Singapore Journal of Legal Studies
[2013] 158–167

LAWFUL ACT CONSPIRACY: MALICE AND ABUSE OF RIGHTS

NATHAN **TAMBLYN***

This article argues that the tort of lawful act conspiracy is best understood, not as an economic tort, but as an instance of abuse of rights, and why it requires a test of malice.

The tort of lawful act conspiracy is where two or more defendants agree and carry out a course of otherwise lawful conduct which causes loss to the claimant. There is an additional requirement, what we might call the *mens rea* requirement, but its formulation is contentious. Three possibilities are presented in the case law:

(i) The defendants' predominant purpose must be to cause loss to the claimant, rather than to advance their own interests;
(ii) The defendants' predominant purpose must be to cause loss to the claimant, with a further defence of justification; or
(iii) The defendants' predominant purpose must be to cause loss to the claimant out of malice.

Even aside from the unresolved question of the tort's definition, there remains the principal theoretical challenge: why should it ever be tortious to carry out otherwise lawful conduct? A standard answer is that lawful act conspiracy is an economic tort, originally conceived as a common law method for controlling excessive competition, but admittedly now regarded as ill-formed, and outflanked by competition legislation.

This article argues that lawful act conspiracy is not an economic tort. It also seeks to resolve the issue of the tort's definition, by arguing in favour of the third possible *mens rea* requirement: the defendants' predominant purpose must be to cause loss to the claimant out of malice. This requirement finds support in the case law, and it is necessary in order to ensure that lawful act conspiracy has an appropriate remit. Further, a test of malice also explains why otherwise lawful conduct might be tortious: malice turns the exercise of lawful rights into an abuse of rights, and that warrants censure. In other words, lawful act conspiracy is an instance of abuse of rights.

This article considers the laws of England and Singapore (which together provide a coherent and unified approach to this tort). This article proceeds as follows: First,

* Assistant Professor, Faculty of Law, Chinese University of Hong Kong. With many thanks to the anonymous reviewer for detailed comments on an earlier draft.

to clear the ground, it argues that lawful act conspiracy is not an economic tort. Second, through three sets of examples, it proposes an appropriate remit for lawful act conspiracy, and explains how that is best delineated by a test of malice (and not, in particular, a defence of justification). Third, it explains how, with a test of malice, lawful act conspiracy is better understood as an instance of abuse of rights, such as might render lawful conduct tortious.

I. Not an Economic Tort

Various authors classify lawful act conspiracy as an economic tort.[1] For example, Carty says that the economic torts represent the common law's chosen method to attack excessive competition.[2] But this global rationale for all economic torts admittedly reduces lawful act conspiracy to an "aberration".[3] Carty says that lawful act conspiracy is an anomaly born out of a desire to monitor oppressive use of economic power,[4] but because it focuses only on the interests of the parties before the court, the tort has little value in terms of regulating the wider market.[5] She says that lawful act conspiracy has been overshadowed by competition laws,[6] and is destined for an anomalous future existence.[7]

There are three criticisms of this approach. First, it is probably wrong that lawful act conspiracy was born out of a desire to promote or safeguard competition by curtailing what the courts saw as excessive use of economic power. Authors, including Carty herself, tend to describe the early period of lawful act conspiracy as a time of judicial neutrality or abstentionism.[8] In other words, the courts declined any jurisdiction to regulate competition, a position articulated expressly in the early case law,[9] and repeated since.[10]

Second, the idea that conspiracy is an 'economic' tort needs unpacking. Yes, the loss most often suffered tends to be pecuniary. But pecuniary loss need not be the

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1 J.D. Heydon, *Economic Torts*, 2nd ed. (London: Sweet & Maxwell, 1978); Simon Deakin, Angus Johnston & Basil Markesinis, *Markesinis and Deakin's Tort Law*, 6th ed. (Oxford: Oxford University Press, 2008); Hazel Carty, *An Analysis of the Economic Torts*, 2nd ed. (New York: Oxford University Press, 2010); R. Simpson, "Economic Torts", in Anthony Dugdale & Michael Jones, eds., *Clerk & Lindsell on Torts*, 20th ed. (London: Sweet & Maxwell, 2010); W.V.H. Rogers, ed., *Winfield and Jolowicz on Tort*, 18th ed. (London: Sweet & Maxwell, 2010) (where lawful act conspiracy is grouped under the heading "interference with contract or business"). But the label "economic tort" is considered a regrettable misnomer in Nicholas J. McBride & Roderick Bagshaw, *Tort Law*, 4th ed. (Harlow, UK: Pearson, 2012) at 656, 657.

