ltd* [1993] 1 WLR 138. *Cf Batts Combe Quarry Ltd* v *Ford* [1942] 2 All ER 639.

[41] *RCA* v *Pollard* [1983] 1 Ch 135.

[42] *CBS Songs Ltd* v *Amstrad Consumer Electronics plc* [1988] 1 AC 1013 at 1058.

[43] Stuart-Smith LJ in *Edwin Hill & Partners* v *First National Finance Corporation plc* [1989] 1 WLR 225 at 234.

[44] *South Wales Miners' Federation* v *Glamorgan Coal Co Ltd*, *supra*, note 39, at 246 and 250; *Greig* v *Insole* [1978] 1 WLR 302 at 332; *Pritchard* v *Briggs* [1980] 1 Ch 338 at 410.

[45] *Merkur Island Shipping Corporation* v *Laughton*, *supra*, note 39, at 607-608. The defendant need not know of the precise terms of the contract: *Emerald Construction Co Ltd* v *Lowthian* [1966] 1 WLR 691; *Greig* v *Insole*, *supra*, note 45, at 335-6. See also *Smith* v *Morrison*

of his conduct is probably not enough, if he was not actually targeting the plaintiff's interests.[46] More recently, this view has been doubted, and it is now arguable that the requisite intention may be present where the defendant knew that injury to the plaintiff's contract rights was a probable consequence of his action.[47]

2. *Direct and indirect interference*

It is usually said that the act of interference may be direct or indirect. The significance is that, in the case of indirect interference, there is the additional requirement that the means used must be unlawful.[48] A clear case of direct interference would be the defendant's persuasion or inducement of the contract-breaker,[49] but in other cases it is much more difficult to determine this question. In spite of attempts to draw a distinction between direct and indirect interference,[50] it is plain that the distinction is not wholly clear.[51] A second difficulty with the direct-indirect distinction is the absence of a satisfactory basis for having, in cases of indirect interference but not in cases of direct interference, the additional requirement of unlawful means. The suggested rationale for such requirement is that liability in cases of indirect interference must be somehow circumscribed,[52] but it is difficult to accept that 'liability depends on a possibly trivial breach of the law which is of no concern to the plaintiff'.[53] Whether an act of interference is direct

[1974] 1 WLR 659 and *Pritchard* v *Briggs*, *supra*, note 44, at 413-414. *Cf Nicholls* v *Township of Richmond* (1983) 145 DLR (3d) 362 where the Court recognised the existence of a tort of negligently inducing a breach of contract. Such a proposition has, on the other hand, been disclaimed by the Hong Kong Court of Appeal in *Club Deluxe Ltd* v *Club Metropolitan Ltd* [1995] 2 HKLR 69 at 78.

46 *Barrets and Baird (Wholesale) Ltd* v *Institute of Professional Civil Servants* [1987] IRLR 3. *Cf* the county court decision in *Falconer* v *ASLEF* [1986] IRLR 331.

47 *Millar* v *Bassey*, *The Independent*, 26 August 1993.

48 *Torquay Hotel Co Ltd* v *Cousins* [1969] 2 Ch 106 at 138; *Wolley* v *Dunford* (1972) 3 SASR 243 at 267; *Davies* v *Nyland* (1975) 10 SASR 76 at 98; *Greig* v *Insole*, *supra*, note 44, at 332; *Merkur Island Shipping Corporation* v *Laughton*, *supra*, note 39; *Loh Holdings Sdn Bhd* v *Peglin Development Sdn Bhd*, *supra*, note 39; *Boral Bricks NSW Pty Ltd* v *Frost* (1987) Aust Torts Reports 80-097; *Mok Tai Dwan* v *Kelang Pembena Kereta-Kereta Sdn Bhd*, *supra*, note 39. See also *F Bowles & Sons Ltd* v *Lindley* [1965] 1 Lloyd's Rep 207 at 212.

49 Lord Esher MR and Jenkins LJ, *DC Thomson & Co Ltd* v *Deakin* [1952] Ch 646 at 681 and 694 respectively; Speight J, *Pete's Towing Services Ltd* v *Northern Industrial Union* [1970] NZLR 32 at 47.

50 See, *eg*, the formulation in *Greig* v *Insole*, *supra*, note 44, at 334.

51 *Davies* v *Nyland*, *supra*, note 48, at 99.

52 See Lord Denning MR in *Torquay Hotel Co Ltd* v *Cousins*, *supra*, note 48, at 138.

53 Heydon, *Interference With Contractual Relations: Recent Developments*, in Simos (ed), *Negligence and Economic Torts* (1980) at 144. See also Lord Radcliffe in *JT Stratford &*

or indirect is principally a question of causation, and it is not easy to see how the presence of unlawful means overcomes the absence of a causative nexus. If anything, it should be the intention of the defendant which compensates for the lack of causal proximity.

It has been suggested that liability in cases of indirect interference should be regarded as a particular example of the tort of unlawful interference with trade or business.[54] This approach, however, would necessitate the retention of the problematic distinction between direct and indirect interference. The better view is to treat the matter simply as one of intention and causal proximity.[55] Taking into account the defendant's intention and the causal proximity between his act and the plaintiff's injury, is the defendant's interference with the plaintiff's contract rights of such a nature and extent as to warrant legal sanction? If it is considered that liability should not be imposed on the strength of the two factors, attention then shifts to the distinct tort of unlawful interference with trade or business and the presence of unlawful means.

3. *Venturing beyond contractual rights*

The paradigm situation in which the tort is invoked is where a defendant intentionally causes a third party to breach a contract with the plaintiff so as to interfere with the plaintiff's contractual rights.[56] However, the tort applies to many other rights which are conferred by law. This is only logical as there is nothing peculiar about a contractual right which justifies according to it more protection than other rights; the tort is wide enough to include civil rights existing independently of contract.[57] For example, the operation of the tort extends to rights[58] such as the plaintiff's right to

Son Ltd v *Lindley*, *supra*, note 39, at 330 and Rogers, *supra*, note 2, at 501-502.

54 Carty, *supra*, note 1, at 257. Some support for this may be derived from *Millar* v *Bassey*, *supra*, note 47.

55 See Speight J, in a slightly different context, in *Pete's Towing Services Ltd* v *Northern Industrial Union*, *supra*, note 49, at 46-47.

56 See Sales, *The Tort of Conspiracy and Civil Secondary Liability* [1990] CLJ 491 who advances the view that the tort is based on civil secondary liability. This was accepted by Lord Hoffmann, *The Redundancy Of Knowing Assistance* in Birks (ed), *The Frontiers Of Liability* (1994), vol 1 at 12.

57 Dixon J, *James* v *Commonwealth* (1939) 62 CLR 339 at 370; Sir Bingham MR, *Law Debenture Trust Corp* v *Ural Caspian Oil Corp Ltd* [1994] 3 WLR 1221 at 1230-1231, citing with approval a passage from Fleming, *supra*, note 2, at 689-690.

58 Parental rights are not included: *F* v *Wirral Metropolitan Council* [1991] 2 WLR 1132. The tort may also be the basis for protecting the right to vote (*Ashby* v *White* (1702) 2 Ld Raym 9380 and the common law right to reasonable accomodation at an inn (*Constantine*

the benefit of the performance of a statutory[59] or common law[60] duty by a third party and to copyright protection.[61] The defendant may also be liable if he knowingly interferes with the plaintiff's right to be protected by an injunction.[62]

Further, the tort may not be concerned solely with the protection of *rights*, whether contractual or otherwise. It has been established that the defendant will be liable as long as he knowingly interferes with the execution of the contract, even if no breach of contract results.[63] For example, a defendant has been held liable if he interferes with the plaintiff's contractual performance by unlawful means and causes the plaintiff to incur more expense in order to honour his contractual obligations.[64] Similarly, a defendant who unlawfully causes the plaintiff's contract with a third party to be frustrated is liable to the plaintiff, even though the third party is not liable to the plaintiff by reason of a *force majeure* clause.[65] It has been pointed out, however, that the cases in which this rule has been applied are those which involve interference with contractual rights by *unlawful means* and may

v *Imperial Hotels Ltd* [1944] KB 693).

59 *Meade* v *Haringey London Borough Council* [1979] 1 WLR 637; *Associated Newspapers* v *Wade* [1979] 1 WLR 697; *Barrets and Baird (Wholesale) Ltd* v *Institute of Professional Civil Servants*, *supra*, note 46; *Associated British Ports* v *Transport & General Workers' Union* [1989] 1 WLR 939, reversed, *ibid*, 970 without affecting this point.

60 *James* v *Commonwealth*, *supra*, note 33 (common carrier's duty).

61 *CBS Songs Ltd* v *Amstrad Consumer Electronics plc*, *supra*, note 42.

62 *Acrow (Automation) Ltd* v *Rex Chainbelt Inc* [1971] 3 All ER 1175; Beldam LJ, *Law Debenture Trust Corp* v *Ural Caspian Oil Corp Ltd*, *supra*, note 57, at 1235. In the former case, the defendants were restrained from abetting a breach of an injunction obtained by the plaintiffs against a third party. The court granted the injunction on the ground that they had, without just cause or excuse, deliberately interfered with the trade or business of the plaintiffs by unlawful means. However, it is difficult to justify this as, on the evidence, the defendants did not intend to cause harm to the plaintiffs: Balkin & Davis, *Law of Torts* (1991) at 667. The more supportable analysis is that the defendants were liable for knowingly interfering with the plaintiffs' right to be protected by the injunction. By analogy with the rules laid down in the normal cases involving contracts, it would be sufficient if the defendants knew of the existence of the injunction and that their actions would interfere with the rights conferred thereunder. *Cf* the earlier cases of *Chapman* v *Honig* [1963] 2 QB 502 and *Hargreaves* v *Bretherton* [1959] 1 QB 45.

63 *Torquay Hotel Co Ltd* v *Cousins*, *supra*, note 48, at 138; *Einhorn* v *Westminster Investments Ltd* (1969) 6 DLR (3d) 71; *Wolley* v *Dunford*, *supra*, note 48, at 267; *Esso Petroleum Co Ltd* v *Kingswood Motors (Addlestone) Ltd* [1974] 1 QB 142 at 155; *Davies* v *Nyland*, *supra*, note 48, at 98; *Greig* v *Insole*, *supra*, note 44, at 332; *MacKenzie* v *MacLachlan* [1979] 1 NZLR 670; *Merkur Island Shipping Corporation* v *Laughton*, *supra*, note 39, at 608; *Loh Holdings Sdn Bhd* v *Peglin Development Sdn Bhd* [1984] 2 MLJ 105; *Boral Bricks NSW Pty Ltd* v *Frost*, *supra*, note 48, at 68,611; *Law Debenture Trust Corp* v *Ural Caspian Oil Corp Ltd*, *supra*, note 57, at 1232-1233; *Mok Tai Dwan* v *Kelang Pembena Kereta-Kereta Sdn Bhd*, *supra*, note 39, at 615-616.

