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THE MODERN FUNCTIONS OF THE ECONOMIC TORTS: REVIEWING THE ENGLISH, CANADIAN, AUSTRALIAN, AND NEW ZEALAND POSITIONS

HAZEL CARTY*

ABSTRACT. *The economic torts were developed to regulate excessive competitive practice. They had the limited function of stretching existing civil liability where a defendant deliberately inflicted economic harm on a claimant, through the use of an intermediary. However, claimants seek to expand the function of the unlawful means and conspiracy torts so that they can fill "gaps" in existing tort liability, to regulate commercial misbehaviour more generally. In light of this phenomenon, the aim of this article is to analyse the modern approach to these torts in the English, Canadian, Australian, and New Zealand courts.*

KEYWORDS: *economic torts, conspiracy tort, unlawful means tort.*

I. INTRODUCTION

Traditionally, the economic torts – the unlawful means tort, the conspiracy tort, and the tort of inducing breach of contract[1] – were accepted to be unusual in shape and severely limited in scope. Their *shape* was unusual because it did not involve the direct infliction of harm, the norm in tort law.[2] These torts instead involved the defendant intentionally inflicting economic harm on that claimant using an intermediary, economically linked to that claimant.[3] Their shape was thus based on intermediary use, the defendant "deliberately striking at his target through a third party".[4] Their *scope* was limited in part by the need for intentional harm.[5] But mere intentional

* Reader in Law Manchester Law School. I am indebted to John Murphy who read and commented on an earlier draft of this article and to the anonymous reviewers. Address for Correspondence: School of Law, The University of Manchester, Manchester, M13 9PL, UK. Email: hazel.carty@manchester.ac.uk.

1 The names of these torts have varied over the years but this article will use their most modern nomenclature. For the purposes of this article, the remaining economic tort – intimidation – is assumed to form part of the tort of causing loss by unlawful means. However, see J. Murphy "Understanding Intimidation" (2014) 77 (1) M.L.R. 33.

2 *Palsgraf v Long Island Railway Co.* (1928) 248 N.Y. 339, per Cardozo C.J., the plaintiff must "sue in her own right for a wrong personal to her and not as the vicarious beneficiary of a breach of duty to another" (p. 342).

3 And indeed *OBG Ltd. v Allan* [2007] UKHL 21; [2008] 1 A.C. 1, per Lord Hoffmann, in defining the unlawful means tort, stated that the wrongful interference had to be with the actions of a third party in which the claimant has an economic interest (at [47]).

4 *OBG Ltd.* [2007] UKHL 21; [2008] 1 A.C. 1, at [306], per Baroness Hale.

5 In the tort of inducing breach of contract, it is the intention to cause breach.

economic harm could not suffice to determine the scope of the torts if competitive activity was to be allowed. Thus, the common law accepted that a further element restricting liability should be identified: in other words, an additional factor would be required to spark liability.

The shape of the tort of inducing breach of contract had to be indirect by its very nature: the claimant's contract partner (the intermediary) had to be persuaded into breach by the defendant. As for this tort's scope, though for some time obscured by uncertainty, it has now been established in the jurisdictions reviewed in this article, that its scope is limited to where the defendant has intentionally procured a breach of contract by the claimant's partner. The tort is parasitic on that breach being procured: mere interference with the contract will not suffice to spark liability.[6] And, as Lord Hoffmann made clear in *OBG v Allan*,[7] the shape and scope of this tort are governed by its function, namely to treat "contractual rights as a species of property which deserve special protection".[8]

The unlawful means and conspiracy torts – the focus of this article – were governed by a different function: to police rivalry in the competitive process by determining what was excessive trade conflict.[9] Thus, the early cases that herald the former tort involve an attack (literally!) on the prospective customers of the claimant.[10] In 2007, Lord Hoffmann asserted in *OBG v Allan* that the unlawful means tort was "designed only to enforce basic standards of civilised behaviour in economic competition"[11] while Deakin and Randall note that the economic torts "set limits to rivalrous behaviour in a market setting".[12]

But this function – to police trade conflict/rivalry – also determined that these torts, like the inducing breach tort, should have an indirect shape and a severely restricted scope.

