Singapore Journal of Legal Studies
[2011] 330–350

CAUSING LOSS BY UNLAWFUL MEANS

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In the past, a number of English authorities have suggested that unlawful interference with trade (now also known as "causing loss by unlawful means") is a "genus" tort that provides the rationale as well as framework for analysing various economic torts including intimidation and conspiracy by unlawful means. However, this view has been decidedly rejected by the House of Lords in *OBG Ltd. v. Allan*. The majority judges in that case restricted the tort to one that redresses only unjustified interferences with third-party liberty. Since it has a multi-party structure, it is conceptually distinct from cases where liability has been imposed for direct (two-party) interferences. On this view, two-party intimidation, unlawful means conspiracy and causing loss by unlawful means are separate torts despite their common reliance on an independent legal wrong. It also means that there is no single thread that runs through this "family" of economic torts. While the element of illegality is an essential and common constituent of these torts, it is not the sole element that justifies the tort. Rather, each tort is founded on the combination of a particular course of conduct with the requisite unlawfulness. Consequently (and more controversially), it is now no longer meaningful to identify a single conception of "unlawful means" that is applicable to all these torts. In each case, it is essential to ensure that the illegality constitutes the tort only if it produces the type of conduct that the tort is designed to deter.

I. INTRODUCTION

The tort of causing loss by unlawful means[1] has had a troubled past. Until the House of Lords' decision in *OBG Ltd. v. Allan*,[2] it was better known as an "undeveloped" tort of "uncertain scope".[3] Substantial uncertainty surrounded the scope of its elements

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1 Or "interference with… trade or business by unlawful means" (*Hadmor Productions Ltd. v. Hamilton* [1982] 2 W.L.R. 322 at 333, Lord Diplock (H.L.) [*Hadmor*]). On the possible significance of the different labels, see Burton Ong, "Two Tripartite Economic Torts" [2008] J. Bus. L. 723 at 732-734. The existence of this tort has been judicially recognised in Singapore: see *Tribune Investment Trust Inc. v. Soosan Trading Co. Ltd.* [2000] 2 S.L.R.(R.) 407 at para. 15 (C.A.), but this was strictly *obiter* as the issues raised in that case ultimately pertained only to the tort of inducing breach of contract. More recently, this tort was also unsuccessfully pleaded in the High Court decision of *Walton International Group (Singapore) Pte. Ltd. v. Yau Kwok Seng Winston* [2011] SGHC 144. But in neither decision was the scope and rationale of the tort examined at length. For that reason, this paper attempts to explicate the tort largely through the lens of English authorities.

2 [2007] UKHL 21, [2008] 1 A.C. 1 (H.L.) [*OBG*].

3 Anthony Dugdale & Michael Jones, eds., *Clerk & Lindsell on Tort*, 19th ed. (London: Sweet & Maxwell, 2006) at paras. 25-88, citing Henry J. in *Barretts & Baird (Wholesale) Ltd. v. Institution of Professional Civil Servants* [1987] Industrial Relations Law Reports 3 at 10 (Q.B.D.) [*Barretts & Baird*].

(namely, intention and unlawful means) as its rationale was rarely examined. Adding to that complexion is the murky relationship that this tort bears to the other economic torts such as inducing breach of contract, intimidation and conspiracy. With the recent pronouncements in *OBG*, a significant measure of clarity appears to have been restored. In particular, by severing the unlawful means tort from its historical links to the tort of inducing breach of contract, it is now clear that the unlawful means tort is (unlike the *Lumley v. Gye*[4] tort) not a form of accessory liability[5] but a primary and substantive tort.

Significant as this clarification may be, perplexing questions remain as to what the precise ambit of the tort of causing loss by unlawful means is, or *ought* to be. In particular, the debate as to the scope of "unlawful means" remains very much alive in view of the lack of unanimity amongst the Law Lords in *OBG* on this point. Although some degree of finality may have been achieved by the adoption of a narrow definition by the majority Law Lords in *OBG*, such an approach has been criticised on account of its illogicality[6] and inconsistency with authorities.[7] Secondly, it is unclear if the legal principles enunciated by their Lordships apply only to indirect interferences, or extend also to those involving direct, two-party interferences. In substance, this second question is part and parcel of a third and larger inquiry: is causing loss by unlawful means a general principle or "genus" tort of which other specific torts are examples?[8] With the excision of the *Lumley v. Gye* tort, the nominate torts that may be included under this broad principle are intimidation, indirect inducement of contractual breaches and conspiracy by unlawful means.

This article addresses these questions by examining the conceptual foundation of causing loss by unlawful means as elucidated by the authorities. On the whole, the strict inductive reasoning employed by the majority Law Lords in *OBG* appears to have foreclosed the development of a broad organising principle. Rather, their Lordships' preference was to construct the law incrementally. Under this approach, causing loss by unlawful means is a discrete tort with a limited object. It recognises that a claimant has a general liberty to trade, and such liberty is protected by limited claim-rights against interferences. Inducing breach of contract, intimidation and conspiracy are established instances of such rights, and causing loss by unlawful means is the latest addition to the stable. It protects the claimant's liberty to trade by remedying unjustified interferences with third-party liberty. For that reason, the tort necessarily has a multi-party structure and is conceptually distinct from

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4 (1853) 2 E. & B. 216 (Q.B.D.).

5 But the correctness of this analysis has been doubted: see Pey-Woan Lee, "Inducing Breach of Contract, Conversion and Contract as Property" (2009) 29 Oxford J. Legal Stud. 511 at 521, 522.

6 *OBG*, *supra* note 2 at para. 155, Lord Nicholls.

7 Simon Deakin & John Randall, "Rethinking the Economic Torts" (2009) 72 Mod. L. Rev. 519 at 544-549.

8 This is a narrower proposition than the "unified principle" rejected by *OBG*, but is similarly traceable to Lord Denning's influential *dicta* in various cases: see *e.g.*, *Daily Newspapers Ltd. v. Gardner* [1968] 2 Q.B. 762 at 782 (C.A.) [*Gardner*]; *Torquay Hotel Ltd. v. Cousins* [1969] 2 Ch. 106 at 139; *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676 at 1682 (C.A.) [*Acrow*]; and culminating in the recognition of a "genus" tort by Lord Diplock principle in *Hadmor*, *supra* note 1 at 333 and *Merkur Island Shipping Corp. v. Laughton* [1983] 2 A.C. 570 at 609 (H.L.). Some commentators (see *e.g.*, Ken Oliphant, *Butterworths Common Law Series: The Law of Tort*, 2nd ed. (London: LexisNexis Butterworths, 2007) at paras. 29-87) have interpreted *OBG* as affirming this more limited general principle.

two-party liability contingent upon the use of unlawful means. On this account, two-party intimidation, unlawful means conspiracy and causing loss by unlawful means are separate torts despite their common reliance on an independent legal wrong. Crucially, this would also mean that although the element of illegality is necessary for founding liability, it is not, by itself, the sole rationale of any of the torts. In each case, the tort is founded on the *combination* of a particular course of conduct with the requisite unlawfulness. If that is right, then the answer to the notoriously vexed question of what should count as unlawful means is not found in an assiduous search for particular types or lists of unlawful acts but in ensuring a critical coherence between the illegality and the rationale of each tort.

II. The Tort Clarified?

It is useful to begin with a review of the tort's elements. In *OBG*, Lord Hoffmann identified them to be: "(a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant".[9]

A. *Intention*

Prior to *OBG*, considerable support existed for the view that the mental element of the tort ought to be construed narrowly, insisting on proof that the defendant has *targeted* or *aimed at* causing loss to the claimant.[10] On this view, it is not sufficient to show that the defendant knows that his conduct would inevitably injure the claimant. It must also be established that the latter is in fact the *primary subject* of the defendant's injurious act. *Barretts & Baird*[11] is often cited as an authority for this proposition. In that case, the defendant union called on its members, who were employed by the Meat and Livestock Commission ("MLC") to certify both livestock and deadstock for export, to go on one-day "lightning strikes" in a bid to coerce the MLC to agree to improved pay structures. The plaintiffs, who were abattoir owners and others involved in the meat trade, unsuccessfully sought to restrain the defendants from proceeding with the strikes on the ground that such conduct would amount to unlawful interference with their business. One consideration that influenced the court's decision was the finding that the defendant had targeted the MLC and not the claimants. For that reason, the defendant could not be said to have intended the claimants' harm, and this was despite their knowledge that the disruption to the claimants' business would be an inevitable consequence of the strikes.[12] By reserving

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9 *Supra* note 2 at para. 47.