64 *Dimbleby & Sons* v *National Union of Journalists* [1984] 1 WLR 67, 427.

in fact be no more than instances of the tort of unlawful interference with trade or business.[66] To a large extent, this proposition cannot be disputed. In the case of interference with contract short of causing a breach, there is no violation of a legal right; only contractual *expectations* are involved. It would surely be extending the tort too far if intentional interference (as opposed to malicious or spiteful interference) with economic expectations were to be actionable. Thus, generally no liability ensues if, without resorting to unlawful means, the defendant procures a third party not to contract with the plaintiff.[67] Neither is it an actionable interference for a defendant to take a transfer of property from a third party and so prevent the plaintiff from applying for injunctive relief against the third party to restrain him from transferring that property.[68] Also, no liability is imposed on a defendant whose intentional conduct devalues the economic advantages attached to the plaintiff's right (without any actual interference with the right itself).[69]

On the other hand, it is submitted that there should be liability for *malicious* interference with contractual performance or other expectations. In *MacKenzie* v *MacLachlan*,[70] there was a personal dispute between the defendant, the general manager of a city council, and the plaintiff, who was an engineer employed by the council. The plaintiff alleged that the defendant's conduct towards him was oppressive and arbitrary, that the defendant had unjustifiably harassed him and that he had suffered injury to his reputation. The defendant's application to strike out the plaintiff's claim for damages and injunctive relief was refused on the ground that it was clearly arguable that the defendant could be liable for such interference with the plaintiff's contract of employment. In *Thomas* v *National Union of Mineworkers (South Wales Area)*,[71] a mineworkers' union was held liable when its pickets verbally abused and threatened violence against the plaintiff workers who had decided to go back to work. Scott

65 *Torquay Hotel Co Ltd* v *Cousins*, *supra*, note 48.

66 See *Clerk & Lindsell on Torts*, *supra*, note 2, at para 23-19 and the writings cited at note 71 therein.

67 The main authorities usually cited being *Allen* v *Flood*, *supra*, note 7; *McKernan* v *Fraser*, *supra*, note 32; *Midland Cold Storage* v *Steer* [1972] Ch 630 at 643-645. *Cf Gershman* v *Manitoba Vegetable Producers' Marketing Board* (1976) 69 DLR (3d) 114.

68 *Law Debenture Trust Corp* v *Ural Caspian Oil Corp Ltd*, *supra*, note 57. See Cane, *Tortious Interference With Contractual Remedies* (1995) 111 LQR 400.

69 See *RCA* v *Pollard*, *supra*, note 41 (bootlegger not liable for making plaintiff's copyright less valuable); *Victoria Park Racing And Recreation Grounds Co Ltd* v *Taylor* (1937) 38 CLR 479 (defendant not liable for simultaneous broadcast of the descriptions of races conducted by plaintiff on neighbouring land which caused a reduction of attendances at the plaintiff's races).

70 *Supra*, note 63.

71 [1985] 2 WLR 1081 at 1107-1109. *Cf News Group Newspapers Ltd* v *SOGAT '82* [1987]

J based his decision on the ground that there was an unreasonable harassment with the plaintiffs' right to go to work.[72] Finally, in *Gershman* v *Manitoba Vegetable Producers' Marketing Board*,[73] the plaintiff entered into the employment of a company in anticipation of an agreement to purchase the shares of that company from its shareholders. The defendant Board, actuated by spite against the plaintiff, cancelled the company's credit and threatened not to restore it as long as the plaintiff continued to be employed by the company. As may be expected, this caused the plaintiff's plans to acquire the shares of the company to be abortive. The court found the defendant liable although, on the facts, there had clearly been interference only with an *anticipated* contract. The court's reasoning, however, was not based on liability for interference with an anticipated contract. Instead, the court held that the plaintiff did not lose the opportunity for making a contract but the opportunity to extend his already existing contractual relationship of employment into one that would include acquisition of shares. Such an analysis was obviously not in accord with the reality of the situation and, more importantly, with the fact that the contract of employment was with the company while the anticipated contract of acquisition of shares was with the shareholders of the company. It would be fair to infer that this unorthodox approach was taken solely to evade the perceived rule that it is not a tort for a defendant to injure his economic expectations, even if the defendant acted maliciously.

It is difficult to dispute that the above decisions were correctly decided; it would be most unjust if the respective plaintiffs' grievances found no remedy at law. Yet, if one were to accept that there is no liability for interfering with economic expectations unless unlawful means are used, one would have to come to the unsettling conclusion that persons who have been so maliciously victimised are indeed remediless. It is therefore contended that there has been some recognition, although not as explicit as one would like, that malicious damage to economic expectations is actionable.

4. *Justification*

The defence of justification to interference with contract is well-recognised. The authorities have shown that it is insufficient that there is absence of malice or ill-will or intention to injure the person whose contract is broken, that the defendant acted in the commercial or other best interests of himself

ICR 181 at 205-6 and *Patel* v *Patel* [1988] 2 FLR 179.

[72] Scott J suggested that such interference might be a species of private nuisance but he felt that the label for the tort did not matter.

[73] *Supra*, note 67. However, the decision recently met with a cool response in the Ontario

or the contract breaker, or that the plaintiff has broken his contract with the defendant and the defendant is effecting 'revenge' on the plaintiff by procuring a breach of the plaintiff's contract with a third party.[74] On the other hand, justification may be established if the defendant intervenes pursuant to a moral duty, if the defendant is procuring the breach of a contract between the plaintiff and a third party which is inconsistent with an earlier contract between the defendant and the plaintiff,[75] if the defendant is acting in protection of his equal or superior legal right,[76] or, possibly, if the defendant is acting in the public interest.[77] On the whole, the justification defence has rarely been successfully invoked to excuse an interference with contract. The reason is that the contracting party's interest in performance and the public interest in security of contracts tend to be regarded as more important than an interest in liberty to trade.[78]

These instances do not reveal any general principle underlying the justification defence other than that it must be reasonable, taking into account all relevant factors, for the defendant to have interfered with the rights of the plaintiff. What amounts to justification[79] is to be decided by the 'good sense of the tribunal';[80] regard must be had to the nature of the contract broken, the position of the parties to the breach, the relation of the person procuring the breach to the person who breaks the contract and the object of the person in procuring the breach.[81] It is thus understandable that the defence has been said to be notoriously unstable.[82] Nevertheless,

Divisional Court in *Daishowa Inc* v *Friends of the Lubicon*, *supra*, note 17.

74 See the summary in *Edwin Hill & Partners* v *First National Finance Corporation plc*, *supra*, note 43, at 230-1 and the cases cited therein. See also *Pritchard* v *Briggs*, *supra*, note 44, at 415-417.

75 See the summary in *Edwin Hill & Partners* v *First National Finance Corporation plc*, *supra*, note 43, at 230-1. See also *Dellabarca* v *Storemen & Packers Union* [1989] 2 NZLR 734 at 753-754.

76 *Edwin Hill & Partners* v *First National Finance Corporation plc*, *supra*, note 43, approving the *dictum* of Darling J in *Read* v *Friendly Society of Operative Stonemasons of England, Ireland and Wales* [1902] 2 KB 88 at 96-7.

77 See, *eg*, *Brimelow* v *Casson* [1924] 1 Ch 302; *Posluns* v *Toronto Stock Exchange* (1964) 46 DLR (2d) 210, (1966) 53 DLR (2d) 193.

78 Heydon, *The Defence Of Justification In Cases Of Intentionally Caused Economic Loss* (1970) 20 UTLJ 139 at 171.

79 For a comprehensive discussion see Heydon, *supra*, note 78, at 171.

80 Bowen LJ in *Mogul SS Co* v *McGregor, Gow & Co*, *supra*, note 11, at 618; Romer LJ in *Glamorgan Coal Co Ltd* v *South Wales Miners' Federation* [1903] 2 KB 545 at 574, affirmed, *supra*, note 39; *Greig* v *Insole*, *supra*, note 44, at 340-341; Stuart-Smith LJ in *Edwin Hill & Partners* v *First National Finance Corporation plc*, *supra*, note 43, at 229.

81 Romer LJ in *Glamorgan Coal Co Ltd* v *South Wales Miners' Federation*, *supra*, note 80, at 574, affirmed *supra*, note 39; Stuart-Smith LJ in *Edwin Hill & Partners* v *First National Finance Corporation plc*, *supra*, note 43, at 229.

82 Gardner, *The Proprietary Effect Of Contractual Obligations Under Tulk v Moxhay And*

taking into account the countless ways in which interference with contract or other rights may take place, it is futile to hope for any better-defined principles. Indeed, it is the very elasticity of the defence which will encourage the development, modification and refinement of the principles of liability to meet novel or difficult situations.

5. *Knowing implication in breach of trust or fiduciary duty*

In equity, certain principles of liability bear a strong resemblance to the tort of interference with contractual and other rights and the question of whether these principles should be amalgamated with the corresponding tortious principles merits attention. The equitable wrong of being knowingly implicated in a breach of trust or fiduciary duty is one example. A defendant who has dishonestly assisted in a breach of trust or fiduciary duty is liable to account to the beneficiary for his loss, irrespective of whether the assisted person also acted dishonestly or fraudulently.[83] The position should be the same if he takes the initiative and knowingly induces the breach of trust or fiduciary duty.[84] Similarly, a defendant is liable for procuring a breach of an equitable obligation to account owed to the plaintiff by his agent.[85] Putting aside the distinctive terminology of the equitable jurisdiction, it is evident that the principle of liability in all these equitable wrongs is fundamentally the same as in the tort of interference with rights.

The similarity between the content of the two principles as well as the context in which their application would usually arise is well-illustrated in *Watson* v *Dolmark Industries Ltd*.[86] The defendant in this case was the substantial proprietor of a company which had been granted manufacturing and marketing rights by the plaintiff for a certain type of plastic storage tray, in consideration for royalties calculated by reference to the number of trays manufactured. The defendant, acting on behalf of the company, dishonestly under-declared to the plaintiff the number of trays produced by the company in order to avoid paying the full royalties to which the plaintiff would have been entitled. The company then used the money saved to manufacture and sell a similar product. On facts such as these, it is probable that an action for interference with rights would have succeeded against the defendant for the amount of royalties which had been lost by

De Mattos v Gibson (1982) 98 LQR 279 at 290.