Their indirect shape mirrors the almost inevitable use of an intermediary in an economic attack on a claimant.[13] As Weir noted, "to ruin a person financially the action you must take must be indirect, through another person, the source of his earnings or profits".[14] And the trade conflict function

6 The Canadian, Australian, and New Zealand courts appear content to follow *OBG* in rejecting the unitary theory and the interference with contractual relations tort and in accepting the narrow definition of the tort of inducing breach of contract. See *Correia v Canac Kitchen* (2008) 91 O.R. (3d) 353, at [99] (Ontario CA); *Murray v A&J Bilske Pty Ltd.* [2012] NTSC 05, at [100], per Mildren J. (Australia); *Diver v Loktronic Industries Ltd.* [2012] NZCA 131 (New Zealand).

7 *OBG Ltd.* [2007] UKHL 21; [2008] 1 A.C. 1.

8 Ibid., at para. [32].

9 Indeed, the unlawful means tort was originally named the tort of unlawful interference with trade.

10 *Garret v Taylor* (1620) Cro. Jac. 56; *Tarleton v M'Gawley* (1793) Peake N. P270.

11 *OBG Ltd. v Allan* [2008] 1 A.C. 1, at [56].

12 S. Deakin and J. Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519, 520, and 532. However, later they state that the torts protect against "the use of illicit means to seek commercial advantage" (at p. 534).

13 There are areas of the civil law that can protect claimants' economic interests where they are directly harmed by the defendant – such as deceit; conversion; breach of confidence; breach of fiduciary duty.

14 T. Weir, *A Casebook on Tort*, 10th ed. (London 2004), 572.

was also reflected in a narrow definition of intention and by the additional liability spark chosen.

So the orthodox test for intention in these torts required "targeted" or "aimed-at" harm. This required a tight nexus between the harm effected by the defendant on the claimant through the intermediary and avoided creating liability for the inevitable economic harm that would ripple beyond the main protagonists into their wider commercial or economic links.

Caution also determined the nature of the additional liability spark for these torts – a matter debated in the late Victorian era. That debate was whether the spark should follow an interventionist or abstentionist policy. The former would require the judges to decide on whether the attack was justified; the latter would severely limit the courts' interference by requiring potentially unlawful acts to be employed by the defendant as part of that attack. In the seminal House of Lords' decision of *Allen v Flood*,[15] it was decided that the abstentionist policy was to be preferred. This was in line with judicial concern that the trade conflict function of these torts should not require the courts to decide upon the boundaries of fairness in competition. In essence, these economic torts were to be "parasitic" on a separate civil wrong.

Therefore, the unlawful means tort and the conspiracy tort (apart from the severely limited *Quinn v Leathem* version, discussed below) simply stretched[16] existing civil liability in order to protect the claimant, the real target of the defendant's attack. What they did not do was fill gaps in the common law by making tortious behaviour that did not already involve a civil wrong.

This limited scope meant that these torts were not perceived to be of major importance where the trade competition involved commercial parties. However, where "competition in labour"[17] was involved, concern over trade union power and industrial action led some courts to seek an expansive, interventionist approach to the economic torts, despite the policy of *Allen v Flood*.[18] Until the 1980s, Parliament reacted by providing immunities from the economic tort liability that would almost inevitably arise in trade disputes in order to provide liberty to engage in peaceful industrial action.[19] Subsequently, of course, this policy of keeping industrial disputes out of court was reversed by the Thatcher administration. In effect,

15 Lord Watson limited the scope to the use of illegal means, defined as "means which in themselves are in the nature of civil wrongs", *Allen v Flood* [1898] A.C. 1, 97–98. Re. conspiracy, note the views of Laddie J. in *Michaels v Taylor Woodrow* [2001] Ch. 493, at [38]–[49], [66], that unlawful means must be the same for both torts.