10 See *e.g.*, Patrick Elias & Keith Ewing, "Economic Torts and Labour Law: Old Principles and New Liabilities" (1982) 41 Cambridge L.J. 321 at 327; Bob Simpson, "The Labour Injunction, Unlawful Means and the Right to Strike" (1987) 50 Mod. L. Rev. 506 at 512, 513; Hazel Carty, "Intentional Violation of Economic Interests: The Limits of Common Law Liability" (1988) 104 Law Q. Rev. 250 at 274-277.

11 *Supra* note 3.

12 It should, however, be noted that this was decided at a time when it was thought that "predominant purpose to injure" was an element of the unlawful means tort (see *Barretts & Baird*, *supra* note 3 at 10), a misconception since dispelled by the Court of Appeal in *Lonrho Plc. v. Fayed* [1989] 2 Q.B. 479 at 488, 489 (C.A.) [*Lonrho*].

the right of action to the primary targets of the defendant's conduct, this conception of "intention" effectively keeps the tort within narrow bounds.

In *OBG*, however, the House of Lords rejected this restrictive notion of "intention", preferring, instead, to define the mental element in terms of ends and means. Thus, the test is that the defendant must either have intended to harm the claimant as an end in itself or as a means to an end.[13] Mere knowledge that loss is probable or foreseeable would not suffice.[14] The inclusion of this means-to-an-end limb clearly has the effect of expanding the test, such that a defendant who knows that a claimant will inevitably be harmed by his conduct may be taken to have intended such harm even if the claimant is not in fact his primary target. So if A induces B to breach its contract with C so as to incapacitate C in the performance of its obligations to D, A's intention to harm C may be inferred from A's knowledge that damage to C is a necessary consequence of B's breach and therefore an effective means of injuring D as the ultimate subject of A's design. This extended concept of intention was established in *Douglas v. Hello! Ltd.*,[15] where the evidence was that *Hello!* knew that the publication of unauthorised photographs of the Douglases' wedding would inevitably harm *OK!*'s interests as the exclusive agent to report on the event. It made no difference that *Hello!*'s *real* purpose was that of improving its own sales because such purpose could only be fulfilled at *OK!*'s expense.[16] In such a case, the defendant's gain and the claimant's loss were "inseparably linked"[17] since it may reasonably be presumed that but for *Hello!*'s interference, the reader who bought the offending magazines would likely have bought the equivalent *OK!* edition.

It does not, however, follow that the relevant intention is inferred whenever harm to the claimant is a natural consequence of the defendant's act. It must also be shown that the defendant *intended* such harm as a *means* of achieving its ultimate end.[18] This is implicit in their Lordships' rejection of *Millar v. Bassey*[19] by distinguishing between means and consequences.[20] In that case, Miss Bassey's refusal to perform for a recording company had resulted in loss to the claimants and it was found that such loss was an inevitable consequence of her action. Nonetheless, it was clear that the only end that Miss Bassey had in mind was the termination of her own contract with the recording company. As far as Miss Bassey was concerned, the termination of the claimants' contracts with the recording company was neither here nor there; they were only the *consequence* of her breach but did not in any way facilitate the end that she had in mind. For that reason, Miss Bassey should not have had to account for the claimants' loss.

Despite the Law Lords' consensus on the mental element of the tort, it is clear the full ramifications of the test as enunciated in *OBG* have yet to be worked out. Indeed,

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13 *OBG*, *supra* note 2 at paras. 42, 43 and 164, 165. Or that "[t]he intent [to injure the claimant] must be *a cause* of the defendant's conduct" (*OBG*, *supra* note 2 at para. 166, Lord Nicholls [emphasis added]).

14 *Ibid*. at paras. 43, 166.

15 One of the three appeals heard in *OBG*, *ibid*.

16 *Ibid*. at paras. 134, 167.

17 *Ibid*. at para. 167, Lord Nicholls.

18 Ong, *supra* note 1 at 742.

19 [1994] E.M.L.R. 44 (C.A.).

20 *OBG*, *supra* note 2 at paras. 43, 166.

OBG was soon followed by *Meretz Investment NV v. ACP*,[21] which clarified that a defendant who acted in the honest belief that it was exercising its legal rights could not be said to have intended to harm the claimant even in the face of clear evidence that it had intended the claimant's loss. In so holding, *Meretz* appears to have added a gloss to the *OBG* test, for it is no longer sufficient to demonstrate that the defendant had intended to injure the claimant as a means to achieving another object. Instead, one must also examine the nature of the defendant's ultimate object, to see if it was proper or legitimate.[22] The enforcement of a security by a first chargee, as was the case in *Meretz*, is a manifestly proper end. Such a chargee could not be said to have acted with a blameworthy state of mind even if its enforcement of the charge was clearly detrimental to the claimant's interests.[23]

An arguably more worrying implication of their Lordships' rejection of targeted harm as a mechanism for controlling liability is that it may lead to the imposition of liability in cases where the claimant's injury appears incidental to the defendant's design. It would, for example, justify the outcome in a case such as *Falconer v. ASLEF*,[24] where the claimant, a passenger on British Rail, sought damages for loss arising from industrial action taken by the defendant unions as against British Rail. There, the defendants had called on the employees of British Rail to withdraw their labour (unlawfully), resulting in inevitable disruptions to the latter's rail services. The claimant, whose travel itinerary was adversely affected by the strike, succeeded in his claim against the defendants. Even though the defendants' acts were ultimately aimed at British Rail, the court accepted that the defendants had clearly intended the passengers (such as the claimant) harm in order to place pressure on British Rail to accede to their requests. Some commentators regard this decision as going too far, since the claimant was not a "direct target" of the union's action.[25] They argue that extending liability to such cases would render the tort too wide. For the same reason, another commentator has predicted that the court's "rejection of targeted harm in *OBG* may not gain support from future courts."[26] This is a formidable criticism, for it is clear that a less exacting mental ingredient will place correspondingly more strain on the tort's other primary ingredient—"unlawful means"—as a liability-controlling device. But this is a prospect that few would relish, since the seemingly irresoluble complexities associated with attempts to define the type of unlawful behaviour that should constitute the tort are only too well-known. Nevertheless, this article will attempt to persuade the reader that a workable concept of unlawful means may well have emerged from *OBG*. And if that is right, a broader notion of intention to injure may well be less objectionable than it first appears.

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21 [2007] EWCA Civ 1303, [2008] 2 W.L.R. 904 at paras. 126 (in relation to inducing breach of contract), 146 (for causing loss by unlawful means and conspiracy) (C.A.) [*Meretz*].

22 This, indeed, was the interpretation adopted by the New Brunswick Court of Appeal in *SAR Petroleum Inc. v. Peace Hills Trust Company* [2010] NBCA 22 at paras. 57, 58 [*SAR Petroleum*].

23 In holding thus, *Meretz*, *supra* note 21, may also be understood as having incorporated the defence of justification (as exemplified by *Edwin Hill v. First National Finance Corp.* [1989] 1 W.L.R. 225 (C.A.) in the context of inducing breach of contract) within the conception of "intention". See also *SAR Petroleum*, *ibid.* at para. 73.

24 [1986] Industrial Relations Law Reports 331 (County Court).

25 See *e.g.*, Deakin & Randall, *supra* note 7 at 541.

26 See Hazel Carty, "The Economic Torts in the 21st Century" (2008) 124 Law Q. Rev. 641 at 659.

B. *Interference by Unlawful Means*

The question as to what would count as "unlawful means" has always been the most problematic aspect of this tort. In *OBG*, it was also a significant point of departure for the majority and minority Law Lords. In the leading judgment,[27] Lord Hoffmann adopted a narrow view, which he summarised in these terms:[28]

> Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.

By confining "unlawful means" to liberty-constraining acts,[29] Lord Hoffmann effectively limited the application of the tort to cases of indirect interferences, where the defendant strikes at the claimant through an intermediary.[30] In addition, requiring the unlawful act to be separately actionable[31] by the intermediary would mean that criminal and statutory offences that do not otherwise afford a cause of action in private law would not constitute "unlawful means" for the purposes of this tort. Although it is far from certain, a further limitation may inhere in the proposition that the unlawful acts must have interfered with the freedom of the third party "in a way which is unlawful *as against that third party*".[32] Literally construed, this may suggest that the unlawful act has to be actionable *only* at the instance of the party whose freedom had been encroached upon. If this were right, the tort would only apply to three-party interferences but would be irrelevant where there are more than three parties, since the intermediary whose freedom has been interfered with may not also be the party who has a cause of action as against the defendant when two or more intermediaries are involved.