83 *Royal Brunei Airlines* v *Tan* [1995] 2 AC 378. See also Birks, *Accessory Liability* [1996] LMCLQ 1 and Harpum, *The Basis Of Equitable Liability* in Birks (ed), *The Frontiers Of Liability* (1994), vol 1.

84 See the discussion and authorities cited by Harpum, *supra*, note 83, at 10-16.

85 *Prudential Assurance Co Ltd* v *Lorenz* (1971) 11 KIR 78.

the plaintiff.[87] As it turned out, however, the defendant's liability was argued and decided on the basis of knowing implication in a breach of fiduciary duty.

Keeping the two principles artificially apart by labelling them tortious and equitable cannot be good for the development of the law. The concept of interference in the tort is, by now, probably wide enough to encompass all forms knowing implication in a breach of trust or fiduciary duty. Further, a person's rights under a trust or pursuant to a fiduciary duty owed to him are clearly capable of being protected under the tortious principles. As Lord Hoffman, writing extra-judicially, points out, fiduciary obligations and contractual obligations are merely species of obligations and it should be possible to assimilate or at least to reconcile the two forms of liability.[88] The proposition that there is no tort known as inducing a breach of trust[89] or, presumably, also a breach of fiduciary duty, may have to be re-considered in the not-too-distant future.

6. *The rule in De Mattos* v *Gibson*

Another equitable principle which has strong parallels with the tort of interference with rights is, of course, the infamous rule in *De Mattos* v *Gibson*.[90] In this case, a mortgagee of a ship who, prior to taking the mortgage over the ship, had knowledge of a charterparty entered into between the shipowner and a hirer, was restrained from enforcing his security over the ship on the ground that this would interfere with the performance of the charterparty. The principle espoused was that a person, who acquires movable or immovable property from another with knowl-

[86] [1992] 3 NZLR 311.

[87] There is a rule that an agent who interferes with the contractual relations between his principal and a third party is not liable as he is the *alter ego* of his principal and his acts are in law the acts of his principal. But this rule does not apply in the instant case as the defendant was not acting *bona fide* within the scope of his authority: see *Said* v *Butt* [1920] 3 KB 497 at 506; *G Scammell & Nephew Ltd* v *Hurley* [1929] 1 KB 419 at 443 and 449; *O'Brien* v *Dawson* (1942) 66 CLR 18 at 32 and 34; *DC Thomson & Co Ltd* v *Deakin*, *supra*, note 49, at 680-681; *Rutherford* v *Poole* [1953] VLR 130 at 135-6; *Official Assignee* v *Dowling* [1964] NZLR 578 at 580-581; *Telemetrix plc* v *Modern Engineers of Bristol (Holdings) plc* [1985] BCLC 213 at 217; *Welsh Development Agency* v *Export Finance Co Ltd* [1992] BCLC 148.

[88] Hoffmann, *supra*, note 56, at 12.

[89] *Metall und Rohstaff AF* v *Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391. In *Crawley Borough Council* v *Ure* [1995] 3 WLR 95 at 106, Glidewell LJ specifically declined to decide on the corectness of this proposition. See also Hoffmann J (as he then was), *Law Debenture Trust Corp* v *Ural Caspian Oil Corp Ltd*, *supra*, note 40, at 151.

edge[91] of a previous contract[92] made by the latter with a third party to use and employ the property for a particular purpose, cannot use and employ the property in a manner which is inconsistent with the contract to the detriment of the third party. He may be restrained from doing so by injunctive relief,[93] but he will not be ordered to positively perform the terms of the contract.[94]

The principle received Privy Council sanction on one occasion[95] but was subject to considerable criticism by other courts.[96] In particular, its application was rejected in relation to resale price maintenance agreements, and a sub-purchaser was held not to be liable if he sold the purchased goods below a certain price with the knowledge that this would place the purchaser in breach of a price maintenance agreement with the supplier.[97] However, more recent cases have established that the principle remains good law today.[98]

The similarity between the *De Mattos* principle and the tort of interference with contract is striking, to say the least. Where a writer contracted to transfer future copyright exclusively to the plaintiff publisher, a rival publisher was restrained on the *De Mattos* principle from publishing the relevant works.[99] On the other hand, where purchasers, who bought cars from the plaintiff on condition that they were not to be re-sold within a year, proceeded to sell them to the defendant in breach of this condition, the defendant was held liable for inducing the purchasers to breach their contracts with the

90 (1858) 4 De G&J 276.

91 Only actual notice will do: *Swiss Bank* v *Lloyds Bank* [1979] Ch 548 at 575; *Mac-Jordan Construction Ltd* v *Brookmount Erostin Ltd* [1992] BCLC 350.

92 This need not a specifically enforceable contract: Lord Shaw, *Lord Strathcona Steamship Co* v *Dominion Coal Co* [1926] AC 108 at 125.

93 Lord Shaw, *Lord Strathcona Steamship Co* v *Dominion Coal Co*, *supra*, at 119.

94 *Law Debenture Trust Corp* v *Ural Caspian Oil Corp Ltd*, *supra*, note 40.

95 *Lord Strathcona Steamship Co* v *Dominion Coal Co* [1926] AC 108. The Privy Council applied the principle to grant a similar injunction against a *purchaser* of a ship.

96 *Barker* v *Stickney* [1919] 1 KB 121; *Greenhalgh* v *Mallard* [1943] 2 All ER 234 at 239; *Port Line Ltd* v *Ben Line Steamers Ltd* [1958] 2 QB 146. The Australian courts have expressed similar sentiments: *Sweeney* v *Tristam* [1936] St R Qd 129 at 134; *Rutherford* v *Poole* [1953] VLR 130 at 141-142; *Howie* v *New South Wales Lawn Tennis Club* (1955) 95 CLR 132 at 156.

97 *Taddy* v *Sterious* [1904] 1 Ch 354; *McGruntther* v *Pitcher* [1904] 2 Ch 306. See also Chan Sek Keong J in *Beecham Group plc* v *Chinheh Trading (S) Pte Ltd* Suit No 2454 of 1991 (10 April 1992, Singapore High Court, unreported), cited by Tjio, *Clogs On Commerce* (1994) 6 SAcLJ at 167.

98 The existence of the principle was approved in *Swiss Bank* v *Lloyds Bank*, *supra*, note 91, at 575; *The Myrto* [1977] 2 Lloyds Rep 243; *Mac-Jordan Construction Ltd* v *Brookmount Erostin Ltd*, *supra*, note 91; *Law Debenture Trust Corp* v *Ural Caspian Oil Corp Ltd*, *supra*, note 57.

plaintiff.[100] Furthermore, where the plaintiff financed a purchase of shares on the security of the shares and on condition that the shares were not to be used as security in favour of any other person, a defendant who took security over the shares with actual notice of such condition would be liable under both the *De Mattos* principle and the tort of interference with contract.[101]

Not surprisingly, the courts have occasionally tended to assimilate the two principles. The *De Mattos* principle has been described as the equitable counterpart of the tort of knowing interference with contractual rights[102] and, more recently, it was held that the grant of a charge could not be restrained on the application of the principle because it was not an interference with the chargor's contractual rights.[103] It is submitted that the sooner the assimilation is completed the better, on the simple but incontrovertible basis that principles of liability which cover the same or substantially the same ground should not be kept distinct on account of purely formalistic considerations.

Such a submission is likely to meet with a hostile reception from the prevailing academic view[104] that the *De Mattos* principle should not be conflated with the tort.[105] One objection raised is that liability under the former is more extensive than the latter; it is said that it is not a tort for a defendant, acting lawfully, to cause a third party to break his contract

[99] *Erskine MacDonald Ltd* v *Eyles* [1921] 1 Ch 631.

[100] *British Motor Trade Association* v *Salvadori*, *supra*, note 40, approved in *Rickless* v *United Artists Corporation*, *supra*, note 40.

[101] *Swiss Bank* v *Lloyds Bank*, *supra*, note 91, reversed on the facts at [1982] AC 584.

[102] Browne-Wilkinson J (as he then was), *Swiss Bank* v *Lloyds Bank*, *supra*, note 91, at 575. See also the Canadian decision of *Banco do Brasil SA* v *Pan American Steamship Lines Inc* [1992] 3 FC 735 where it was apparently assumed by the court that the *De Mattos* principle, as interpreted in *The Myrto* [1977] 2 Lloyd's Rep 243, was based on the tort of inducing breach of contract.

[103] *Mac-Jordan Construction Ltd* v *Brookmount Erostin Ltd*, *supra*, note 91, at 357. This conclusion was sound, since the relevant contractual rights did not relate to any specific property comprised in the charge, and this is also the basis of distinction between this decision and *De Mattos*. *Cf* the views expressed by Clarke, *De Mattos v Gibson Again* [1992] LMCLQ 448.

[104] Tettenborn, *Covenants, Privity Of Contract And The Purchaser Of Personal Property*]1982] CLJ 58; Gardner, *supra*, note 82; Clarke, *supra*, note 103; Swaddling, Ch 1, *Interests In Goods* (1993, eds Palmer and McKendrick) at 6. A fair number of commentators, however, have taken the opposite view that the *De Mattos* principle is based on the tort of interference with contract: see Wade (1926) 42 LQR 141; Treitel, *Limited Interests In Chattels* (1958) 21 MLR 422; Cohen-Grabelsky, *Interference With Contractual Relations And Equitable Doctrines* (1982) 45 MLR 241.

[105] It has been suggested that the *De Mattos* principle rests on the doctrine of unjust enrichment: Tettenborn, *supra*, note 104. Another view is that the principle is an application of the land law doctrine of restrictive covenants to ships: Salleh Abas FJ, *Tam Kam Cheong* v *Stephen Leong Kon Sang* [1980] 1 MLJ 36 at 40. This is very doubtful, as the notions of a proprietary

with the plaintiff, as was the case in *De Mattos*.[106] This appears to be based on the view that such an act would be indirect interference with contract which requires unlawful means for it to be actionable. However, it is by no means clear that this is an indirect interference. For example, where the defendants acquired control of a company and prevented it from performing a contract obligation owed to the plaintiff, they were held to have directly interfered with the contract.[107] Furthermore, as suggested earlier, the better view is that even if it is strictly an indirect interference it does not follow that unlawful means are always required; the intention of the defendant and the causative proximity of the interference would have to be considered. A second objection is that the *De Mattos* principle predates that established in *Lumley* v *Gye*,[108] but surely this is not a good ground for not consolidating them into one single coherent doctrine if it is otherwise desirable to do so. Such a consideration certainly did not dissuade the High Court of Australia from deciding that the nineteenth century rule in *Rylands* v *Fletcher*[109] was to be absorbed by modern negligence principles.[110] A third objection is that *De Mattos* does not apply to contracts involving land, but the tort of interference with contract does.[111] However, this only shows that *De Mattos* may in some situations be narrower in application than the tort and does not really conflict with the suggestion that *De Mattos* should be subsumed under tortious principles.