2 Carty, *ibid.* at 2.

3 *Ibid.* at 323.

4 *Ibid.* at 145.

5 *Ibid.* at 146.

6 *Ibid.* at 147.

7 *Ibid.* at 25, 172, 175, 179, 180, 323.

8 J.D. Heydon, "The defence of justification in cases of intentionally caused economic loss" (1970) 20 U.T.L.J. 139, 151; Heydon, *Economic Torts*, *supra* note 1 at 17; Peter Cane, *Tort Law and Economic Interests*, 2nd ed. (Oxford: Clarendon Press, 1996) at 259, 260; Carty, *ibid.* at 5-10.

9 *Mogul Steamship Company, Limited v. McGregor, Gow, & Co.* (1889) 23 Q.B.D. 598 at 615, 620, Bowen L.J. and 625, 626, Fry L.J. (C.A.) [*Mogul* (C.A.)], aff'd [1892] A.C. 25 at 37, Lord Halsbury and 43, Lord Watson and 45, 46, 49, Lord Bramwell and 50, 51, Lord Morris (H.L.) [*Mogul* (H.L.)]; *Crofter Hand Woven Harris Tweed Co Ltd v. Veitch* [1942] A.C. 435 at 472, Lord Wright (H.L.) [*Crofter*].

10 *OBG Ltd v. Allan* [2008] 1 A.C. 1 at para. 148, Lord Nicholls and para. 306, Baroness Hale (H.L.).

only type of loss recoverable; there is no reason in principle for such a limitation. For a start, and despite *Lonrho Plc. v. Fayed (No. 5)* to the contrary,[11] some authors argue that it should cover aggravated damages (injury to feelings),[12] and there is precedent to support that possibility.[13] At any rate, damages are not presently restricted to itemised pecuniary loss, but are at large, and even *Lonrho* acknowledges that.[14] Further, and despite the concession of counsel in *Powell v. Boladz*,[15] a case later overruled anyway,[16] there is no reason in principle why damages for conspiracy could not extend beyond pecuniary loss to cover personal injury and physical damage, even if such instances might be rare. (An example might be a sports team setting out to injure an opposing player, even within the rules of the game.)

And yes, litigation often arises against the background of competition between businesses. But those cases which were truly about competition did not result in liability for conspiracy after all.[17] Liability only resulted in those cases which were characterised by personal ill-will or spite, and that can arise across a much broader range of circumstances, not just in business relations gone sour,[18] but also with jilted lovers,[19] bitter personal rivalries between millionaires,[20] or haughty behaviour by officials.[21] There is nothing to suggest that conspiracy only covers acts of an economic flavour. Indeed, the courts have rejected the argument that conspiracy is only limited to protecting a claimant in his trade or business,[22] just as defendants can be heard to say that they are advancing a much wider set of interests than mere economic or pecuniary ones.[23]

Third, if, as an economic tort, lawful act conspiracy is an anomaly and an aberration, does that not suggest that it is not an economic tort after all? Must conspiracy adopt a rationale in common with the other economic torts? Can it not find its own

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[11] [1994] 1 All E.R. 188 (C.A.) [*Lonrho*].

[12] Harvey McGregor, ed., *McGregor on Damages*, 18th ed. (London: Sweet & Maxwell, 2009) at para. 40-025; Paula Giliker, "A 'New' Head of Damages: Damages for Mental Distress in the English Law of Torts" (2000) 20 L.S. 19 at 35, 36.

[13] *Rookes v. Barnard* [1964] A.C. 1129 at 1221, Lord Devlin (H.L.) [*Rookes*]; *Michaels v. Taylor Woodrow Developments Ltd* [2001] Ch. 493 at para. 65, Laddie J.

[14] *Lonrho, supra* note 11 at 193, Dillon L.J. and 201, 204, Stuart-Smith L.J. See *Rookes, ibid.* at 1221, Lord Devlin; *R + V Versicherung AG v. Risk Insurance and Reinsurance Solutions SA (No. 3)* [2006] EWHC 42 (Comm) at para. 60, Gloster J.