In contrast to the restrictive approach of the majority, Lord Nicholls argued for a broader tort that would redress "intentional harm caused by unacceptable means".[33] As such, it could extend to two- and three- (or more) party claims. In either case, the essential liability-controlling mechanism would lie not in the type of unlawful act, but in the causal connection between the defendant's unlawful conduct and the claimant's loss. This would mean, in a three-party situation, that the claimant had been harmed through the "*instrumentality* of a third party".[34] On this approach, "unlawful means" would embrace both civil and criminal wrongs. Were it otherwise, the law would

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27 *OBG*, *supra* note 2 at paras. 48, 49, 51. All the other Law Lords except Lord Nicholls concurred with this aspect of Lord Hoffmann's analysis: *OBG*, *supra* note 2 at paras. 269, 270, 302, 319.

28 *Ibid.* at para. 51.

29 *Ibid.*

30 Endorsed by the Ontario Court of Appeal decision, *Leona Alleslev-Krofchak v. Valcom Limited* [2010] ONCA 557 at para. 60, where Goudge J.A. restated "unlawful means" as requiring actions that "(i) cannot be actionable directly by the plaintiff and (ii) must be directed at a third party, which then becomes the vehicle through which harm is caused to the plaintiff."

31 For this purpose, an "inchoate" tort—one that is incomplete only because the third party has not suffered any loss—will suffice: *OBG*, *supra* note 2 at para. 49.

32 *Ibid.* at para. 51 [emphasis added].

33 *Ibid.* at para. 153.

34 *Ibid.* at para. 159 [emphasis in original].

be unintelligible. If the law's intent is to deter unacceptable conduct in commercial activities, it would make no sense to proscribe a breach of contract but not a crime.[35]

This divergence in judicial opinion reflects a fundamental disagreement on the social utility of the tort. For Lord Hoffmann, the limited scope of the tort is justified by the fact that it is designed only to "enforce *basic* standards of civilised behaviour in economic competition".[36] The court is thus only concerned with unfair competitive conduct at the *threshold* level. Lord Nicholls, on the other hand, envisaged the tort as a tool that is responsive to a broad category of "clearly excessive conduct".[37] Emphasis therefore resides in the *wrongful* quality of the defendant's conduct. Although the majority appears now to have settled the law in favour of the more restrictive function, the powerful dissent of Lord Nicholls has nevertheless introduced an element of uncertainty that is likely to threaten the stability of this new-found equilibrium in the future.

III. Justifying the Tort

The classic exposition of the tort locates its purpose in the need to protect one's liberty to pursue a trade, calling or profession by safeguarding the liberty of those who deal with him. The leading passage is that of Lord Lindley in *Quinn v. Leathem*:[38]

> As to the plaintiff's rights…He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. *This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing*.

While reference is made in this passage to the plaintiff's "right" to deal with others as the justification for imposing a correlative duty on others not to interfere with such "right", it is now clear that this reasoning is, in one sense, flawed.[39] It is not meaningful to speak of a "right" (in the sense of a Hohfeldian claim-right) to trade at a high level of generality since there can be no concomitant general duty on others not to interfere with such right. On the contrary, such interferences are generally permitted, even encouraged, in capitalist economies where competition for limited resources must of necessity constrain a trader's liberty.[40] So what Lord

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35 *Ibid*. at para. 152.

36 *Ibid*. at para. 56 [emphasis added].

37 *Ibid*. at para. 153.

38 [1901] A.C. 495 at 534 (H.L.) [*Quinn*] [emphasis added], cited by Lord Hoffmann in *OBG*, *supra* note 2 at para. 46. See also *Meretz*, *supra* note 21 at para. 115.

39 Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L.J. 16 at 36, 37. A similar "right" to trade has been assumed in other cases; see *e.g*., *Mogul Steamship Co. v. McGregor* (1889) 23 Q.B.D. 598 at 614, Bowen L.J.; and *A.G. v. Adelaide SS Co.* [1913] A.C. 781 at 793 (H.L.), Lord Parker.

40 See J.W. Neyers, "Rights-Based Justifications for the Tort of Unlawful Interference with Economic Relations" (2008) 28 L.S. 215 at 221, where the learned author argues that "there can be no right to trade since in a capitalist society there is no concomitant duty on anyone to respect that right". The point is repeated in J.W. Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts Law Journal 162 at 180.

Lindley really meant to say was that the plaintiff had a Hohfeldian *liberty* rather than a right to trade. A person is free to exercise such liberty and commits no wrong in carrying on his trade or business,[41] but the liberty entails no corresponding duty of non-interference.

This is not to say, however, that the law does not admit of claim-rights against the type of interferences inflicted, for instance, by Quinn and his associates (who, in that case, were held to have wrongfully conspired with the predominant intention to injure the claimant). While a liberty does not in and of itself entail such a duty, there usually exist other claim-rights (and corresponding duties) that serve as its "protective perimeter".[42] Thus, a person's liberty to carry on a lawful business will usually be protected by the right to claim against another in both tort and criminal law for intentional damage to his goods and property. Although the obligations against such interference correspond to his rights in the property rather than his liberty to trade, they nevertheless secure the essential conditions for the exercise of his liberty. In the context of economic competition, it is settled that a trader's liberty now enjoys some measure of protection against interference through the torts of inducing breach of contract, intimidation and conspiracy. The issue in both *Quinn* and *OBG* was whether that perimeter should be broadened.

Once it is recognised that the claimants in *Quinn* and *OBG* were seeking to fortify their liberty rather than to vindicate a right, it becomes clear that the courts were in both cases asked to engage in judicial lawmaking, that is, to *create*, rather than merely uncover, a claim-right. Liberal appeals to "rights", without appreciating that such rights may encompass liberties, obscure the true nature of the enquiry and substitute for relevant considerations of justice and policy a fallacious process of logical deduction.[43] Acknowledging that such social and policy concerns lie at the heart of the issue displaces the specious assumption that the "answer" is simply the logical outworking of some pre-existing (and unscrutinised) principle of law.[44]

That the majority Law Lords in *OBG* were fully appreciative of the nature of the task before them is amply demonstrated by the caution they advocated. The task of demarcating the line between fair and unfair competition is primarily the responsibility of Parliament, and an expansive tort would unduly encroach upon the legislature's function.[45] Whilst it is not disputed that the common law has a legitimate role in policing unfair conduct in a free market, this role is, at best, residual in nature. From this perspective, the court should generally be critical of any attempt to extend liability in this arena. But even if one accepts as fundamental the need to confine

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41 Glanville Williams, "The Concept of Legal Liberty" (1956) 56 Colum. L. Rev. 1129 at 1146.

42 Herbert. L.A. Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982) at 171.

43 Hohfeld, *supra* note 39 at 35. See also Matthew H. Kramer, Nigel. E. Simmonds & Hillel Steiner, *A Debate Over Rights* (Oxford: Oxford University Press, 2002) at 173. The risk of such analytical pitfalls lends support to the suggestion that the economic torts are better understood as conduct-based (or duty-based) rather than rights-based liability: see Peter Cane, "Justice and Justifications for Tort Liability" (1982) 2 Oxford J. Legal Stud. 30 at 40.

44 See generally, the helpful analysis of Thomas Perry, "A Paradigm of Philosophy: Hohfeld on Legal Rights" (1977) 14 American Philosophy Quarterly 41.

45 See *OBG, supra* note 2 at para. 56, Lord Hoffmann; para. 270, Lord Walker; and para. 306, Baroness Hale.

the tort to "manageable and readily comprehensible limits",[46] the question whether this is best achieved through the dual strictures suggested by Lord Hoffmann—those of indirect interference and separate actionability—remains contentious. In shaping the tort for the future, it is entirely pertinent to re-examine the role of "unlawfulness" and how it ought to relate to the other elements of the tort. Having selected "unlawfulness" as the touchstone of unacceptable competitive conduct, any curtailment of that criterion would have to be principled rather than arbitrary. This must mean, as Lord Nicholls argued, that the tort should not condemn relatively trivial civil wrongs whilst tolerating potentially more egregious criminal offences. What follows is an attempt to resolve this tension by separately examining the twin strictures identified by Lord Hoffmann.