Further, if the view that *De Mattos* should be subsumed under the tort is accepted, the rejection of *De Mattos* in relation to the price maintenance cases may be plausibly explained on the ground that the defence of justification was applicable in those cases. While price maintenance agreements are enforceable *inter partes*,[112] they are probably contrary to public interest and the security of trade to enforce price maintenance agreements against third parties who are strangers to the price maintenance agreement.[113] A sub-purchaser who, strictly speaking, procures a breach of the price maintenance agreement by the purchaser can probably claim justification on this ground.

interest and a dominant tenement are nonsensical in the context of personalty.

[106] Tettenborn, *supra*, note 104, at 82-83; Swaddling, *supra*, note 104, at 16.

[107] *Esso Petroleum Co Ltd* v *Kingswood Motors (Addlestone) Ltd*, *supra*, note 63.

[108] Gardner, *supra*, note 82, at 292-293.

[109] (1866) LR 1 Ex 265, affirmed (1886) LR 3 HL 330.

[110] *Burnie Port Authority* v *General Jones Pty Ltd* (1994) 120 ALR 42.

[111] Gardner, *supra*, note 82, at 292.

[112] *Elliman* v *Carrington* [1901] 2 Ch 275.

[113] As pointed out by Tettenborn, *supra*, note 104, at 67, citing Lord Shaw, *National Phonograph*

IV. Intimidation

1. *General principles*

The tort of intimidation is committed when a defendant threatens to commit an unlawful act against another person, so as to compel the latter to do something which he would not otherwise do or to refrain from doing something which he would have refrained from doing, and which thereby causes damage to the plaintiff.[114] It must be shown that the defendant's object was to injure the plaintiff[115] and the defendant must have intended to compel the plaintiff to take a particular course of action.[116] Unlawful acts for the purpose of intimidation would clearly include illegal and tortious acts. Thus, a defendant who fired his cannons at African natives who were attempting to trade with the plaintiff and frightened them away was liable to the plaintiff for his loss of trade.[117]

Further, it is established that even a breach of contract is an unlawful act.[118] Where the defendants threatened their employer that they would go on strike in breach of their contracts of employment unless the employer terminated the employment of the plaintiff, and the employer succumbed to the demand and discharged the plaintiff, the defendants were liable for intimidation to the plaintiff.[119] It should be noted that the extension of intimidation to a threat of breach of contract does not undermine the doctrine of privity; privity of contract only prevents the plaintiff from suing on a contract to which he is not a party, and does not prohibit him from suing in respect of a tort committed against him by the defendant.[120]

2. *Justification*

Since the tort of intimidation by definition requires an unlawful threat, a threshold question as to the applicability of the justification defence is whether unlawful acts can ever be justified. There is a view that they can

Co v *Menck* [1911] AC 336 at 347.

[114] *James* v *Commonwealth*, *supra*, note 33; *Rookes* v *Barnard*, *supra*, note 6; *Morgan* v *Fry* [1968] 2 QB 710 at 724; *Central Canada Potash Co Ltd* v *Government Of Sasketchewan* (1978) 88 DLR (3d) 609; *Latham* v *Singleton* [1981] 2 NSWLR 843; *Hadmor Productions Ltd* v *Hamilton* [1983] AC 191.

[115] Lord Devlin, *Rookes* v *Barnard*, *supra*, note 6, at 1208; Martland J, *Central Canada Potash Co Ltd* v *Government Of Sasketchewan*, *supra*, note 114, at 642.

[116] *Huljich* v *Hall* [1973] NZLR 279 at 285.

[117] *Tarleton* v *M'Gawley* (1794) Peake 270.

[118] *Rookes* v *Barnard*, *supra*, note 6.

[119] *Rookes* v *Barnard*, *supra*, note 6.

[120] See Lord Reid, *Rookes* v *Barnard*, *supra*, note 6, at 1168. See also Hoffmann, *Rookes* v

never be justified,[121] but probably the preferable position is that they can be justified in appropriate circumstances. As Heydon points out,[122] it cannot be said that all unlawful acts in all circumstances are morally reprehensible, malicious or harmful, and there is in fact no sustainable basis for saying that they can never be justified. The truth is that there is a multitude of unlawful acts of which the nature, culpability and consequences are widely differing; this is all the more so with the modern pervasiveness of legislation and regulation. Furthermore, it is perhaps easily conceivable that there might be situations, analogous to self-defence, which may justify the use of unlawful means to protect one's interests. The possibility of justification should not depend on whether there is some independent illegality in the facts, but on the seriousness and social inutility of what has to be justified.[123] While acknowledging that it is somewhat distasteful to hold that an unlawful act may be justified, the reality is that the justification defence is required because of the wide meaning of unlawful threats that has been adopted. Allowing the justification defence is, on balance, more satisfactory than arbitrarily restricting the category of unlawful threats.

The weight of authority also suggests that justification is recognised as a defence to intimidation. It has been said that intimidation may be justified in a situation such as where defendant unionists are trying to stamp at 'troublemakers who fomented discord in the docks without lawful cause of excuse'.[124] Justification has been accepted as a defence to intimidation in Australia.[125] One may expect that, as in the case of justification in the other economic torts, it would be impossible to draw any definite or precise guidelines as to the operation of the defence. Indeed, it has been likened to the justification defence in the context of interference with contract: it is to be determined by the good sense of the court in the individual circumstances of each case.[126] Relevant factors which the court would look at would presumably include the nature of the threat, the relationship between the parties, the purpose sought to be achieved by the defendant and the respective positions of the plaintiff and the defendant. It is to be made clear, however, that justification to intimidation will in the great majority of cases be much harder to establish than justification to interference with contract,

Barnard (1965) 81 LQR 116 at 124-128 and Rogers, *supra*, note 2, at 510-512.

[121] See the *dicta* referred to by Heydon, *supra*, note 78, at note 271.

[122] Heydon, *supra*, note 78, at 177-182.

[123] Heydon, *supra*, note 78, at 182.

[124] Lord Denning, *Morgan* v *Fry*, *supra*, note 114, at 729. Lord Devlin left open the possibility of justification applying to intimidation in *Rookes* v *Barnard*, *supra*, note 6, at 1206 and 1209. See also Lord Denning, *Cory Lighterage* v *TGWU* [1973] ICR 339 at 356-357.

[125] *Latham* v *Singleton*, *supra*, note 114. For the more tentative New Zealand position, see *Dellabarca* v *Northern Storemen and Packers Union*, *supra*, note 75, at 750-751.

given that what is sought to be justified is an act which the defendant was not at liberty to commit.

3. *Three-party and two-party intimidation*

The normal case of intimidation is where A makes an unlawful threat to B thereby causing him to act to the prejudice of C. It is unsettled whether intimidation may be constituted in a two-party situation. There is *dicta* that it may.[127] Certainly, there does not seem to be any reason why two-party intimidation should not be allowed in a case such as where, for example, a plaintiff trader is compelled to discontinue his business by means of intentional threats of personal violence made against him by the defendant.[128] Indeed, it seems reasonably clear that where what is threatened is a tort, as opposed to a mere breach of contract, liability may arise in a two-party situation.[129]

Controversy arises, however, where the threat is one of a breach of contract. As has been seen, a threat to break a contract in a three-party situation is clearly sufficient to amount to intimidation. In a two-party situation, such a threat raises problems relating to the boundaries between contract and tort law. It has been said that, if two-party intimidation can arise with respect to a threatened breach of contract, it must follow that an intentional breach of contract will always amount to the tort of unlawful interference with trade. This would conflate tortious and contractual liability.[130] While this proposition is undeniably true and dictates the conclusion that it is superfluous to render it a tort to breach a contract intentionally, it does not follow that it is unnecessary for there to be a tort

[126] *Latham* v *Singleton*, *supra*, note 114, at 867-870.

[127] Lord Devlin, *Rookes* v *Barnard*, *supra*, note 6, at 1205; Lord Denning MR, *D&C Builders* v *Rees* [1966] 2 QB 617 at 625 and *JT Stratford & Son Ltd* v *Lindley*, *supra*, note 39, at 283. Note, however, the reservations of Lord Reid, *JT Stratford & Son Ltd* v *Lindley*, *supra*, note 39, at 325. For similar *dicta* in the Australian and New Zealand courts , see: *Williams* v *Hursey* (1959) 103 CLR 30 at 77; *Pete's Towing Services Ltd* v *Northern Industrial Union*, *supra*, note 49, at 41-2; *Huljich* v *Hall*, *supra*, note 116, at 285; *Latham* v *Singleton*, *supra*, note 114, at 858.

[128] Dixon J, *James* v *Commonwealth*, *supra*, note 33, at 374; Lord Devlin, *Rookes* v *Barnard*, *supra*, note 6, at 1205-1206. See also *The Tubantia* [1924] P 78. *Cf* Hoffman, *supra*, note 120, at 127-128 where he suggests that where such threats are made against the plaintiff he should resort to other remedies such as a *quia timet* action or an action in restitution. With respect, it is submitted that the former may not always be practical and a restitutionary action is not appropriate where the plaintiff is made to suffer a detriment without a corresponding benefit being obtained by the defendant.

[129] *Mintuck* v *Valley River Band* (1977) 75 DLR (3d) 589; Martland J, *Central Canada Potash Co Ltd* v *Government Of Sasketchewan*, *supra*, note 114, at 640.

of *threatening* a breach of contract. In the case of a threat to break a contract, there is no confusion at all between tortious and contractual liability. No contractual liability arises simply because the contract is not broken, and any injury which the plaintiff suffers is not by reason of any breach of contract but is due to the threat of the defendant.

A second argument is that the law should not encourage the plaintiff to yield to the defendant's threat of breach of contract but should persuade him to resist it; if the defendant carries out his threat the plaintiff always has his contractual remedies.[131] While this contention has some merit, it is respectfully suggested that it is based on a policy which the law has abandoned, having fairly recently taken up the position that economic duress may vitiate a contract or give rise to a restitutionary remedy. On another note, however, the advent of the doctrine of economic duress appears to be a formidable argument against liability for intimidation in a two-party situation arising out of a threat of breach of contract. This argument certainly deserves attention.