16 "Liability stretching" was the phrase used by Cromwell J. in *A.I. Enterprises Ltd. v Bram Enterprises Ltd.* 2014 SCC 12, at [37].

17 Lord Shand in *Allen* [1898] A.C. 1.

18 Even though that was in essence a trade dispute case involving inter-union rivalry.

19 Where the defendant was acting in the course of a trade dispute. This started with the Trade Disputes Act 1906; now see Trade Union and Labour Relations (Consolidation) Act 1992 (as amended).

therefore, though economic tort liability still lies at the heart of industrial dispute law, statutory regulation is now the most important feature of liability. Parliament has taken over the task of delimiting "what industrial action should be lawful or unlawful", given it is assumed that action not covered by the immunities is unlawful.[20]

It was hardly surprising, therefore, that Lord Hoffmann, writing extra-judicially in 2011, accepted a modest role for the economic torts. Where regulating industrial relations was involved, he predicted "the economic torts have run their course".[21] As for regulating other competition, he stated that the common law should be "modest in its ambitions", confining itself to preventing "crude and obvious forms of unfair competition which seldom in practice occur". Overall, he acknowledged that the decision in *OBG* (discussed below) reflected "a wish to confine the economic torts as narrowly as possible" and hoped that economic tort cases would become "rare curiosities of little practical consequence".[22]

Yet, a review of commercial litigation both in England and the major Commonwealth jurisdictions of Canada, Australia, and New Zealand reveals that claimants/plaintiffs are increasingly turning to the economic torts to seek redress in commercial disputes, pleading them in "new and creative ways".[23] The aim is to persuade the courts that the unlawful means and conspiracy torts should no longer be seen simply as policing trade conflict and the competitive process, but rather as providing protection more generally against interference with economic interests. They wish to broaden the remit of these torts so that they are no longer simply "stretching" existing liability but are gap-filling, creating new civil liability where economic harm has been intentionally caused but where other civil liability might be problematic or lacking.[24] To do so, they have questioned both the shape and the limited scope of these torts.

This quest has been successful in part. In recent years, the House of Lords in *OBG*,[25] the Supreme Court of Canada in *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*,[26] and the Court of Appeal of New Zealand in *Diver v Loktronic Industries Ltd.*[27] have all declined to expand the shape

20 Lord Hoffmann, "The Rise and Fall of the Economic Torts" in J. Edelman, J. Goudkamp and S. Degeling (eds.), *Torts in Commercial Law* (Sydney 2011), 113. It is significant that the extension of the conspiracy tort in both Canada and Australia appears to be based on the statutory regulation of industrial action.

21 Ibid., at p. 114. (On the potential impact of *OBG* on economic tort liability in labour disputes, see further B. Simpson, *OBG* case comment [2007] I.L.J. 468.)

22 Ibid., at pp. 113, 116, respectively.

23 M. Matthews, C. O'Cinneide and J. Morgan (eds.), *Hepple & Matthews' Tort: Cases and Materials*, 6th ed. (Oxford 2008), 864.

24 See Cromwell J., *A.I. Enterprises Ltd.* 2014 SCC 12, at [43], though unfortunately he describes liability stretching as "gap-filling".

25 *OBG Ltd.* [2007] UKHL 21; [2008] 1 A.C. 1.

26 *A.I. Enterprises Ltd.* 2014 SCC 12.

27 *Diver* [2012] NZCA 131. The case concerned the agreement of a manufacturer and the defendant company to cut out the plaintiff middleman from its distribution chain.

and scope of the unlawful means tort and it is likely that the High Court of Australia will follow suit.[28] However, the House of Lords in *Total Network SL v Revenue and Customs Commissioners*,[29] the Supreme Court of Canada in *Canada Cement LaFrage Ltd. v British Columbia Lightweight Aggregate Ltd.*,[30] and the Federal Court of Australia in *Dresna Pty Ltd. v Misu Nominees Ltd.*[31] have determined that the conspiracy tort has its own vitality (a view which appears reflected in some of the dicta of the High Court of Australia in *Williams v Hursey*).[32] And *Total Network* has been accepted to be authority for the tort in New Zealand.[33] Thus, this tort is now accepted in all the jurisdictions to include the direct infliction of economic harm and to play a gap-filling role, imposing liability even where there is no civil liability to be "stretched". Consequently, the shape and scope of the unlawful means and conspiracy torts now differ the one from the other in these jurisdictions.