[15] [1998] Lloyd's Rep. Med. 116 (C.A.).

[16] *Revenue and Customs Commissioners v. Total Network SL* [2008] 1 A.C. 1174 (H.L.).

[17] Exemplified most clearly by *Mogul* (H.L.), *supra* note 9, the first case to discuss lawful act conspiracy.

[18] *Gulf Oil (Great Britain) Ltd. v. Page* [1987] Ch. 327 (C.A.) [*Gulf*]; *Lim Leong Huat v. Chip Hup Hup Kee Construction Pte. Ltd.* [2011] 1 S.L.R. 657 (H.C.) [*Lim Leong Huat*].

[19] *X Pte Ltd v. CDE* [1992] 2 S.L.R.(R.) 575 (H.C.) [*X Pte Ltd*].

[20] *Lonrho, supra* note 11.

[21] *Quinn v. Leathem* [1901] A.C. 495 (H.L.) [*Quinn*]; *Huntley v. Thornton* [1957] 1 All E.R. 234 (Ch.) [*Huntley*].

[22] *Kuwait Oil Tanker Co SAK v. Al Bader (No. 3)* [2000] 2 All E.R. (Comm) 271 at para. 114 (C.A.). But lawful act conspiracy will not protect reputation which is, rightly, the exclusive domain of defamation: *Lonrho, supra* note 11. And it might not protect against the malicious exercise of (strict liability) contract rights: *Allen v. Flood* [1898] 1 A.C. 1 at 46, Wills J. (H.L.) [*Allen*]; D.J. Devine, "Some Comparative Aspects of the Doctrine of Abuse of Rights" (1964) Acta Juridica 148 at 172; G.H.L. Fridman, "Malice in the Law of Torts" (1958) 21 Mod. L. Rev. 484 at 489.

[23] *Crofter, supra* note 9 at 462, 478, 479, Lord Wright; *Scala Ballroom (Wolverhampton) Ltd. v. Ratcliffe* [1958] 3 All E.R. 220 at 223, Hodson L.J. and 224, Morris L.J. (C.A.) [*Scala*].

voice? Hence the attraction of seeking a different explanation for lawful act conspiracy. And indeed, the tort makes better sense when it is viewed as an instance of abuse of rights, as we shall discuss below.

II. The Appropriate Remit of Lawful Act Conspiracy

This section uses three sets of examples, some drawn from the case law, to persuade the reader as to which activities should and should not attract liability in lawful act conspiracy. In doing so, this section seeks to identify the appropriate remit of the tort, and argues that this remit is best realised by asking whether the defendants were motivated by malice to harm the claimant (and not, in particular, by offering the defendants a defence of justification).

(I) It should not be tortious for a professional athlete to engage a trainer with the purpose of enabling him to run faster than the reigning world champion. It should not be tortious for a group of politicians to set out a new and popular manifesto with the object of defeating the incumbent party at the next election. It should not be tortious for a group of scientists to devise a new medicine which more effectively treats an illness, even though no-one will continue to buy the medicine currently available. It should not be tortious for employees to lobby their employer to dismiss a co-worker for gross misconduct.[24] It should not be tortious for charity workers to persuade passers-by to make a donation.[25] It should not be tortious for citizens to agree not to buy cosmetics from a shop which tests on animals, even though loss to that shop is intended as the means of bringing about a change in policy. It should not be tortious for musicians to embargo a club which refuses to admit black people, with the purpose of bringing about equality of treatment.[26]

Happily, in none of these examples would lawful act conspiracy likely be made out. None of these activities would be censured by any of the three alternative *mens rea* requirements presented in the case law. This is because the tort does not simply ask whether the claimant has suffered loss as a result of the defendants' agreed course of conduct. As the courts have made clear, it is not even sufficient that the loss was foreseeable or inevitable or intended.[27] And rightly so, in order to avoid censuring activities such as those set out in the examples above. Hence the need, at the very least, for the additional requirement that loss to the claimant be the defendants' predominant purpose. In none of the examples is there any suggestion that loss to the claimant was the defendants' predominant purpose. Instead, the defendants sought to become the world's fastest runner, or become the next government, or cure disease, or create a healthier work environment, or support a charity, or improve animal welfare, or improve racial equality.