4. *Two-party intimidation and economic duress*

The view has been advanced that, in the case of a threatened breach of contract involving two parties, tort protection is not necessary as there is already the restitutionary action for economic duress.[132] After all, most of the economic duress cases have arisen out of situations where a defendant, who is a party to a contract, issues a threat to the other party, the plaintiff, that he (the defendant) would breach the contract unless the plaintiff agrees to vary the contract to the his benefit, and the plaintiff yields to this threat and agrees to the demanded variation.[133]

However, to simply say that the doctrine of economic duress renders liability for intimidation unnecessary is unsatisfactory. Applying established principles, tortious liability for intimidation arising out of a threatened breach of contract, if available *vis-à-vis* two contractual parties, is *easier* to establish than economic duress. Intimidation would always be established whenever a threat to breach a contract is made by one contractual party to the other which causes the threatened party to submit

[130] Carty, *supra*, note 1, at 261-262.

[131] Martland J, *Central Canada Potash Co Ltd* v *Government Of Sasketchewan*, *supra*, note 114, at 640, citing with approval a passage from *Winfield and Jolowicz on Tort* (10th Ed), at 458.

[132] Carty, *supra*, note 1, at 261-262.

[133] See, *eg*, *North Ocean Shipping Co Ltd* v *Hyundai Construction Co Ltd* [1979] QB 705; *Pao On* v *Lau Yiu Long* [1980] AC 614; *B&S Contracts and Design Ltd* v *Victor Green Publications Ltd* [1984] ICR 419; *Atlas Express Ltd* v *Kafco Ltd* [1989] QB 833; *The Alev*

to the other's demands. But economic duress is not always present in such a situation. There is an additional inquiry into the impact of the pressure on the free will of the threatened party: the courts have been concerned to determine whether there was also a coercion of the will of the threatened party so as to vitiate his consent[134] or whether he was left with any practical or reasonable alternative.[135] Factors such as whether the threatened party protested, whether he had access to independent advice and whether he took steps to avoid the consequences of his submission are also to be considered.[136]

The real question, therefore, is why the doctrine of economic duress is deemed to be more appropriate than the tort of intimidation in this sphere. The answer is probably one based more on form than substance.

Despite the criteria for economic duress laid down by the courts, it is clear that ultimately a decision in an economic duress case lies in the proper balance of two competing interests. On the one hand, there is the interest in preserving the sanctity of a contract freely entered into by the parties; on the other, there is the interest in allowing *bona fide* re-negotiation of the terms of a contract where changed circumstances may render the original terms to be extremely harsh on one party. It is an issue the resolution of which involves consideration of all the circumstances, some of which have been expressly identified and others of which the courts prefer not to articulate. Factors in the latter category may include those which the courts have traditionally been reluctant to include as a judicial consideration, for example, the reasonableness of the re-negotiated terms and the unreasonableness of the original terms. This may explain the notorious fact that the cases on economic duress are not consistent with each other or with the express criteria that have been laid down.[137]

It is submitted that, in an approach based on two-party intimidation, the same underlying policy concerns would have to be addressed but from a different angle: they would be considerations which have to be taken into

[1989] 1 Lloyd's Rep 138.

[134] Kerr J, *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep 293 at 336; Lord Scarman, *Pao On* v *Lau Yiu Long*, *supra*, note 133, at 635-636; *Moyes & Groves Ltd* v *Radiation New Zealand Ltd* [1982] 1 NZLR 368; Lord Scarman, *The Universe Sentinel* [1983] 1 AC 366 at 400. This test has been criticised: see Atiyah, *Duress and the Overborne Will* (1982) 98 LQR 197; McHugh JA, *Crescendo Management Pty Ltd* v *Westpac Banking Banking Corp* (1988) 19 NSWLR 40 at 45-46; Birks, *Introduction To The Law Of Restitution* (1989) at 183. It is probably no longer in favour.

[135] Lord Scarman, *The Universe Sentinel*, *supra*, note 134, at 400; Griffiths LJ and Kerr J, *B&S Contracts and Design Ltd* v *Victor Green Publications Ltd*, *supra*, note 133, at 426 and 428 respectively; *The Alev*, *supra*, note 133, at 146-147.

[136] Lord Scarman, *Pao On* v *Lau Yiu Long*, *supra*, note 133, at 635-636.

[137] See, *eg*, Burrows, *The Law Of Restitution* (1993) at 174-182; Phang, *Whither Economic*

account in determining whether the defence of justification applies. If a defendant's threat of breach of contract does not amount to economic duress, it must correspondingly be the case that his unlawful threat is justified in the circumstances of the case. If his threat does amount to economic duress, it must mean that he was not justified in making it. In other words, liability for economic duress and two-party intimidation are to be equated, though the formal route by which liability is established in each case would be different. Thus, Lord Scarman thought that economic duress not only renders the relevant transaction void but is also actionable as a tort if it causes damages or loss.[138]

Of course, this is not to say that the economic duress doctrine should be jettisoned in favour of an analysis based on the tort of intimidation. The economic duress analysis should continue to be utilised. The guidelines on economic duress that have been laid down by the courts in such cases, though lacking in clarity and comprehensiveness, are nevertheless of some assistance to the task at hand. In contrast, the intimidation analysis centres on the very indistinct concept of justification. In a developing area of the law in which there are relatively few case authorities, a more structured approach is better than a less structured one. In any event, the analysis based on economic duress has been well-entrenched in the authorities, and any attempt to argue that it should be discarded would be academic.

What the suggested approach seeks to achieve, then, is twofold. Firstly, it attempts to remove any theoretical difficulty as to why, contrary to established principles, no liability for intimidation apparently arises in cases of threatened breaches of contract in a two-party situation. Secondly, it asserts that there is no difference in the content of the principles to be applied whether the plaintiff is seeking to vitiate a contract or to the restitution of a benefit, or he is claiming damages for losses incurred. The orthodoxy is that economic duress applies only in the former situation. However, it should not make any difference that the plaintiff is claiming damages rather than rescission or restitution; surely the moral claim of a wrongfully injured plaintiff is at least as strong as that against an unjustly enriched defendant. Yet, if economic duress does not *per se* amount to a tort,[139] the uncomfortable conclusion is that the injured plaintiff is indeed worse off. The suggested approach would eliminate this difficulty.

Duress? (1990) 53 MLR 107.

[138] *The Universe Sentinel*, *supra*, note 134, at 400. Admittedly, this is not the favoured view, which is that economic duress is not a tort *per se*: Lord Diplock, *ibid*, at 385; Lord Goff, *The Evia Luck (No 2)* [1992] AC 152 at 166. See also Carty and Evans (1983) JBL 218 at 224; Birks, *The Travails Of Duress* [1990] LMCLQ 342.

[139] Lord Diplock, *The Universe Sentinel*, *supra*, note 134, at 385; Lord Goff, *The Evia Luck*

V. CONSPIRACY

1. *General principles*

There are two types of conspiracy: conspiracy by unlawful means and conspiracy by lawful means.[140] A conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of harming the plaintiff's economic interests.[141] In a conspiracy by lawful means, there need not be an unlawful act committed by the conspirators. However, the additional element that needs to be proved is that it was the *predominant purpose* of all the conspirators[142] to cause injury to the plaintiff; it is now clear that this is a requirement peculiar to conspiracy by lawful means and does not apply in the case of a conspiracy by unlawful means.[143]

With respect to conspiracy by unlawful means, the unlawful act concerned may be any act contrary to the civil or criminal law. Thus, wrongs such

(No 2), *supra*, note 138, at 166.

[140] This division is well-established, having been accepted by the House of Lords in decisions such as *Crofter Hand-Woven Harris Tweed Co Ltd* v *Veitch*, *supra*, note 17; *Lonrho Ltd* v *Shell Petroleum Co Ltd*, *supra*, note 35; *Lonrho plc* v *Fayed*, *supra*, note 35. The distinction was accepted by Chao J in *Multi-Pak Singapore Pte Ltd* v *Intraco* [1994] 2 SLR 282, reversed without affecting this point at [1995] 1 SLR 313. See, however, *Tuan Haji Ishak bin Ismail* v *Leong Hup Holdings Bhd* [1996] 1 MLJ 661 at 699D.

[141] *Ibid*.

[142] It is not enough that only one member of the conspiracy is acting with such a predominant intention: *McKernan* v *Fraser*, *supra*, note 32.

[143] *Lonrho plc* v *Fayed*, *supra*, note 35; *Sim Leng Chua* v *Interfood Ltd* Suits No 4049, 4050 of 1982 (Coomaraswamy J, Singapore Hgih Court, 22 September 1992, unreported); *Seagate Technology (S) Pte Ltd* v *Heng Eng Li* [1994] 1 SLR 534, the High Court's decision on the conspiracy action affirmed by the Court of Appeal at [1995] 1 SLR 17. Prior to the *Lonrho* decision, the law in England was unsettled due to the ambiguity in the speech of Lord Diplock in *Lonrho Ltd* v *Shell Petroleum Co Ltd (No 2)*, *supra*, note 35, at 188-189. It was thought that the requirement of a predominant purpose to injure also applied in a conspiracy by unlawful means: *Allied Arab Bank Ltd* v *Hajjar (No 2)* [1988] 1 QB 944; *Metall und Rohstaff AF* v *Donaldson Lufkin & Jenrette Inc*, *supra*, note 89; *Dellabarca* v *Northern Storemen and Packers Union*, *supra*, note 75; *The Wing On Bank Ltd* v *Wai Man Estates* [1990] 1 HKLR 375; *Certact Pte Ltd* v *Tang Siew Choy* Suit No 451 of 1991 (Chao J, Singapore High Court, 3 March 1991, unreported). This created a furore among commentators: see, *eg*, Eekelaar, *The Conspiracy Tangle* (1990) 106 LQR 223; Carty, *supra*, note 1, at 253; Sales, *supra*, note 56. The Australian and Canadian courts consistently took the view that a predominant intention to injure is required only in a conspiracy by lawful means: *Williams* v *Hursey*, *supra*, note 127; *Canada Cement LaFarge* v *BC Lightweight*

as defamation,[144] fraud[145] and a breach of a statute[146] would qualify as unlawful means for the purposes of the tort.