A. *Indirect Interference*

There are, it appears, two reasons for restricting the tort to situations involving indirect harm. The first is the constraint of precedents. As Lord Hoffmann had observed,[47] the tort was first derived from cases such as *Garret v. Taylor*[48] and *Tarlton v. M'Gawley*,[49] where the defendants had injured the plaintiffs indirectly by threats of physical violence to the latter's potential customers. Similarly, the leading cases commonly cited as endorsing this principle (that one may be liable for causing loss by unlawful means) appear to have done so largely in contexts involving a similar tripartite structure.[50] In general, therefore, the authorities do not support a broader tort that would also apply to the direct infliction of harm by one party on another.[51]

But the second and more important reason is the concern that an unbridled extension of two-party unlawful means torts would effectively swallow up all other categories of legal wrongs. In a three-party context, the tort is needed as a remedy to the claimant who would otherwise have no recourse against the immediate actor. The same is not true of two-party cases, where the fault lines have long been established in the various fields of civil wrongs. The overlay of tort liability in such cases can only lead to the undesirable multiplication of liability.[52] In *OBG*, Lord Hoffmann

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[46] *Ibid*. at para. 320, Lord Brown. Note, however, Lord Walker's observation (*ibid.* at para. 269) that Lord Hoffmann's requirement for interference with third-party liberty may, if taken out of context, "be regarded as so flexible as to be of limited utility".

[47] *Ibid*. at para. 6.

[48] (1620) Cro. Jac. 567 [*Garret*].

[49] (1790) 1 Peake N.P.C. 270 [*Tarlton*]. In *Allen v. Flood* [1897] A.C. 1 at 104, 105 (H.L.) [*Allen*], Lord Watson approved of both *Garrett* and *Tarlton* as cases in which "an act detrimental to others, but affording no remedy against the immediate actor, had been procured by illegal means".

[50] *Allen*, *ibid*. was, of course, a three-party case in which the plaintiff was dismissed as a result of the pressure applied by the defendant trade union on the plaintiff's employer. Likewise, both *Rookes v. Barnard* [1964] A.C. 1129 (H.L.) [*Rookes*] and *Quinn*, *supra* note 38, were concerned with indirect harm.

[51] *Cf. Indata Equipment Supplies Ltd. v. ACL Ltd.* [1998] F.S.R. 248 (C.A.), where a majority of the Court of Appeal accepted that a cause of action in two-party unlawful interference with contract could be made out on account of the defendant's breach of the equitable duty of confidence to the claimant, but that holding was clearly *obiter* given that the claimant already had a remedy for breach of confidence.

[52] See Leonard. H. Hoffmann, "*Rookes v. Barnard*" (1965) 81 Law Q. Rev. 116 at 127. A similar point was made in Charles. J. Hamson, "A Further Note on *Rookes v. Barnard*" (1964) 22 Cambridge L.J. 159 at 168.

alluded to these concerns in observing that a case of two-party intimidation "raises altogether different issues".[53] These are sound reasons for circumscribing the tort. The creation of an omnibus tort extending to all two-party wrongs is inherently unappealing and practically unworkable[54] since it would all but eradicate the fine balance of interests painstakingly struck in each area of the law.[55] Seen in this light, Lord Nicholls' conception of a broader principle[56] that applies to both two- and three-party wrongs appears deficient since it does not adequately delimit the tort in two-party scenarios.

If these arguments are accepted, then it must follow that the rationale of the tort is in fact rather limited, *i.e*. it presupposes that everyone has an interest in another's autonomy to deal with him, and this interest ought to be protected by a claim-right that imposes a duty on everyone else not to interfere with such autonomy by the use of unlawful means. Like the elements of intention, unlawful means and damage, the fact of interference is thus a definitive element that serves, as we shall see, also to limit the tort.

B. *Independently Actionable Wrongs*

Conceiving the tort as one that redresses three-party or indirect interferences does not, however, necessarily entail the acceptance of Lord Hoffmann's other restriction, *i.e*. independent actionability. Whether this should be so calls for a separate analysis. The logical starting point is to ascertain the precise role that "unlawful means" assumes in this context. If the tort were understood as no more than an extension of liability for the *underlying unlawful conduct* to indirect victims,[57] then the illegality so employed would itself be the wrong against these victims. One may also say, in such circumstance, that the defendant's unlawful act towards the intermediary would be "transferred" to the benefit of the claimant.[58] So understood, the requirement for independent actionability would make sense, for the defendant cannot be sued on the underlying unlawful conduct unless such conduct already constitutes an existing civil wrong. However, such an approach is conceptually problematic because it disregards the reality that a claimant who is indirectly injured by the defendant's conduct is suing for the transgression of his *own* right, not that of the intermediary.[59] To borrow an illustration given by Professor Hamson:[60]

> [If] A by threatening to libel B succeeds in putting an end to B's association with C and C, having thereby suffered damage, sues A for intimidation, C is not in

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53 *OBG*, *supra* note 2 at para. 61.

54 Indeed, a "travesty of history" in Horton Rogers, ed., *Winfield & Jolowicz on Tort*, 17th ed. (London: Sweet & Maxwell, 2006) at 852.

55 This concern is acknowledged in Philip Sales & Daniel Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999) 115 Law Q. Rev. 411 at 420, but the learned authors argue that the tort may nevertheless apply in two-party contexts where no prior balance of interests has been established.

56 Although it is possible that his Lordship had, in enunciating this principle, only intended its application to established instances of two-party unlawful means torts, *viz.*, two-party intimidation and conspiracy by unlawful means.

57 Carty, "The Economic Torts in the 21st Century", *supra* note 26 at 668.

58 John Eekelaar, "The Conspiracy Tangle" (1990) 106 Law Q. Rev. 223 at 226.

59 See Neyers, "Rights-Based Justifications", *supra* note 40 at 223.

60 Hamson, "A Further Note on *Rookes v. Barnard*", *supra* note 52 at 163.

> that action seeking to vindicate B's reputation nor, if the libel has been put about, does he recover damages for the injury done to B's good name. C quite simply is not entitled to sue A for A's defamation of B.

To distinguish between the entitlements of B and C in such instance is not merely to make a point of conceptual nicety, but to highlight the dissimilar interests protected by the different causes of action. Since the reasons for protecting B's reputation differ from those for protecting C's economic interests, there is no inherent logic in "transferring" B's right of action against A to C.[61]

If the inclusion of "unlawful means" as an ingredient of the tort is to be justified at all, it has to be because it is a logical and reasonable badge of unacceptable competitive conduct. In cases of indirect interferences, it is not difficult to see why that is so. One's liberty to trade, as we have seen, is of value only if others are at liberty to deal with him. Although competition presupposes and, indeed, mandates interference with such liberty, a distinction has always been drawn between interferences resulting from "mere competition"[62] and those resulting from the use of unlawful conduct.[63] The reason is regarded as self-evident—everyone who engages in competition in a free market is obliged to, and is further entitled to, expect that his rivals would compete *within the strictures of the general law*.[64] So while a trader would have no complaint if his customers were enticed by a competitor's superior product, services or publicity, he would be entitled to object if such custom were intentionally impeded or deflected by unlawful behaviour. In the latter case, the aggrieved trader's right is founded, not on the injury to the customer, but on his own interests in the customer's liberty to trade. Returning to the example above, C's right of action is founded, not on A's act against B, but on the *effect* of A's unlawful act on *B's freedom to deal with C*.

Understanding "unlawful means" in this way would also, it is submitted, suggest that it is neither necessary nor logical to restrict the concept to actionable civil wrongs.[65] If the tort is aimed at remedying interferences brought about by unlawful means, then it should generally suffice if the illegal act has in fact constrained the intermediary's liberty.[66] In other words, all that has to be proven is *factual* interference caused by an unlawful act. Insisting that the unlawful act be independently actionable, on the other hand, is to require a coincidence of both *legal* and factual interferences in the same intermediary. Although this more stringent approach may keep the tort within familiar boundaries and reduce uncertainty for litigants, it may also in some measure stultify the very object for which it was developed. If the

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61 Of course, a similar objection may be raised even if "unlawful means" is not confined to actionable wrongs. Absent a satisfactory explanation for the tort's reliance on an illegality directed at B rather than C, it is difficult to see why C should thereby acquire a right against A. This was acknowledged by both Lords Hoffmann and Nicholls in *OBG*: see *OBG*, *supra* note 2 at paras. 59, 146, citing Roderick Bagshaw, "Can the Economic Torts be Unified?" (1998) 18 Oxford J. Legal Stud. 729 at 732; and John Dyson Heydon, *Economic Torts*, 2nd ed. (London: Sweet & Maxwell, 1978) at 124.