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[24] There is a similar discussion about whether it would be actionable for a cook to make her continued employment dependent on the sacking of a butler, in *Allen, supra* note 22 at 36, Cave J. and 57, Grantham J. and 138, 139, Lord Herschell and 165, 166, Lord Shand and 179, Lord James.

[25] A scenario mentioned in *Crofter, supra* note 9 at 493, Lord Porter.

[26] *Scala, supra* note 23.

[27] *Sorrell v. Smith* [1925] A.C. 700 at 748, Lord Buckmaster (H.L.) [*Sorrell*]; *Crofter, supra* note 9 at 444, 445, Viscount Simon; *Lonrho, supra* note 11 at 200, Stuart-Smith L.J.; *Quah Kay Tee v. Ong and Co Pte Ltd* [1997] 1 S.L.R.(R.) 390 at paras. 49, 50 (C.A.) [*Quah Kay Tee*]; *The "Dolphina"* [2012] 1 S.L.R. 992 at para. 201, Belinda Ang Saw Ean J. (H.C.).

So applying the first possible *mens rea* requirement presented by the case law,[28] the defendants' predominant purpose was not to cause loss to the claimant, but to advance their own interests (in becoming the world's fastest runner etc.). Applying the second possible *mens rea* requirement, the defendants' predominant purpose was not to cause loss to the claimant, so no further question arises about a defence of justification. Applying the third possible *mens rea* requirement, again the defendants' predominant purpose was not to cause loss to the claimant, so no further question arises about malice.

(II) It should not be tortious for parents to discipline a child by withholding an allowance. It should not be tortious for politicians to legislate a higher tax rate on the rich. It should not be tortious for doctors to perform an operation on an unconscious car crash victim, where a responsible body of professional medical opinion supports the need for such an operation. It should not be tortious for judges to sentence a convict to prison.

The first possible *mens rea* requirement cannot accommodate these examples. For a start, punishment by judges might, on some theories of punishment, be characterised as predominantly seeking to cause loss to the person punished. At any rate, the principal problem here is the binary formulation of the first possible *mens rea* requirement: the defendants' predominant purpose must be either to cause loss to the claimant, or to advance their own interests. But in these examples, the defendants do not seek to advance their own interests. Instead, they seek to advance the interests of the 'victim', or a further set of interests, and the first possible *mens rea* requirement cannot cope with that circumstance.

The second possible *mens rea* requirement could in theory accommodate these examples by allowing the defendants to say that they were acting to advance *any* legitimate interest (and not necessarily their own interests). Such a defence of justification, or acting with just cause, has been countenanced in the case law,[29] although there has also been judicial demur,[30] and no case has yet been decided upon such a defence. Indeed, such a defence would, in this context, be flawed, and for three reasons.

First, this defence of justification, unconstrained by reference to any other guidance than the judge's own moral compass, provides the defendants with no advance warning as to whether or not their conduct is lawful. It all depends on how the judge assesses the justice of their cause after the event, and it is invidious to impose liability on someone for conduct not proscribed in advance.[31] Second, it reverses the usual burden of proof by requiring the defendants to justify themselves. There is no good reason for this reversal, especially when the defendants have otherwise acted

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[28] *Sorrell*, *ibid.* at 712, Viscount Cave L.C. and 717, 723, 724, Lord Dunedin; *Crofter, supra* note 9 at 443, 445, 446, Viscount Simon L.C. and 452, Viscount Maugham and 491, 495, 496, Lord Porter; *Gulf, supra* note 18 at 333, Parker L.J.; *Lonrho, supra* note 11 at 192, Dillon L.J. and 198, 200, Stuart-Smith L.J.

[29] *Mogul* (C.A.), *supra* note 9 at 617, 618, Bowen L.J.; *Ware and de Freville, Limited v. Motor Trade Association* [1921] 3 K.B. 40 at 61, Bankes L.J. (C.A.) [*Ware*]; *Sorrell, ibid.* at 712, Viscount Cave L.C.; *Crofter, ibid.* at 452, Viscount Maugham and 491, 495, 496, Lord Porter; *Gulf, supra* note 18 at 334, Ralph Gibson L.J.; *Tribune Investment Trust Inc v. Soosan Trading Co Ltd* [2000] 2 S.L.R.(R.) 407 at para. 38 (C.A.).