2. *Predominant purpose*

A conspirator does not act with the predominant purpose of injuring the plaintiff if he acts only to protect or further his own interests. Thus, he will not be liable for conspiring to protect or further his own business interests or the interests of an association of which he is a member.[147] Apparently it may even be enough that the conspirator is advancing a policy which he *bona fide* believes in,[148] though in such a situation the general public interest in pursuing such a policy will probably become relevant to the court's determination. Such an approach has effectively resulted in the test of predominant purpose being equivalent to asking whether the defendant is actuated by malice against the plaintiff. It has been said that the purpose of the combination must be spiteful and malicious[149] or actuated by 'disinterested malevolence'.[150] The defendants' actions must therefore serve no commercial purpose of their own.[151]

However, there are instances where the predominant purpose approach is possibly inadequate. In the American case of *Evenson* v *Spaulding*,[152] the conspirators were held liable when they arranged for their men to persistently trail a rival trader's salesmen and interfere with their efforts to sell their products. While it could be said that the conspirators were acting in their self-interest and not with the predominant purpose of injuring the plaintiff, it is equally clear that their mode of securing their own interests was unacceptable.

If by adopting the predominant purpose test the courts are declining to undertake the task of balancing the legitimate commercial interests of the

Aggregate Ltd (1983) 145 DLR (3d) 385.

144 This was assumed in *Mrs Kok Wee Kiat* v *Kuala Lumpur Stock Exchange Bhd* [1979] 1 MLJ 71.

145 *Seagate Technology (S) Pte Ltd* v *Heng Eng Li* [1994] 1 SLR 534, [1995] 1 SLR 17; *Ching Mun Fong* v *Peng Ann Realty Pte Ltd* [1995] 2 SLR 541.

146 *Multi-Pak Singapore Pte Ltd* v *Intraco*, *supra*, note 140.

147 See the excellent discussion in Heydon, *supra*, note 78, at 150-161.

148 *Scala Ballroom (Wolverhampton) Ltd* v *Radcliffe* [1958] 1 WLR 1057.

149 Lord Buckmaster, *Sorrell* v *Smith*, *supra*, note 6, at 748. See also Evatt J, *McKernan* v *Fraser*, *supra*, note 32, at 390-409.

150 Evatt J, *McKernan* v *Fraser*, *supra*, note 32, at 398, following the phraseology adopted in the American cases of *American Bank & Trust Co* v *Federal Reserve Bank* (1921) 256 US 350 and *Nann* v *Raimist* (1931) 255 NY 307.

151 Cases where a predominant purpose to injure has been established are not common: see, *eg*, *Huntley* v *Thornton* [1957] 1 WLR 321; *Hughes* v *Northern Coal-Mine Workers' Industrial Union of Workers* [1936] NZLR 781 at 787; *X Pte Ltd* v *CDE*, *supra*, note 35.

respective parties and wider societal interests, then it is a test which may be too narrow in an exceptional situation such as that which featured in *Evenson* v *Spaulding*. There may be a situation in which a conspiracy to further the conspirators' self-interest should not be condoned, whether because of the use of questionable tactics, prejudice to the public interest or simply blatant unfairness to the victim. On the other hand, it is possible that the predominant purpose test is sufficiently flexible to deal with such cases but, even so, this will probably entail some linguistic distortion. It is submitted that, ultimately, a wider general test of absence of lawful cause or justification is more appropriate, and the existence of a predominant purpose to injure is an instance of when such cause or justification is absent.[153] Conduct which is not spiteful but which passes the bounds of what is permissible in the name of free but fair competition should nevertheless negate the existence of lawful cause of justification.

3. *The magic in plurality fallacy*

Conspiracy by lawful means has been often been treated as anomalous as it is not easy to explain why an act which is not actionable if committed by one person becomes actionable where it is committed pursuant to an agreement between that person and another.[154] The argument that a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise[155] ignores the reality of the modern world of huge business corporations.[156] As Pollock puts it, the vexed question of whether there is magic in plurality will never be settled until some powerful corporation does some of the things which, on the authorities, one person may do with impunity but two or more may not.[157]

In truth, of course, the continued existence of the tort of conspiracy by lawful means poses a direct challenge to the correctness of *Allen* v *Flood*. The element of combination, which quite clearly should be irrelevant, was added onto the tort to make it formally distinguishable from that troublesome case. In substance, they are fundamentally irreconciliable; either conspiracy by lawful means should not be a tort or *Allen* v *Flood* is wrong.[158] One thus waits with bated breath for the appropriate occasion to finally

[152] 150 F 517 (1907).
[153] See *Salmond & Heuston on the Law of Torts*, *supra*, note 2, at 369.
[154] Lord Diplock, *Lonrho Ltd* v *Shell Petroleum Co Ltd (No 2)*, *supra*, note 35, at 188; Lord Bridge, *Lonrho plc* v *Fayed*, *supra*, note 35, at 307-309. This sentiment was echoed by Judith Prakash JC (as she then was) in *X Pte Ltd* v *CDE*, *supra*, note 35.
[155] Bowen LJ, *Mogul SS Co* v *McGregor, Gow & Co* (1889) 23 QBD 598 at 616.
[156] Lord Diplock, *Lonrho Ltd* v *Shell Petroleum Co Ltd (No 2)*, *supra*, note 35, at 189.
[157] (1925) 41 LQR 369.

arrive when the courts have to decide to adopt one stand or the other. As has been the theme of this article, it is hoped that the result will be the demise of *Allen* v *Flood* and the embracing of a general principle of liability for intentionally-caused harm without lawful cause or justification.[159]

4. *Justification*

Since a predominant intention of the defendant to injure the plaintiff has to be established by the plaintiff before there can be liability,[160] it may be that justification is not a defence to conspiracy by lawful means. Once such a predominant intention is established, it is not easy to see how any plea of justification may succeed. Moreover, the arguments which support the availability of justification in respect of unlawful acts would not apply here. However, even so, it is suggested that one should not be too eager to lay down a rule that justification may never apply. For example, in a case where it is the equally malicious conduct of the plaintiff which has prompted the retaliation from the defendant, it may be possible for the defendant to plead justification, at least to partially exempt him from liability. It would take a truly exceptional case for malicious conduct to be justified, but this does not warrant any rule that it should never be capable of being justified.

With respect to conspiracy by unlawful means, it has been held that justification does not apply.[161] This position probably has to be re-considered. As argued above, unlawful acts are capable of being justified. Further, the availability of justification as a defence to intimidation indicates that it should similarly be a defence to conspiracy by unlawful means.

VI. Unlawful Interference With Trade or Business

1. *General principles*

It is a tort for a person to use unlawful means to intentionally interfere with the trade or business of another person.[162] This tort, however, is still

[158] Heydon, *supra*, note 2, at 28.

[159] See Heydon, *supra*, note 2, at 28 and 128-132.

[160] The burden is on the plaintiff: Lords Wright and Porter, *Crofter Hand-Woven Harris Tweed Co Ltd* v *Veitch*, *supra*, note 17, at 471 and 495 respectively; *Huntley* v *Thornton* [1957] 1 WLR 321.

[161] Menzies J, *Williams* v *Hursey*, *supra*, note 127, at 124; *Dellabarca* v *Northern Storemen and Packers Union*, *supra*, note 75, at 754-755. See also Markesinis & Deakin, *supra*, note 2, at 397.

[162] *Fairbairn, Wright & Co* v *Levin & Co* (1914) 34 NZLR 1; *Sorrell* v *Smith*, *supra*, note

in its infancy. In particular, the type of intention and unlawful means required have not been conclusively decided. Further, there are uncertainties as to the relationship of this tort with the other economic torts.

2. *A general basis for the economic torts?*

It is often said that in *Merkur Island Shipping Corporation* v *Laughton*[163] Lord Diplock expressed the view that the tort of interference with trade by unlawful means is a genus tort of which interference with contract[164] and even conspiracy (without differentiating between conspiracy by lawful means and conspiracy by unlawful means)[165] are species torts. This interpretation is probably an unduly wide reading of the crucial passages, if the context in which Lord Diplock's comments were made is scrutinised.

The *Merkur* case involved an action by shipowners against a trade union in respect of the latter's acts in causing its members to breach their contracts of employment (*not* entered into with the shipowners) and to refuse to perform certain operations for the shipowners' ship, whereupon the shipowners were rendered in breach of a charterparty. The shipowners sought damages against officials of the union in respect of loss caused by the interference with their performance of the charterparty. This was an *indirect* interference with the shipowners' business and, on the orthodox view, the use of unlawful means had to be established. The unlawful means relied on by Lord Diplock was the inducement by the union of the breaches of their members' contracts of employment. While this was a totally independent wrong which *per se*

6, at 719; *Torquay Hotel Co Ltd* v *Cousins*, *supra*, note 48, at 139; *Sid Ross Agency Pty Ltd* v *Actors and Announcers Equity Association of Australia* [1970] 2 NSWR 47 at 52; *Emms* v *Brad Lovett Limited* [1973] 1 NZLR 282; *Gershman* v *Manitoba Vegetable Producers' Marketing Board*, *supra*, note 67; *Volkswagen Canada Ltd* v *Spicer* (1978) 91 DLR (3d) 42; *Merkur Island Shipping Corporation* v *Laughton*, *supra*, note 39, at 609-610; *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd* [1984] 1 NZLR 354; *Lonrho plc* v *Fayed* [1990] 2 QB 479; *Ansett Transport Industries (Operations) Pty Ltd* v *Australia Federation of Air Pilots*, *supra*, note 30. See also *JT Stratford & Son Ltd* v *Lindley*, *supra*, note 39, at 324 and 328; *Acrow (Automation) Ltd* v *Rex Chainbelt Inc*, *supra*, note 62.

[163] *Supra*, note 39, at 609-610. See also *Lonrho plc* v *Fayed*, *supra*, note 162, at 488-489 where Dillon LJ appeared to assume that 'injury by wrongful interference with a third party's contract with the victim' was a case of unlawful interference with trade or business. See also Gibson LJ, *ibid*, at 491.

[164] Beldam LJ, *Law Debenture Trust Corp* v *Ural Caspian Oil Corp Ltd*, *supra*, note 57, at 1233. See also *Clerk & Lindsell on Torts*, *supra*, note 2, at para 23-57; *Salmond & Heuston on the Law of Torts*, *supra*, note 2, at 356; Balkin & Davis, *supra*, note 2, at 665; Carty, *Unlawful Interference With Trade* (1983) 3 LS 193 at 203; Carty, *supra*, note 1, at 250; Bentil, *Improper Interference With Another's Business Or Trade As A Tort* [1993] JBL 519 at 521-522 and 527.

did not give rise to any cause of action on the part of the shipowners against the union, its unlawfulness coupled with the fact that it interfered with their trade and business sufficed to constitute the tort of unlawful interference with trade. It was with reference to these facts that Lord Diplock stated:

> ... the evidence establishes a prima facie case of the common law tort ... of interfering with the trade or business of another person by doing unlawful acts. To fall within this genus of torts the unlawful act need not involve procuring another person to break a subsisting contract or to interfere with the performance of a subsisting contract... Where, however, the procuring of another person to break a subsisting contract *is* the unlawful act involved,... this is but one species of the wider genus of tort. (Lord Diplock's emphasis)

Lord Diplock was thus simply referring to the various types of unlawful conduct which would found liability in respect of the tort of unlawful interference with trade or business. It is a particular species of this tort if the unlawful act relied on is an actionable interference with contract, but other types of unlawful acts may also suffice, that is, other species may also exist. There is a world of difference between this proposition and the proposition that an actionable interference with contract is *per se* a species of the tort of unlawful interference with trade or business.