62 *Mogul Steamship Company v. McGregor Gow & Co.* (1889) 23 Q.B.D. 598 at 626, Fry L.J.

63 *Rookes*, *supra* note 50 at 1207, Lord Devlin states that, "A dividing line must be drawn and the natural line runs between what is lawful and unlawful as against the party threatened."

64 See Charles. J. Hamson, "A Note on *Rookes v. Barnard*" (1961) 19 Cambridge L.J. 189 at 191, 192.

65 For a similar view, see Elias & Ewing, *supra* note 10 at 337, 338; Deakin & Randall, *supra* note 7 at 544-550.

66 In the manner discussed in Part III below.

true import of the tort is to maintain a level competitive field, then market participants should in general be entitled to expect that they can deal with others free from interferences involving *all* types of illegality. A blanket exclusion of non-actionable offences would be odd, as it would suggest that the law condones interferences involving such conduct, however egregious they may be. Moreover, insisting on legal (as opposed to merely factual) interference may render the tort too narrow because it would have no application in situations where the harm is inflicted through more than one intermediary. To take a somewhat extreme example, consider a case where A, by threatening an unlawful act against B, coerces B to buy up all raw materials required for C's trade so as to cripple C's business.[67] Here, there is no coincidence of legal and factual interferences because although B has a cause of action as against A if it suffers losses as a result of A's intimidation, B's freedom *vis-à-vis* C has not been interfered with since B was not in any way "dealing" with C. Rather, B's conduct has had the effect of preventing C from dealing with another intermediary—presumably the supplier of the raw materials. Insisting on a coincidence of legal and factual interferences on these facts will mean that no unlawful means has been employed, since A's conduct is not unlawful as against the supplier. But that would hardly be a satisfactory outcome, for A's conduct is surely no less objectionable only because it was calculated to injure C through more than one intermediary. It is submitted, therefore, that in all cases of indirect interference, the critical test ought to be one of factual interference only. Legal interference, on the other hand, is not logically required except as an arbitrary means of containing the tort.

That said, there is a case for modifying the general approach in cases where breaches of statutory duties are involved because this is where the risk of trespassing on legislative territory is most acute. Here, the primacy of Parliamentary intention has long been recognised by the line of cases following *Cutler v. Wandsworth Stadium Ltd.*[68] and *Gouriet v. Union of Post Office Workers*,[69] which confine the right to bring private actions to those instances where it is established that Parliament had intended the statute in question for the protection of a class of persons including the claimant, or where the claimant suffers special damage as a result of the breach.[70] To the extent that an action based on the unlawful means tort is an enforcement of a statutory duty, the need to respect the underlying legislative intent must remain paramount. So while there is no justification for a general requirement of separate actionability, the construction test as enunciated in *Cutler* and *Gouriet* ought to be regarded as an integral part of the test for "unlawful means" where statutory breaches are concerned. Outside the sphere of statutory offences, however, the fear that a liberal interpretation of "unlawful means" would lead to an expansive tort may be less critical if the elements of the tort are defined with sufficient stringency. This is especially so once regard is had to the fact that in addition to the elements of intention

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67 I am indebted to Professor Ken Oliphant for drawing my attention to this possible factual matrix.

68 [1949] A.C. 398 (H.L.) [*Cutler*]. See *X (Minors) v. Bedfordshire County Council* [1995] 2 A.C. 633 (H.L.) for the modern reiteration of the same principle.

69 [1978] A.C. 435 (H.L.) [*Gouriet*], applied in *Lonrho*, *supra* note 12; *RCA Corp. v. Pollard* [1983] Ch. 135 [*RCA Corp.*]; *Rickless v. United Artistes Corp.* [1988] Q.B. 40.

70 Note, however, that this test has not been consistently applied: see especially *Gardner*, *supra* note 8; *Brekkes v. Cattel* [1972] Ch. 105; and the observations of Butler-Sloss L.J. and Stuart-Smith L.J. in the Court of Appeal decision of *Associated British Ports v. Transport and General Workers' Union* [1989] 1 W.L.R. 939 at 961, 965, 966.

and unlawful means, a third control mechanism is now found in the requirement for an unlawful act that has *interfered with the intermediary's freedom*.

IV. Interference

Until *OBG*, little attention was directed at the fact of interference. The likely reason is that until then, it was often assumed that the tort encompassed both direct and indirect interferences, and as such, the question whether such interference had occurred was generally subsumed within the broader enquiry on causation. However, if it is accepted that the tort is aimed at safeguarding one's minimum rights in another's liberty, then the defendant's interference with such liberty is evidently the gist of the tort. It is not any unlawful act which is tortious, but only those acts impinging on third-party liberty. The discussion that follows is an attempt at outlining the concept, but no more than a sketch is proffered given that the notion is just being developed.

It is, first of all, reasonably clear that any conduct that has the effect of impeding the intermediary's physical or practical capacity to deal with the claimant would suffice. This may be achieved, for instance, by physically detaining the intermediary so as to prevent him from performing his contractual obligations to the claimant.[71] Another well-known example is found in *GWK Ltd. v. Dunlop Rubber Co. Ltd.,*[72] where the defendant physically altered the intermediary's contractual performance, thus disabling the third party from fulfilling its contractual duty to the claimant. Further, the defendant's conduct must have rendered it *impossible or impracticable* for the intermediary to deal with the claimant. So in *JT Stratford & Son Ltd. v. Lindley*,[73] where the defendant trade union had instructed its members not to handle the claimants' barges, thereby preventing the hirers of the barges from returning them to the claimants as they were contractually bound to do, it was no answer to say that the hirers could have engaged non-union members to handle the barges because this was not, in fact, a practicable option. Apart from physical imposition, interferences may also take the form of conduct calculated to limit or impair the intermediary's judgment, causing him either to cease dealing with the claimant or otherwise to injure the latter's interests. Typically, these interferences occur where intimidation[74] or deception[75] has been applied on an intermediary to manipulate the latter into adopting a course of conduct injurious to the claimant.

In *OBG*, Lord Hoffmann distinguished between unlawful conduct that interferes with another's freedom, and that which merely undermines the claimant's financial interests.[76] As an instance of the latter, his Lordship cited the case of *RCA Corp*.[77] There, the plaintiffs, who held the exclusive licence to exploit recordings of Elvis Presley's performances, complained that they had sustained losses as a result of the defendant's bootlegging activities. It was not disputed that the defendant's activities

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71 *DC Thomson & Co. Ltd. v. Deakin* [1952] 1 Ch. 646 at 678, Evershed M.R.

72 (1926) 42 T.L.R. 376 (C.A.).

73 [1965] A.C. 269 at 322 (H.L.).

74 *Rookes*, *supra* note 50.

75 *National Phonograph Co. Ltd. v. Edison-Bell Consolidated Phonograph Co. Ltd.* [1908] 1 Ch. 335; *Lonrho*, *supra* note 12.

76 *OBG*, *supra* note 2 at para. 52.

77 *Supra* note 69.

constituted criminal offences under the *Dramatic and Musical Performers' Protection Act, 1958*,[78] and that the Presley estate could have sued the bootleggers on account of such contraventions because the Act was enacted for the protection of the performers. Nevertheless, the plaintiffs' claim failed. For Lord Hoffmann, this outcome could be justified on the ground that the defendant's activities did not in any way interfere with the liberty of the Presley estate to perform the exclusive licensing contract even if they did in fact render the contract less valuable. In the same vein, the publication of the unauthorised photographs of the Douglases' wedding had not affected the couple's liberty to deal with OK! in *Douglas v. Hello! Ltd.*[79] since OK! could still proceed with the publication of the wedding photographs without any physical or legal obstacle. However, this reasoning is premised on a narrow interpretation that Lord Hoffmann had ascribed to "unlawful means", *i.e.* conduct that interferes with the autonomy of a third party (factual interference) *and* which is unlawful as against that party (legal interference). If it is accepted, as is argued above,[80] that there is no necessity for any coincidence of legal and factual interferences, then would it not be plausible to argue, for instance, that *RCA Corp.* was an "interference" case because the defendant's bootlegging activities had caused some customers (rather than the Presley estate) to purchase the defendant's unauthorised recordings when they would otherwise have purchased the plaintiffs' recordings? It is, of course, reasonable to assume that the defendant's conduct would (as is generally true of passing off) lead to some damage to the plaintiffs. But this simplistic equation of "interference" with "mere causation"[81] should be resisted. Rather, the answer is located in the requirement that the interference in question must have the effect of *physically or practically* preventing the third party last intermediary from dealing with the claimant. This test was not satisfied in *RCA Corp.* because the plaintiffs' customers were entirely free to purchase the plaintiffs' products even if they were less valuable or attractive as a result of the defendant's unlawful conduct.