[30] *Ware, ibid.* at 78, Atkin L.J.; *Sorrell, ibid.* at 726-729, Lord Dunedin and 747, 748, Lord Buckmaster.

[31] Tony Weir, *Economic Torts* (Oxford: Clarendon Press, 1997) at 68, 69.

lawfully.[32] The effect would be to create a *prima facie* strict liability tort of causing loss by lawful means, which entails a liability of unacceptably broad potential.

Third, it is probably beyond the competence of the court simply to apply its own conscience to determine which causes are 'just'. For a start, is it just to campaign for or against the death penalty or higher taxes? Is it just to campaign for or against controls on the media or pornography or animal testing? Can it be just to campaign both for and against such things? Can all sides of every argument be just? And structurally, the courts are not equipped, in a private dispute between few parties who themselves plead the issues, and given the limited time and evidence available, to determine the wider social implications of any particular cause. And constitutionally, it should be for the legislature and not the courts to determine such broad questions of social policy as the legitimacy of any particular cause. For precisely these reasons, the courts have already declared not justiciable the issue of whether genetically modified food is in the public interest, thus precluding a defence of acting to protect the public interest.[33] And for precisely these reasons, the courts also declined to use lawful act conspiracy to regulate 'fair' competition.[34]

Yet there is a defence of justification to the tort of procuring breach of contract, so might fruitful comparison be made there? The possibility was favourably noted in *Crofter*,[35] but previously rejected in *Sorrell*.[36] Indeed, this comparison—the only one invoked in the case law for lawful act conspiracy—provides no support for a defence of justification to the tort of lawful act conspiracy. For a start, the defendant to a claim of procuring breach of contract has procured an *unlawful* act, in contrast to the defendants who commit *lawful* act conspiracy.[37] Further, the defence of justification to the tort of procuring breach of contract is no role model: it has been described as "incapable of exact definition",[38] and "so limited as to be practically meaningless".[39] Finally, an example from the case law might seal the argument against any fruitful comparison.

In *South Wales Miners' Federation v. Glamorgan Coal Company, Limited*,[40] the defendant federation, without malice, called members out on strike, in breach of contract, with the object of securing better pay. The defence of justification failed. In other words, against a charge of procuring breach of contract, there was no defence of just cause in *Glamorgan Coal*, despite an absence of malice, and despite the purpose, surely unobjectionable,[41] of securing better pay.

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[32] *Sorrell, supra* note 27 at 728, Lord Dunedin and 748, Lord Buckmaster.

[33] *Monsanto Plc. v. Tilly* [1999] EWCA Civ 3044 (C.A.).

[34] *Mogul* (C.A.), *supra* note 9 at 615, 620, Bowen L.J. and 625, 626, Fry L.J.; *Mogul* (H.L.), *supra* note 9 at 43, Lord Watson and 45, 49, Lord Bramwell and 50, 51, Lord Morris; *Crofter, supra* note 9 at 472, Lord Wright.

[35] *Ibid.* at 491, 495, 496, Lord Porter.

[36] *Supra* note 27 at 713, Viscount Cave L.C.

[37] Yet even in *unlawful* act conspiracy, some authors would still deny a defence of justification: Carty, *supra* note 1 at 137; Deakin, Johnston & Markesinis, *supra* note 1 at 597; McBride & Bagshaw, *supra* note 1 at 688.

[38] Rogers, *supra* note 1 at 870.

[39] Deakin, Johnston & Markesinis, *supra* note 1 at 580.

[40] [1905] A.C. 239 (H.L.) [*Glamorgan Coal*].

[41] The same purpose featured, without ensuing liability, in *Brimelow v. Casson* [1924] 1 Ch. 302, and *Crofter, supra* note 9.

Of the four judges who sat in *Glamorgan Coal*, two had sat in *Mogul*,[42] and three had sat in *Quinn*,[43] being the first two cases to discuss lawful act conspiracy. It seems probable that had *Glamorgan Coal* been pleaded as a lawful act conspiracy, the claim would have failed, following the tests articulated in *Mogul* and *Quinn*, because the defendants had acted without malice only to further their own interests. But when instead the case was pleaded as procuring breach of contract, the claim succeeded, with no defence of justification. In other words, the two different torts need not produce the same result on the same set of facts; they are not comparable after all.