Indeed, it would be curious if Lord Diplock was creating a general basis of liability for the economic torts. It must always be kept in mind that the term 'unlawful interference with trade or business' is convenient shorthand for 'interference with trade or business *by unlawful means*' and not 'interference with trade or business which is tortious'. Otherwise the expression would lose all meaningful content and be relegated to a mere label. If the orthodox interpretation of Lord Diplock's remarks were to be accepted, the continued existence of the tort of conspiracy by lawful means would be a stark and anomalous exception to the principle, since by definition no unlawful means are involved.[166] The same point may be made with respect to the tort of interference with contract. In cases of direct interference with contract at least, the defendant's act of interference may be, and in many cases is, perfectly lawful; it is only when such act is combined with the other elements of the tort, such as intention, loss and absence of

[165] Trindade & Cane, *supra*, note 2, at 233.

[166] See Balkin & Davis, *supra*, note 2, at 666-667. As pointed by the learned authors, it is significant that Lord Diplock, when considering the tort of conspiracy in *Lonrho Ltd* v *Shell Petroleum Co Ltd (No 2)*, *supra*, note 35, did not assert that it was a species of the genus

justification, that the overall result becomes tortious and unlawful. The breach of contract itself is the *consequence* of the defendant's conduct and should not be treated as the unlawful *means* employed by the defendant. The tort of interference with contract should therefore be correctly classified as a case where loss is caused by means intrinsically lawful.[167] In any event, even if the breach of contract itself may be regarded as unlawful means, the fact is that there need not be a breach of contract for there to be an interference with contract.

The conclusion is that the tort of unlawful interference cannot be, and was not intended by Lord Diplock to be, a general principle of liability in respect of all the economic torts. The exact nature of the relationship between these torts, however, bears closer examination.

3. *Relationship with the other economic torts*

As suggested above, the torts of direct interference with contract and conspiracy by lawful means are not part of the genus tort of unlawful interference with trade or business. The tort of conspiracy by unlawful means should, in contrast, be treated as a species of such genus tort; indeed, apart from the element of combination, there is no substantive difference between the two torts. The tort of conspiracy by unlawful means only serves to highlight the uncontroversial fact that liability for the tort of unlawful interference with trade or business extends to acts done by a combination of persons.

The similarity is even more striking with respect to intimidation. A distinct feature of intimidation appears to be the presence of a threat to do an unlawful act but, surely, there is no difference between threatening to do such an act and actually doing it.[168] If it is a tort for the defendant to threaten a third party with a breach of contract unless such third party takes a course of action which injures the plaintiff, it must equally be a tort for the defendant to breach a contract with a third party with the intention of harming the interests of the plaintiff. The fact that a threat was made simply serves as cogent evidence of the defendant's intention to harm the plaintiff. On this analysis, there is some doubt whether intimidation should be seen even as a distinct species of the tort of unlawful interference with trade or business; it may possess no distinctive characteristics to justify it being treated so.

tort of unlawful interference with trade or business.

[167] It is so classified in Heydon, *supra*, note 2, at Ch 2.

4. *Intention*

It is unsettled what type of intention the defendant must possess in order to be liable for the tort of unlawful interference with trade or business. It is clear, however, that it is insufficient that the defendant knew that the plaintiff's economic loss was a necessary consequence of his unlawful acts. In the controversial case of *Beaudesert Shire Council* v *Smith*,[169] the plaintiff who was licensed to obtain water from a river suffered damage when the defendant altered the flow of the river by taking gravel from its bed in breach of a statutory prohibition. Even though there was no intention on the part of the defendant to harm the plaintiff, the High Court of Australia held him liable for the plaintiff's loss. The High Court based its decision on the principle that a defendant was liable for the harm caused to a plaintiff if such harm was the inevitable consequence of the defendant's deliberate, unlawful and positive act, even though such act was not directed at the plaintiff. The *Beaudesert* rule was subsequently rejected in England[170] and New Zealand,[171] criticised by academics,[172] and ostracised in Australia itself.[173] It is not surprising, therefore, that *Beaudesert* was recently overruled by a full bench of seven judges of the High Court of Australia[174] in *Northern Territory of Australia* v *Mengel*.[175] In this case, officials of a government department imposed restrictions on the movement of the plaintiffs' cattle in an effort to eradicate certain diseases, in the erroneous belief that they were authorised by statute to do so. They knew that this would cause the plaintiffs to suffer losses as the cattle would not be capable of being sold as planned, but they did not intend to harm the plaintiffs. The lower courts

[168] See Lord Devlin in *Rookes* v *Barnard*, *supra*, note 6, at 1168.

[169] (1966) CLR 145.

[170] *Lonrho Ltd* v *Shell Petroleum Co Ltd (No 2)*, *supra*, note 35.

[171] *Takaro Properties Ltd* v *Rowling* [1978] 2 NZLR 314 at 339; *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd*, *supra*, note 162.

[172] See Dworkin and Harari, *The Beaudesert Decision – Raising the Ghost of the Action upon the Case* (1967) 40 ALJ 296 and 347; Dworkin, *Intentionally Causing Economic Loss – Beaudesert Shire Council* v *Smith Revisited* (1974) 1 Mon U L Rev 4; Heydon, *Economic Torts* (2nd Ed, 1978) at 133-134; Balkin & Davis, *Law of Torts* (1991) at 687. *Cf* Sadler, *Whither Beaudesert Shire Council* v *Smith* (1984) 58 ALJ 38.

[173] It was repeatedly distinguished by the Australian courts: see *Grand Central Car Park Pty Ltd* v *Tivoli Freeholders* [1969] VR 62; *Kitano* v *The Commonwealth* (1973) 129 CLR 151, affirmed (1974) 129 CLR 176; *Freedman* v *Petty* [1981] VR 1001; *Copyright Agency Ltd* v *Haines* [1982] 1 NSWLR 182; *Dunlop* v *Woollahra Municipal Council* [1982] AC 159. *Cf Hospitals Contribution Fund of Australia* v *Hunt* (1982) 44 ALR 365.

[174] This course had earlier been suggested in *Elston* v *Dore* (1982) 149 CLR 480 at 492.

[175] (1995) 129 ALR 1. See also the recent discussion of this case in *Three Rivers District Council*

allowed the plaintiffs' claim on the *Beaudesert* principle but this was reversed in the High Court on the ground that the *Beaudesert* principle was not supported by authority[176] and that it was difficult to reconcile with the boundaries of liability in the torts of negligence and breach of statutory duty. It could not be subsumed under the tort of unlawful interference with trade or business since this requires that the unlawful act be directed at the person injured,[177] whereas there was no such requirement in *Beaudesert*.

Interestingly, there is an early local decision, predating even *Beaudesert*, to the same effect. In *Straits Steamship Co Ltd* v *The Attorney General*,[178] the government had, without statutory authority, exempted particular persons from compliance with certain statutory requirements and thereby enabled them to carry on business at a lower cost. Their trade rivals who suffered loss as a result of the unfair competition was held to have no claim against the government.

While it is clear from the above cases that the unlawful act must be directed at the plaintiff, it remains unsettled what this means precisely. It was decided by the English Court of Appeal in *Lonrho plc* v *Fayed*[179] that, unlike the case of conspiracy by lawful means, to constitute the tort of interference with trade by unlawful means no dominant purpose to injure the plaintiff's economic interests need be shown. Beyond this, there is limited judicial consideration of the exact state of mind which is required. One view is that it must be proved that the unlawful act is in some sense directed against the plaintiff or intended to harm the plaintiff.[180] On the other hand, it may be sufficient if the defendant has deliberately embarked upon a course of conduct the probable consequences to the plaintiff of which he appreciated.[181] In any event, it seems reasonably clear that a defendant may not avoid liability by merely showing that he acted with the purpose

v *Bank of England (No 3)* [1996] 3 All ER 558.

[176] Deane and Brennan JJ thought that it was in fact supportable by old decisions but concluded that it should be overruled in any event.

[177] Reliance was placed on *Lonrho plc* v *Fayed*, *supra*, note 162.

[178] (1933) 2 MLJ 43, affirmed, *ibid*, at 170.

[179] *Supra*, note 162. This was followed in *Ansett Transport Industries (Operations) Pty Ltd* v *Australia Federation of Air Pilots*, *supra*, note 30, where Brooking J declined to follow *dicta* to the contrary by Mason J in *Kitano* v *Commonwealth*, *supra*, note 173, at 173-174.

[180] Dillon LJ, *Lonrho plc* v *Fayed*, *supra*, note 162, at 489. Ralph Gibson LJ expressly agreed with this: *ibid*, at 492.

[181] Woolf LJ, *Lonrho plc* v *Fayed*, *supra*, note 162, at 494; *Millar* v *Bassey*, *supra*, note 48.

[182] See *Fairbairn, Wright & Co* v *Levin & Co*, *supra*, note 162; *Emms* v *Brad Lovett Limited*, *supra*, note 162. Note, however, that these cases may have been implicitly disapproved in

of advancing his own interests.[182]

A somewhat higher standard was adopted by the New Zealand Court of Appeal in *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd*.[183] Here the plaintiff, who carried on a manufacturing business, suffered loss of business and damage to trade reputation by reason of the defendant unlawfully using confidential information in breach of his duty to a third party (the plaintiff's licensor) to manufacture similar but inferior products. The court dismissed the plaintiff's claim on the basis that there was insufficient intent on the part of the defendant to harm the plaintiff. It was opined that the defendant's intent to harm the plaintiff's economic interests must be a cause of his conduct; it must be shown that the defendant would not have engaged in the same conduct even without such intent and that the intent alone would have led him to act as he did. It is not enough that the reasons which actuate the defendant to use unlawful means are wholly independent of a wish to interfere with the plaintiff's interests, and such interference is an incidental consequence foreseen by and gratifying to the defendant.