Cases where the unlawful act in question does not affect the intermediary's liberty are not true cases of indirect or tripartite interferences since the defendant does not have to act through the agency of the intermediary at all. This does not mean that no tort liability should ever be imposed where the unlawful act is direct, but only that "[the] policy issues opened by cases such as these are of a different order from the 'intermediary cases"'.[82] Indeed, it is this singular failure to distinguish between direct and intermediary cases that has continued to bedevil the concept of "unlawful means" in this context. For example, *Hargreaves v. Bretherton*[83] is often cited for the proposition that the act of perjury could not constitute "unlawful means" for purposes of the economic torts. In that case, it was held that an act of perjury did not, by itself, confer a cause of action on the party injured. Likewise, it is sometimes suggested that contempt of court is not a type of actionable "unlawful means". So in *Chapman v. Honig*,[84] it was held that a landlord who had (lawfully) terminated a

78 (U.K.), 6 & 7 Eliz. II, c. 44.
79 *OBG*, *supra* note 2 at para. 129.
80 See text accompanying notes 65-67.
81 Specifically rejected by Lord Hoffmann in *OBG*, *supra* note 2 at para. 58.
82 Eekelaar, *supra* note 58 at 227.
83 [1959] 1 Q.B. 45 (C.A.) [*Hargreaves*].
84 [1963] 2 Q.B. 502 [*Chapman*].

lease to punish the tenant for having testified against him in an earlier lawsuit had incurred no civil liability even though his vindictive motive would have rendered him liable for criminal contempt. However, whether *Chapman* has in fact excluded contempt of court from the province of "unlawful means" is questionable in light of the subsequent decision of *Acrow*.[85] There, a defendant who was guilty of contempt (by aiding and abetting in the breach of an injunction) was found liable for causing loss to the claimant. However that may be, it is submitted that all these cases are better analysed as direct, two-party interferences. In each case, the defendant's conduct had no effect on the court's ability to deal with the claimant even if it is wrongful as against the State. Clearly, both enhanced civil remedies for contempt (as was the result in *Acrow*) and attenuated rights in relation to perjury (such as that in *Hargreaves*) may be equally justifiable for the proper administration of justice. In these two-party contexts, a general principle that purports to "tortify" every description of unlawful conduct simply does not work. On the other hand, the risk of unprincipled expansion is much reduced in three-party or indirect interference cases by reason of the requirement for proof of interference with the third party's autonomy. A critical controlling mechanism is therefore found not merely in the notions of intention and illegality, but in a disciplined approach to the fact of interference.

V. Two-Party Intimidation

Thus far, it has been argued that the tort of causing loss by unlawful means ought to be understood as a nominate tort that is distinct and independent from the primary unlawful means. Its purpose is to remedy indirect interferences. By itself, it does not seek to lay down a general principle that renders tortious all harm resulting from intentional conduct involving the use of unlawful means. It is not, so to speak, a "genus" tort from which other "species" torts are derived.[86] Applied to the tort of intimidation, this will mean that only the three- (or more) party form of the tort is a true instance of causing loss by unlawful means, while two-party intimidation[87] is really a distinct form of liability resting on a unique rationale. This proposition may seem startling at first sight. After all, the House of Lords assumed in *Rookes* that both two- and three-party intimidation were merely varied manifestations of a single phenomenon, the gist of which was the wrongful coercion of another.[88] For reasons explained,[89] however, this conception is mistaken as it overlooks the diverse interests that lie at the root of two- and three-party intimidation.

In the two-party scenario, the mischief resides in the fact of unlawful coercion. So if A threatens to batter B unless B stops selling widgets to C, A may be liable

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85 *Supra* note 8.

86 In *Meretz*, *supra* note 21 at para. 114, Arden L.J. stated that the House of Lords had held in *OBG*, *supra* note 2, that "conspiracy, inducing breach of contract and other economic torts are separate torts".

87 This tort appears to have been accepted in *D & C Builders v. Rees* [1966] 2 Q.B. 617 at 625 (C.A.) and *Cory Lighterage Ltd. v. Transport and General Workers' Union* [1973] 1 W.L.R. 792 (C.A.).

88 See, in particular, the speech of Lord Devlin in *Rookes*, *supra* note 50 at 1205. In Singapore, there is scant authority on the application of this tort whether in the two- or three-party form, though its existence has been affirmed (in *obiter*) by the High Court in *Goh Chok Tong v. Chee Soon Juan* [2003] 3 S.L.R.(R.) 32 at para. 49 (H.C.) and *Lee Kuan Yew v. Chee Soon Juan* [2003] 3 S.L.R.(R.) 8 at para. 48 (H.C.).

89 See text accompanying notes 59-61.

to B if B suffers a loss by yielding to A's threat. Here, the combination[90] of the threat and the threatened illegality form the nub of the tort, with the threat supplying the coercive force and the illegal act (*i.e.* battery) furnishing the unlawful quality. Following *Rookes*, this same set of facts would also confer upon C a right of action against A. Although there can be no doubt that the fact of coercion is (in this example) also critical to A's cause of action, the chief justification for C's action lies in the fact that A has improperly prescribed B's conduct *in relation to C*.[91] Thus, while the two-party tort seeks to identify illegitimate *threats*, the aim of the three-party tort is to protect the claimant from unlawful *interferences* with the intermediary's liberty.

Though subtle, this distinction is critical for correctly identifying the illegality relevant to each tort. In the two-party intimidation set out above, A's threat is unlawful *vis-à-vis* B because battery is itself a tort and/or a crime. In the three-party setting, however, the unlawful means is that which taints the interference rather than the threat. So as against C, the unlawful means employed by A is not battery but A's tortious *intimidation* of B. It is the fact of intimidation, rather than the act of battery, that has prevented B from transacting with C. The same may be said of *Rookes*, the indisputable archetype of the unlawful means tort. There, the defendants were liable for "intimidation" when they threatened BOAC with the withdrawal of labour if the latter did not dismiss the plaintiff. The threatened act, if it materialised, would have constituted a breach of the workers' employment contracts with BOAC. Properly analysed, the true weapon wielded by the defendants in this case was the act of intimidation against BOAC since it was the coercive force of the *threat* of breach, rather than the breach *per se*, that denied BOAC any real option of employing the plaintiff.[92] Indeed, no element of compulsion need inhere in the breach itself, for the (actual) withdrawal of labour would, in principle, still leave BOAC free to engage the plaintiff's services. By this reasoning, it must follow that in every case where liability is established in a three-party context involving the threat of an unlawful act, there is simultaneously admitted a tort of two-party intimidation between the defendant and the threatened intermediary.[93] In other words, *the two-party tort is itself a necessary component of the three-party tort* insofar as it is the act of intimidation that constitutes the unlawful means that interferes with the intermediary's liberty.

So understood, the decision in *Rookes* has in fact established *two* torts, namely, the tort of causing loss by unlawful means involving intimidation *and* the two-party tort of intimidation. Insofar as the latter is an independent tort, it must also mean that the defendants' threat of contractual breach was itself a (two-party) tort of intimidation *against* BOAC. The difficulties associated with this last proposition are well known. Lord Wedderburn, the leading critic, decried the decision as a heresy that conflates

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90 It is long settled that the threat is an integral but not sufficient element of the tort, for the threat of a lawful act is not (except where the threat is part of a conspiracy to injure) a cause of action: see *Sorrell v. Smith* [1925] 1 A.C. 700 at 747, Lord Buckmaster (H.L.) [*Sorrell*]; *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch* [1942] 1 A.C. 435 at 467 (H.L.), Lord Wright; and *Rookes*, *supra* note 50 at 1168, 1169, Lord Reid.