If the approach of the second possible *mens rea* requirement is unattractive, for the reasons just discussed, fortunately the examples in this section can be accommodated by applying the third possible *mens rea* requirement, and asking whether or not the defendants acted maliciously. In none of the examples was there any indication of malice, and so none of the activities would have attracted liability.

A test of malice finds strong support in the case law,[44] although again not without some judicial demur.[45] A test of malice is also factually consistent with almost all the outcomes of the cases in which lawful act conspiracy has been pleaded: the presence of malice led to liability, while an absence of malice led to no liability, whether or not malice was expressly adopted as the determining test.[46] And a test of malice suffers none of the problems which beset a defence of justification. There is no constitutional difficulty with the courts censuring malice, any more than there is with the courts censuring negligent or dishonest conduct (and the vocabulary of malice, and its censure, has been part of legal landscape for centuries). There is no structural difficulty with the courts identifying the presence of malice, since the necessary evidence comes from the parties themselves, and the factual finding of malice in one case has no wider implications (unlike the finding that a particular cause is just). The defendants know in advance that lawful conduct, for any cause at all, is only tortious when done maliciously. And the burden remains on the claimant to prove malice.

Nevertheless, a principal criticism of a test of malice is that motive is inscrutable,[47] although judicial attitudes on this point are mixed.[48] If that were so, it would anyway

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[42] *Supra* note 9.

[43] *Supra* note 21.

[44] *Mogul* (H.L.), *supra* note 9 at 36, 37, Lord Halsbury L.C. and 44, Lord Bramwell and 52, 57, Lord Field and 58, 59, Lord Hannen; *Quinn, supra* note 21 at 505, 506, Lord Halsbury L.C. and 511, 512, Lord Macnaghten and 513, 515, Lord Shand and 531, Lord Brampton and 535, 536, Lord Lindley; *Ware, supra* note 29 at 67, 71, Scrutton L.J. and 77, Atkin L.J.; *Sorrell, supra* note 27 at 748, Lord Buckmaster and 738, 739, Lord Sumner; *Quah Kay Tee, supra* note 27 at para. 50; *X Pte Ltd, supra* note 19 at para. 63, Judith Prakash J.C.

[45] *Sorrell*, *ibid.* at 714, 715, Viscount Cave L.C. (who nevertheless felt moved to record that the defendants were not anyway actuated by spite); *Scala, supra* note 23 at 223, 224, Hodson L.J. who nevertheless resolved the case on the basis that the defendants were acting to further their own interests anyway); *Crofter*, *supra* note 9 at 450, Viscount Maugham and 471, 472, Lord Wright (who still thought malice a relevant inquiry).

[46] Even Carty seems to acknowledge the important role of malice in lawful act conspiracy. See Carty, *supra* note 1 at 323.

[47] Richard O'Sullivan, "Abuse of Rights" (1955) 8 Curr. Legal Probs. 61, 71, 72; McBride & Bagshaw, *supra* note 1 at 687.

[48] Inscrutable: *Allen, supra* note 22 at 118, 119, Lord Herschell and 153, Lord Macnaghten; *Crofter*, *supra* note 9 at 471, Lord Wright. Not inscrutable: *Flood v. Jackson* [1895] 2 Q.B. 21 at 38, 39, Lord Esher M.R. (C.A.).

favour the defendants, since the claimant would bear the burden of proof. But motives *are* forensically scrutable. For a start, defendants can be asked what their motives were, and the credibility of their answers can be tested against other evidence. Assessing the truthfulness of witnesses has forever been the courts' daily task. And in particular, the courts are well practiced in inquiring into states of mind, such as intention or dishonesty. Finally, the case law itself is testament to how malice can readily be identified on the facts; in all cases where lawful act conspiracy was made out, there was clear evidence that the defendants were actuated by malice.[49]

(III) It should be tortious for defendants to stifle another man's attempts at gaining employment,[50] or to run a business into the ground,[51] to vindicate their own piqued pride or ruffled dignity. It should be tortious for defendants to print information about another person, to take pleasure in the destruction of his reputation.[52] It should be tortious for traders to force the closure of a rival as revenge for some perceived personal slight.[53]

On these examples, the first possible *mens rea* requirement would produce the wrong result by failing to censure these activities. This is because the defendants *are* seeking to advance their own interests, of personal gratification, satisfaction or fulfilment, or aggrandisement. The second possible *mens rea* requirement would also fail to censure these activities. How could seeking personal gratification or fulfilment ever be characterised as an 'unjust cause'? (So even if, despite my arguments above to the contrary, the reader still believes that the approach of the second possible *mens rea* requirement is not unattractive, nevertheless it cannot accommodate the examples given here, and so an alternative still needs to be sought.)