The common ground between the two approaches is probably that the defendant must have the plaintiff's interests in his contemplation when he engages in the unlawful act and must know that his unlawful act would be detrimental to such interests. The disagreement is over the causative role of this intent. Put simply, *Van Camp Chocolates* takes the view that the defendant's intent must be a 'but-for' cause while the position in *Lonrho* v *Fayed* is that this is not necessary. On balance, it would appear that the latter approach is preferable as the former imposes a standard which is too high and which perhaps approaches the level of maliciousness. Such a high standard is unwarranted where unlawful means have been resorted to. Secondly, the approach in *Lonrho* v *Fayed* would work well with a wide and flexible defence of justification. The tort would ultimately be better-equipped to deal with the different factual situations which may arise. The fact that in a certain case the intent of the defendant to cause injury to the plaintiff played a greater role in causing the defendant to act as he did would be relevant in determining whether his acts should be justified. Thirdly, while the argument that the *Lonrho* v *Fayed* approach would entail minute and refined exploration of the defendant's precise state of mind[184] may have some validity, this is not reason enough not to adopt that test. It is a task which the courts are already performing in relation to conspiracy by unlawful means. Indeed, as argued above, conspiracy by unlawful means may actually be a species of the tort of unlawful interference with trade or business.

Van Camp Chocolates Ltd v *Aulsebrooks Ltd*, *supra*, note 162, at 360.

183 *Supra*, note 162, at 360. See also Peter Gibson LJ and Ralph Gibson LJ in *Millar* v *Bassey*, *supra*, note 47.

5. *Unlawful means*

It must be shown that the interference with the plaintiff's trade or business was by way of unlawful means. The unlawful means must have sufficient causal nexus with the plaintiff's injury.[185]

It is not entirely clear, however, what is meant by 'unlawful means'. The three possibilities suggested by Carty[186] are: acts which the defendant is not at liberty to commit, acts which constitute a legal wrong and acts which constitute a civil wrong. It is however submitted that the first possibility[187] is probably no wider than the compendium of the second and third possibilities and, on this basis, there is no reason why it should not be adopted as the appropriate formula. A breach of a statute[188] has been held to constitute unlawful means for the purposes of unlawful interference with trade.[189]

A civil wrong would also constitute unlawful means. Fraudulent misrepresentation by the defendant to a third party which causes economic

[184] *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd*, *supra*, note 162, at 360.

[185] See *Lonrho plc* v *Fayed*, *supra*, note 162, at 492 and 493.

[186] Carty, *supra*, note 1, at 265-273. See also Carty, *supra*, note 164.

[187] This is the formula used by Lord Denning in *Torquay Hotel Co Ltd* v *Cousins*, *supra*, note 48, at 139. But 5 years earlier it had appeared in a note by Weir, *Chaos Or Cosmos? Rookes* v *Barnard And The Economic Torts* [1964] CLJ 225 at 226.

[188] There is some uncertainty as to whether the breach of statute must be one which itself gives rise to a civil remedy. One view is that it must: see Dillon LJ, *Lonrho plc* v *Fayed*, *supra*, note 162, at 488, relying on *Lonrho Ltd* v *Shell Petroleum (No 2)*, *supra*, note 35, and *RCA* v *Pollard*, *supra*, note 41. See also *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd*, *supra*, note 162, at 359. This requirement appears to be based on the perception that otherwise the tort of unlawful interference with trade or business would circumvent the requirements of an action for breach of statutory duty. This concern is probably unwarranted, as there is already the additional element of the defendant intending to inflict harm on the plaintiff. Furthermore, if the requirement exists then the tort adds nothing to the tort of breach of statutory duty. The better view is therefore that no such requirement exists: see the tentative views expressed in *Associated British Ports* v *TGWU* [1989] 1 WLR 939 at 952-5, 960-1, 965-6, reversed on appeal without affecting these views, *ibid*, at 970 *et seq*. See also *Multi-Pak Singapore Pte Ltd* v *Intraco*, *supra*, note 140, where Chao J held that on the alleged facts there was a conspiracy to cause a breach of the statute, without inquiring into whether such breach gave rise to a civil cause of action.

[189] *Fairbairn, Wright & Co* v *Levin & Co*, *supra*, note 162; *Emms* v *Brad Lovett Limited*, *supra*, note 162.

loss to the plaintiff may render the defendant liable,[190] as may nuisance against the plaintiff[191] or third parties,[192] or, arguably, a refusal by the defendant to perform a contract with a third party.[193] Similarly, to threaten malicious prosecution against the plaintiff's trade customers[194] or to make an unauthorised instruction to the plaintiff's bank to impose restrictions on the plaintiff's banking facilities[195] probably constitutes unlawful means. Further, in the case where the defendant act is unlawful *vis-à-vis* a third party, it is not necessary that the third party suffered loss.[196]

It has been suggested, however, that misuse of confidential information in breach of a duty of confidentiality owed not to the plaintiff but to a third person is arguably not unlawful means for the purpose of imposing tortious liability, as any remedy should be given by way of extension of breach-of-confidence principles.[197] This is not entirely convincing. It is hard to discern any difference between breach of confidence and another civil wrong such as breach of contract and, further, it is at present fairly obscure as to how breach-of-confidence principles may be extended to confer protection on a third party. More fundamentally, the nature of the unlawful means should not be used as a control mechanism; rather that important function should be performed by the defendant's *intention* to injure the plaintiff's interests, provided of course that the meaning of intention in this context is properly and precisely defined. Unlawful means may take a wide variety of forms and any classification on broad lines such as that between legal and civil wrongs would probably be arbitrary. Neither is it immediately apparent how one would measure the impact or relevance of a particular form of unlawfulness in relation to the strength of the plaintiff's claim in order to effect such classification.

The above analysis is consistent with the notion that the torts of indirect interference with contract, conspiracy by unlawful means and intimidation are but species of the genus tort of unlawful interference with trade or business. Accepting this theory, what suffices as unlawful acts for the purposes of those species torts would, by definition, suffice for the genus

[190] *Lonrho plc* v *Fayed*, *supra*, note 162.

[191] *Keeble* v *Hickeringill* (1706) 11 East 574n. See also *Daishowa Inc* v *Friends of the Lubicon*, *supra*, note 17, where the jamming of the telephone lines of the plaintiff pizza parlour on New Year's Eve to prevent orders being taken was regarded as unlawful; an injunction was granted to prohibit the defendants from threatening or doing anything that would prevent the public from placing orders with the plaintiff's customers.

[192] *Lyons* v *Williams* [1899] 1 Ch 255; *Tynan* v *Balmer* [1967] 1 QB 91.

[193] *Millar* v *Bassey*, *supra*, note 47.

[194] *Garrett* v *Taylor* (1620) Cro Jac 567.

[195] *Volkswagen Canada Ltd* v *Spicer*, *supra*, note 162.

[196] Dillon LJ, *Lonrho plc* v *Fayed*, *supra*, note 162, at 489.

tort. Unlawful means for indirect interference with contract include diverse unlawful acts such as an inducement of breach of contract,[198] fraudulent representation by the defendant to a third party[199] and breach of the rules of natural justice.[200] With respect to conspiracy by unlawful means, that tort may be constituted where the conspiracy involves wrongs such as defamation,[201] fraud[202] or a breach of a statute.[203] A similar position arises in relation to the tort of intimidation; it is intimidation to threaten to commit a crime, a tort or a breach of contract.

6. *Justification*

The issue of whether an unlawful act may be justified has been dealt with elsewhere in this article. The conclusion being that such an act may be justified in appropriate circumstances, the submission is that there is a defence of justification to the tort of unlawful interference with trade or business. This is in line with the suggested position that justification is a defence to the torts of conspiracy by unlawful means and intimidation.

VII. Conclusion

The foregoing discussion has attempted to establish five basic points. Firstly, it is not too late for the courts to turn their backs on *Allen* v *Flood* and adopt a general principle of liability for intentionally-inflicted economic damage without lawful cause or justification. Secondly, this should be accompanied by the introduction of a general defence of justification which takes into account all the relevant circumstances of a particular case. In particular, the following factors are relevant: the nature of any right claimed by the defendant to entitle him to engage in such conduct, the violation of the plaintiff's legal right, the use of unlawful means by the defendant, the presence of maliciousness on the part of the defendant and the commercial unfairness of the defendant's conduct. It is important that this defence should remain flexible and capable of taking into account all relevant circumstances. Thirdly, the existing authorities are in any event showing

[197] *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd*, *supra*, note 162, at 360.
[198] *DC Thomson & Co Ltd* v *Deakin*, *supra*, note 49; *JT Stratford & Sons Ltd* v *Lindley*, *supra*, note 39.
[199] *National Phonograph Co* v *Edison-Bell* [1908] 1 Ch 335.
[200] *Posluns* v *Toronto Stock Exchange*, *supra*, note 77.
[201] This was assumed in *Mrs Kok Wee Kiat* v *Kuala Lumpur Stock Exchange Bhd* [1979] 1 MLJ 71.
[202] See, *eg*, *Seagate Technology (S) Pte Ltd* v *Heng Eng Li* [1994] 1 SLR 534, [1995] 1 SLR 17; *Ching Mun Fong* v *Peng Ann Realty Pte Ltd* [1995] 2 SLR 541.

signs of moving towards this position. In particular, there is recognition that maliciously-caused damage to economic expectations may be actionable and the continued existence of the tort of conspiracy by lawful means also implicitly challenges the correctness of *Allen* v *Flood*. Fourthly, the above approach facilitates a proper understanding of the relationship between the economic torts and similar principles of liability in other areas of the law, chiefly the equitable wrong of knowing implication in breach of trust or fiduciary duty, the rule in *De Mattos* v *Gibson* and the doctrine of economic duress. Finally, the tort of unlawful interference with trade or business is not a genus tort in respect of all the economic torts; it is the genus tort only for the economic torts the essence of which is the use of unlawful means, that is, intimidation and conspiracy by unlawful acts. The tort of interference with contractual or other rights is in another category, since its emphasis is on the violation of a legal right. The tort of conspiracy by lawful means, on the other hand, bases liability on the malicious conduct of the defendant and should also be treated separately. The formidable argument that there cannot be any magic in plurality, coupled with the few cases recognising that there could be liability for malicious damage to economic expectations, strongly indicate that it should more rightly be a tort of malicious damage to economic rights. Such an organisation of the economic torts accords with the suggested formulation of general principle.

LEE ENG BENG*

[203] *Multi-Pak Singapore Pte Ltd* v *Intraco*, *supra*, note 140.

* LLB (Hons)(NUS); BCL (Oxon); Lecturer, Faculty of Law, National University of Singapore. Thanks are due to Assoc Prof Tan Keng Feng, Ms Mary Wong and Mrs Ng-Loy Wee Loon for their valuable comments. I remain responsible for all views expressed and all errors made herein.