91 Hamson, "A Note on *Rookes v. Barnard*", *supra* note 64 at 191, 192.

92 As Lord Reid observed in *Rookes*, *supra* note 50 at 1168, "[what the claimant] sues for in each case is loss caused to him by the use of an unlawful weapon against him—*intimidation of another person by unlawful means*" [emphasis added].

93 Although the intermediary's right of action is further contingent on the proof of damage.

tortious with contractual remedies, the result of which is the eventual "tortification" of all contractual breaches.[94] Others, however, pointed to the remedial variances between tort and contract law as a reason for recognising the two-party tort.[95] Be that as it may, what is more important to note is that if *Rookes* is correctly decided, then there is, consistent with the reasoning in *OBG*, no escaping the conclusion that the threat of a breach of contract is, *at least in principle*, itself a tortious act. In practice, however, it may be necessary, for policy reasons, to confine the right of action to situations where there exists no concurrent remedy in contract.[96] So in a case where A threatens to breach its contract with B unless B ceases all dealings with C, and B succumbs to A's threat, B would have no remedy for breach (since the contract with A is affirmed) nor any restitutionary remedy on the ground of economic duress (since no contract is in fact concluded under coercion), the tort of intimidation may apply to compensate B for the loss of C's custom. But to accept the threat of a breach of contract as a tort is not to convert all contractual breaches into torts. There is, it is submitted, no inherent absurdity in maintaining a distinction between the threat to breach and the breach itself.[97] A breach is distinguishable from a threat to breach in that the former is an event defined and anticipated by the contract itself while the latter will often involve the use of the contract "as an instrument to an end (to cause harm to [the claimant]) which is not contemplated by the consensual distribution of risk under the contract itself".[98]

In summary, two- and three-party intimidation are conceptually distinct in that the former seeks to isolate unlawful threats while the latter is aimed at wrongful interferences with third-party liberty. As such, the "unlawful means" relevant to each tort is distinct, even if both torts emanate from a single course of conduct. However, the two torts are nevertheless inextricably connected in that two-party intimidation, being the effective hindrance of the intermediary's conduct, is invariably an essential ingredient of the three-party tort. In light of that, every threatened unlawful act that amounts to a two-party intimidation must also suffice for the three-party tort. However, policy reasons may intervene to restrict the actionability of the tort in certain two-party contexts.

VI. Conspiracy by Unlawful Means

Given the rejection in *OBG* of a "genus" unlawful means tort, it must now be clear that unlawful means conspiracy is a stand-alone tort that cannot simply be rationalised as a manifestation of any such wider principle.[99] But that does not yet dispose of the

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94 Kenneth. W. Wedderburn, "Intimidation and the Right to Strike" (1964) 27 Mod. L. Rev. 257 at 261, 262, 264.

95 Heydon, *supra* note 61 at 64, 65.

96 This exception is more limited than that suggested by Carty, who would prefer the threat of contractual breach to be non-actionable in *all* two-party contexts: see Hazel Carty, *An Analysis of the Economic Torts*, 2nd ed. (Oxford: Oxford University Press, 2010) at 119.

97 *Cf.* the contrary view of Pearson L.J. in *Rookes*, *supra* note 50 at 696, who observed that "[it] seems inherently absurd to say that a mere threat to do something is actionable, when the actual doing is not, so that the minor act has a greater effect than the major act".

98 Sales & Stilitz, *supra* note 55 at 424.

99 For the contrary suggestion that unlawful means conspiracy is but an instance of the wider "genus" tort, see Heydon, *supra* note 61 at 10, 67; Elias & Ewing, *supra* note 10 at 336; John Murphy, *Street on Torts*, 12th ed. (Oxford: Oxford University Press, 2007) at 359.

question whether, despite the absence of any such overarching principle, a consistent notion of "unlawful means" ought to apply to all economic torts. On the one hand, there is obvious logic and merit (of clarity and certainty) in adopting a uniform interpretation of "unlawful means" in this context, particularly if regard is had to the fact that "unlawful means" serves a similar purpose in all the torts, namely, to protect the liberty to trade and compete by separating licit from illicit forms of commercial activity.[100] Yet a moment of reflection may reveal such an approach to be at once too sweeping and too sanguine as it overlooks the fundamental structural and justificatory variance amongst the economic torts. As the preceding discussion on the tort of intimidation demonstrates, the scope of "unlawful means" cannot be ascertained without close reference to the particular mechanics of each tort and its impact on the allocation of risk and liability in the wider context.

For some time, the view that has gained traction amongst commentators is the conception of conspiracy by unlawful means not as a substantive tort, but as a form of secondary liability or joint tortfeasance.[101] On this understanding, two or more persons may be liable for the same tort when each of them has participated in its commission. For this purpose, "combination" is a sufficient form of participation. By this account, unlawful means conspiracy does not create new liability but merely extends the class of defendants whom the claimant may sue.[102] It would also mean that only conduct that constitutes a tort actionable by the claimant should count as "unlawful means", since there can be no ancillary liability in the absence of primary liability. But while it has the advantages of promoting certainty and respecting legislative supremacy, this analysis is unsatisfactory once it is applied to civil wrongs other than torts. For instance, it is conceptually implausible *jointly* to breach a contract[103] or a fiduciary duty unless all conspirators are parties to the contract or subject to the same equitable obligation. Secondly, it has been pointed out that once the principle of joint tortfeasance is accepted as the true rationale, then there is no reason to insist on the proof of intention to injure as an element of the tort.[104]

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[100] Dugdale & Jones, *supra* note 3 at paras. 25-94 and 25-121.

[101] Peter G. Heffey, "The Survival of Civil Conspiracy: A Question of Magic or Logic?" (1975) 1 Monash University Law Review 136; Philip Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 Cambridge L. J. 491; Hazel Carty, "Joint Tortfeasance and Assistance Liability" (1999) 19 L.S. 489 at 496-500; Carty, "The Economic Torts in the 21st Century", *supra* note 26 at 668, 669, 672; Sales & Stilitz, *supra* note 55 at 435; Neyers, "The Economic Torts as Corrective Justice", *supra* note 40 at 198. For an analysis of unlawful means conspiracy as a form of accessorial tort after *Revenue & Customs Commissioners v. Total Network SL* [2008] UKHL 19, [2008] 1 A.C. 1174 (H.L.) [*Total Network*], see Joachim Dietrich, "Accessorial Liability in the Law of Torts" (2011) 31 L.S. 231.

[102] If so, the tort is "mere surplusage" (*Sorrell*, *supra* note 90 at 716, Lord Dunedin) or "a barren iteration of joint tortfeasance" (*Total Network*, *supra* note 101 at para. 66, Lord Scott). But *cf.* Sales, *supra* note 101 at 511, who argues that the tort still has a substantive role in cases where the acts of each defendant are insufficient for establishing the underlying tort but the *combination* of all the defendants' acts would suffice. A pleading of conspiracy may also operate to aggravate damages: see Peter T. Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982) 16 University of British Columbia Law Review 229 at 245.

[103] Presumably, the action may be more accurately framed as a conspiracy *to induce* a breach of contract instead: see Kenneth. W. Wedderburn, "The Right to Threaten Strikes" (1961) 24 Mod. L. Rev. 572 at 581-583.

[104] Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 249. Stevens's notion of joint tortfeasance is, however, distinguished from those of Sales, *supra* note 101, and Carty, "Joint

However, the mental ingredient of the tort is deeply entrenched[105] and its removal is therefore improbable. Finally, any attempt to revive this joint tortfeasance theory must now contend with the House of Lords' decision in *Total Network*,[106] which has categorically rejected the characterisation of unlawful means conspiracy as a joint tort.

In *Total Network*, the defendant was alleged to have conspired with others to cheat the Commissioners of VAT (Value Added Tax). A preliminary issue that arose before the court was whether the alleged unlawful means employed by the defendant must have been independently actionable by the party against whom it was inflicted. For this purpose, the assumed facts were that the defendant's conduct constituted the common law offence of cheating, but such offence was not actionable by the Commissioners as a civil suit.[107] It was unanimously held that a common law offence could count as "unlawful means" even if it was not separately actionable by the claimant. In this connection, the stricter approach in *OBG* was distinguished as one that was intended to apply only to a three-party unlawful means tort.[108] Conspiracy by unlawful means, on the other hand, was neither a species of causing loss by unlawful means tort[109] nor a form of joint tort.[110] The gist of the tort lay, instead, in the intentional infliction of harm through a *combination*.[111] That being the case, there was no reason for insisting on a "single consistent approach as to what constitutes unlawfulness in relation to all the economic torts",[112] and no reason why unlawful means conspiracy could not be established by a crime that was not also actionable as a tort.