These examples do suggest reprehensible conduct—conduct which did indeed persuade the court to impose liability. Their reprehensible quality is precisely because the defendants' interests of personal gratification are being achieved only through spiteful predation upon the claimant. These examples merit the censure which the courts imposed, and that censure can be achieved by applying the third possible *mens rea* requirement for lawful act conspiracy, because the defendants' predominant purpose in these examples was to cause loss to the claimant out of malice.

By way of an interim conclusion, the three sets of examples given above sought to persuade the reader as to the proper remit of lawful act conspiracy. Only the third possible *mens rea* requirement was able to accommodate all three sets of examples: the defendants' predominant purpose must be to cause loss to the claimant out of malice. Thus that *mens rea* requirement is necessary to delineate the tort within proper bounds, and it also finds support in the case law, without suffering the problems which beset a defence of justification. Finally, a test of malice is a desirable ingredient in lawful act conspiracy anyway because of its potential to explain why lawful conduct might ever be tortious: malice turns the exercise of lawful rights into an abuse of rights, and that can be censured, as we shall now discuss.

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[49] *Quinn*, *supra* note 21; *Huntley*, *supra* note 21; *Gulf*, *supra* note 18; *Lonrho*, *supra* note 11; *X Pte Ltd, supra* note 19; *Lim Leong Huat, supra* note 18.

[50] *Huntley*, *ibid*.

[51] *Quinn, supra* note 21.

[52] *Gulf, supra* note 18; *Lonrho, supra* note 11; *X Pte Ltd, supra* note 19.

[53] For a similar scenario, see *Tuttle v. Buck* 119 N.W. 946 (Minn. 1909).

III. Abuse of Rights

It is best to view abuse of rights, not as its own self-standing cause of action, but as a descriptive justification of other more particular pleas, such as lawful act conspiracy.[54] Abuse of rights, conceived in the present context, means the exercise of specific rights, or the exploitation of the freedoms delineated by rights, unconscionably and contrary to the reasons for their recognition. It comprises a cynical misuse of the law and the courts need not tolerate that.

Two examples from other areas of law might illustrate the concept. First, it is unlawful to hit another person offensively, whereas it is lawful to hit another person defensively. But it is unlawful to incite an attack so as to hit another person offensively under the guise of self-defence.[55] In other words, the law of self-defence is not there to be cynically manipulated to circumvent the law against hitting another person offensively. Second, it is important that a claimant with a grievance has access to court. This is so whether or not the claim is ultimately successful. But a bad claim brought insincerely and cynically, merely to exert leverage on the other party through the daunting burdens of litigation, is liable to be struck out as an abuse of process, with an adverse order of indemnity costs. Indeed, such behaviour can even amount to lawful act conspiracy.[56]

So too it is an abuse of rights for defendants to inflict loss on another out of spite, cynically seeking shelter for such culpable behaviour behind the lawfulness of their activity. The reasons for recognising rights, and the freedoms they delineate, are no doubt manifold,[57] but never for enabling spiteful predation upon others. Malice is reprehensible, and the malicious exercise of rights in order to inflict loss should be censured.

The reader who agrees that malice is reprehensible might skip this paragraph. For the reader who is wavering, I offer some further views. For a start, there are perhaps economic arguments against acting maliciously. The person who acts with malice acts in a negative way. He seeks to inflict suffering. He is destructive. He does nothing which is creative or which contributes to the common wealth. He merely wastes resources.[58] At any rate, malice has been described as "the most reprehensible state of mind".[59] Kant too thought malice reprehensible, identifying it as being the essence of vileness and wickedness.[60] In Kantian vein, Finnis explains why: it is wrong to inflict suffering on another person for one's own gratification, because that

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[54] The explanation of lawful act conspiracy as an instance of abuse of rights is contemplated in Rogers, *supra* note 1 at 895. Other potential instances might include misfeasance in public office, and lawful act duress: Jason Neyers, "Explaining the Inexplicable? Four Manifestations of Abuse of Rights in English Law" in Donal Nolan & Andrew Robertson, eds., *Rights and Private Law* (Oxford: Hart Publishing, 2012) 309. On the relationship between lawful act duress and lawful act conspiracy, see Nathan Tamblyn, "Contracting Under Lawful Act Duress" [2010] 2 Sing. J.L.S. 400.

[55] David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed. (Oxford: Oxford University Press, 2011) at 391, 392.

[56] *Lim Leong Huat, supra* note 18 at para. 199, Quentin Loh J.

[57] For example, see Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 329-340.

[58] Lord Bramwell suggested that unnecessary competition might well be criticised for wasting the resources of the commonwealth: *Mogul* (H.L.) *supra* note 9 at 45, 46. How much more so then malicious conduct.

[59] Deakin, Johnston & Markesinis, *supra* note 1 at 31.

[60] Peter Heath & J.B. Schneewind, eds., Immanuel Kant, *Lectures on Ethics*, trans. by Peter Heath (Cambridge: Cambridge University Press, 1997) at 153, 197, 420.

treats the other person as a means and not also as an end in himself.[61] The satirist Samuel Butler said that, as men take pleasure in pursuing, entrapping, and destroying all sorts of beasts and fowl, and call it sport, so would the malicious man do men.[62] Thus the malicious man reduces his victim from a person to an object of sport, or simply a tool for self-gratification. Kant elaborated further: he said that humanity consists in sympathy and pity, whereas malice, to be pleased when others suffer, to bring about unhappiness wilfully, is cruel and inhuman.[63]

There are two final points to note. First, malice in the tort of lawful act conspiracy can be given an everyday meaning, as indeed it has been by the courts, to suggest ill-will,[64] personal ill-feeling,[65] vengeance,[66] malevolence,[67] or spite.[68] It is this everyday meaning which captures its reprehensible nature and which aligns lawful act conspiracy with the notion of abuse of rights.

Second, malice has a further role to play in lawful act conspiracy, beyond rendering lawful conduct abusive. Because malice is directed towards a victim, it identifies that victim as the appropriate claimant. It prevents lawful act conspiracy being actionable as an abuse of rights by anyone, however remote, who might have suffered as a consequence of the defendants' actions.

IV. Conclusion

The uncertainty concerning the definition of the tort of lawful act conspiracy should be resolved by requiring that the defendants' predominant purpose be to cause loss to the claimant out of malice. This finds support in the case law, and of the three possible *mens rea* requirements presented in the case law, it is the only one which secures a proper remit for lawful act conspiracy when applied across a range of factual scenarios. It also suffers none of the problems which beset a defence of justification. Quite the contrary, a test of malice is able to answer the principal theoretical challenge to lawful act conspiracy by explaining why otherwise lawful conduct might be tortious: malice turns the exercise of lawful rights into an abuse of rights, and that warrants censure. Thus lawful act conspiracy is best understood, not as an economic tort, but as an instance of abuse of rights.

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[61] John Finnis, "Intention in Tort Law" in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 229 at 244.

[62] Samuel Butler, "Varieties of Malice and Corruption" in Amélie Oksenberg Rorty, ed., *The Many Faces of Evil: Historical Perspectives* (London: Routledge, 2001) 151 at 153.

[63] *Supra* note 60 at 200, 421.

[64] *Mogul* (H.L.), *supra* note 9 at 44, Lord Bramwell and 52, 57, Lord Field; *Ware, supra* note 29 at 77, Atkin L.J.

[65] *Mogul* (C.A.), *supra* note 9 at 622, Fry L.J.

[66] *Quinn, supra* note 21 at 511, 512, Lord Macnaghten; *X Pte Ltd, supra* note 19 at 63, Judith Prakash J.C.

[67] *Quinn*, *ibid.* at 531, Lord Brampton; *Quah Kay Tee, supra* note 27 at para. 50.

[68] *Ware, supra* note 29 at 67, 71, Scrutton L.J.; *Sorrell, supra* note 27 at 748, Lord Buckmaster; *Quah Kay Tee, ibid.* at para. 50; *X Pte Ltd, supra* note 19 at para. 63, Judith Prakash J.C.