Judged against contemporary scholarship, this reversion to "conspiracy" or "combination" as the nub of the tort is surprising, as the weaknesses associated with this line of reasoning are well ventilated. The idea that a peculiar power or force of coercion resides in *numbers* is widely regarded as sophistry. In the modern market place dominated by large corporations, power is concentrated not in numbers but in size.[113] Nor should it matter that a combination may be evidence of malice, since there is no tortious liability for malicious injury in English law.[114] Nevertheless, the arguments are not all one-sided, and some reasons may fairly be given in support of their Lordships' stand in *Total Network*. In the first place, although it is true that a large corporation is often more powerful than several individual traders combined,

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Tortfeasance and Assistance Liability", *supra* note 101, in that he argues that it is the *act*, rather than the liability, of one party that is attributed to another.

105 *Lonrho*, *supra* note 12.

106 *Supra* note 101. This appears also to be the position in Singapore. In *Beckkett Pte. Ltd. v. Deutsche Bank AG* [2009] 3 S.L.R.(R.) 452 at para. 120 (C.A.), Chan Sek Keong C.J. stated that "[it] is not disputed that in unlawful means conspiracy, the element of unlawfulness covers both a criminal act or means, as well as an intentional act that is tortious".

107 *Total Network*, *supra* note 101 at para. 42. See also the Court of Appeal's decision in *Revenue & Customs Commissioners v. Total Network SL* [2007] 2 W.L.R. 1156 at para. 36 (C.A.).

108 *Total Network*, *supra* note 101 at para. 43, Lord Hope; para. 99, Lord Walker; para. 124, Lord Mance; and para. 223, Lord Neuberger.

109 *Ibid.* at para. 123, Lord Mance.

110 *Ibid.* at para. 44, Lord Hope; paras. 94, 104, Lord Walker; and para. 118, Lord Mance.

111 *Ibid.* at para. 41, Lord Hope; para. 57, Lord Scott; para. 122, Lord Mance; and paras. 221, 222, Lord Neuberger.

112 *Ibid.* at para. 224, Lord Neuberger.

113 *Lonrho*, *supra* note 12 at 189.

114 *Allen*, *supra* note 49.

it does not follow that the latter cannot constitute an unfair or intimidating force against a lone trader. So while a common law action for conspiracy may not adequately capture all abuses of dominant power, a case may be made for retaining it to supplement anti-trust regulations.[115] Moreover, the distinction between corporations and individuals may appear to be overstated if regard is had to the fact that corporations are just as likely as individuals to attract liability in cases where unlawful means are used, since it is settled that a company may, together with its directors and officers, be liable as co-conspirators for wrongs committed by the company.[116] More fundamentally, it may be argued that the true rationale underlying the civil tort of conspiracy by unlawful means is to protect members of society against injury that results from the *deliberate subversion of the law*.[117] On this view, it is the *agreement* among the conspirators to perpetrate an unlawful act that is the essential wrong of the tort, while the elements of intention to injure and ensuing injury help to identify the appropriate claimant. So explained, the decision in *Total Network* is neither anomalous nor illogical. The law objects to the perpetration of illegality through concerted conduct, even if the same act is not civilly actionable when it is done by an individual.

By rejecting the theory of joint tortfeasance, *Total Network* has clarified that "unlawful means" in the context of the conspiracy tort should be construed broadly to include crimes that are not also civilly actionable. But it does not mean that any unlawful act will suffice. Instead, greater reliance will have to be placed on the need to demonstrate a tight causal link between the unlawful act and the injury sustained to rein in the tort.[118]

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[115] Thus, it has been observed in Joe Thomson, "An Island Legacy—The Delict of Conspiracy" in D.L. Carey Miller & David W. Meyers, eds., *Comparative and Historical Essays in Scots Law* (Edinburgh: Butterworths and the Law Society of Scotland, 1992) 150, that:

> [W]hatever its illogicalities, the tort/delict of conspiracy remains a cogent weapon in the attempt to outlaw fraudulent practices in the international commercial and banking community, where individuals and individual companies may otherwise escape liability for any substantive tort/delict used, because they are outwith the jurisdiction of the courts.

Indeed, quite apart from the facts assumed in *Total Network*, *supra* note 101, there may be other situations in which the tort could perform a useful gap-filling role. For example, if A bribes B in return for B's agreement not to award a contract to C, C is unlikely to have any remedy against B in the absence of any pre-existing legal relation between them. Although A has, broadly speaking, injured C through the agency of B, causing loss by unlawful means is inapplicable on these facts since A has committed no wrong as against B. Instead, the wrong (if any) as against C is perpetrated not by A alone but by the combined conduct of A and B. So if the act of bribery should constitute a criminal offence under, *e.g.*, the *Bribery Act 2010* (U.K.), 2010, c. 23, an action for conspiracy by unlawful means as against both A and B would appear to be the more logical and effective means of redressing C's loss.

[116] *Belmont Finance Corp. v. Williams Furniture Ltd.* [1979] Ch. 250, though there is a presumption against liability where the wrong in question is a breach of contract in the ordinary course of the company's business: *Said v. Butt* [1920] 3 K.B. 497 (C.A.).

[117] This is not unlike the rationale that underlies criminal conspiracy: see Ian H. Dennis, "The Rationale of Criminal Conspiracy" (1977) 93 Law Q. Rev. 39 at 50, 51.

[118] See *Total Network*, *supra* note 61 at paras. 95, 96, Lord Walker; paras. 119, 120, Lord Mance; and para. 224, Lord Neuberger. For a helpful analysis of the principles relevant to determining what crimes would suffice for establishing the conspiracy tort, see Peter Edmundson, "Conspiracy by Unlawful Means: Keeping the Tort Untangled" (2008) 16 Torts Law Journal 189 at 196-198.

VII. Conclusion

Academic discourse has for some time been preoccupied with the question of whether there exists a general principle that unites the torts commonly discussed under the broad heading of economic torts. These torts, it has been said, are in need of "a Cardozo or an Atkin to tell them where they belong".[119] A general principle that distils the essence of a seemingly disparate group of torts has obvious and enormous appeal. Apart from clarifying the torts, it could also remedy existing "gaps" in the law and provide a firmer foundation for its rational development. However, the decisions in *OBG* and *Total Network* have demonstrated that this is not an attainable idea. Attempts to fashion a wide general principle are likely to be unfruitful because, on its own, "unlawful means" is simply too broad and unwieldy a concept. Moreover, calls to rationalise the law by the adoption of a broad principle often assume that the economic torts share a unity in their conceptual underpinnings, but such an assumption is, as this article has attempted to demonstrate, largely mistaken. It is true that, at a high level of abstraction, "unlawful means" performs a common function across the torts in isolating right from wrong. But in each instance, it is not the unlawful means *per se* that makes the wrong, but the primary course of conduct that is coloured by the use of unlawful means. Thus, the fact of interference with an intermediary's liberty is key to causing loss by unlawful means, while two-party intimidation is distinguished by the fact of illegitimate coercion. Conspiracy by unlawful means, on the other hand, is (following *Total Network*) characterised by the fact of agreement to commit illegal acts. Given the different starting points, it makes sense to develop each tort through a "cautious incremental approach".[120] For much the same reason, we should also be slow to assume that what suffices as "unlawful means" in one tort must of necessity suffice for another. In each case, the relevance of the illegality must be tested against the rationale of the tort.[121]

Some may bemoan this "fragmentation" of the economic torts as a retrogressive step. But such a view is premised largely on the supposition that "unlawful means" serves as a satisfactory unifying factor for the economic torts. It does not. Instead, what this article has attempted to demonstrate is that the diverse bases of the torts logically require a more nuanced approach to the elements of the different torts—including unlawful means. Such an approach would not, of course, render the law simple, but faithful adherence to a cogent rationale will be more likely to beget a principled and fair body of law in the future.

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[119] David F. Partlett, "From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry" (1992) 66 Tul. L. Rev. 771 at 773, 774.

[120] *OBG*, *supra* note 2 at para. 270, Lord Walker.

[121] A similar argument is made by Edmundson in respect of unlawful means conspiracy: see especially Edmundson, *supra* note 118 at 202-206.