This article seeks to review and analyse that phenomenon. What will be argued is that the different reactions to the unlawful means and conspiracy torts result from the courts attributing different modern functions to these two torts.

The unlawful means tort continues to be viewed as a tort limited to resolve the parameters of acceptable competitive conflict. For this reason, as the House of Lords in *OBG* accepted, it is still based on the infliction of indirect harm and simply involves stretching existing civil liability. On the other hand, the conspiracy tort has been handed a wider function: the control of intentional harm caused by commercial *misbehaviour* – which concept as yet has not been adequately defined or delimited but clearly extends beyond the presence of civil wrongs.[34]

It will further be argued that these courts have failed to justify the acceptance of this new function for the conspiracy tort and that the ripples of uncertainty that flow from the revitalised tort of conspiracy will ultimately call into question the future function of the unlawful means tort. This last concern is compounded by the uncertainty as to the modern definition of intention in these torts.

II. Background

The traditional function of the economic torts was to protect against excessive trade competition, providing protection in certain circumstances against the indirect infliction of economic harm. Lord Watson in *Allen v*

28 *Sanders v Snell* (1998) 196 C.L.R. 329.
29 *Total Network SL v Revenue and Customs Commissioners* [2008] UKHL 19; [2008] 1 A.C. 1174.
30 *Canada Cement LaFrage Ltd. v British Columbia Lightweight Aggregate Ltd.* [1983] 1 S.C.R. 452.
31 *Dresna Pty Ltd. v Misu Nominees Ltd.* [2004] F.C.A.F.C. 169 (Federal Court of Australia Full Court).
32 *Williams v Hursey* (1959) 103 C.L.R. 30 (see Menzies J. and Taylor J.).
33 *Wagner v Gill* [2014] NZCA 336, at [71].
34 There are of course some who suggest that the unlawful means tort may not be confined to economic losses. See N.J. McBride and R. Bagshaw, *Tort Law*, 4th ed (London 2012), 699.

Flood analysed intermediary-use civil liability for intentional economic harm as contained within two torts – now recognised as the tort of inducing breach of contract and the unlawful means tort.[35] The trade competition function determined the shape – harming the claimant indirectly through the instrument of a third party[36] – and was also *ultimately* crucial in determining their scope so that they would not unduly inhibit competitive activity.

Of course, this is a neat and simplified summary. The impact of *Allen v Flood* was not clear initially and subsequently the direction of the law became entangled with the wider debate on the emerging trade unions and labour competition. Industrial disputes inevitably involve collective labour or their representatives using the weapon of economic harm against trade dispute employers. And that harm will involve intermediary use, the trade dispute employer's economic connections.

Concern in certain judicial quarters on the rise of trade union power (and an inability to equate labour competition with commercial competition) explains the decision in *Quinn v Leathem*,[37] decided some three years after *Allen v Flood* by a differently constituted House of Lords. Though the facts were essentially the same as *Allen*, the *Quinn* court used the additional allegation of conspiracy to create a new version of the conspiracy tort. At this time, a tort of *unlawful* means conspiracy seemed to exist,[38] though it would be assumed that this was subject to the same abstentionist policy as for the unlawful means tort. However, the *Quinn v Leathem* version of conspiracy – *lawful* means conspiracy – favoured an interventionist role for the common law. This was based on the same indirect shape as the other economic torts and, like them, required intentional harm. However, liability in this version of the tort was sparked not by civil wrongs, but by a predominant purpose of malice or malevolence.

This new tort was always seen as a damp squib, the malice spark appearing to limit the tort to extreme scenarios, rare in competitive practice.[39]

35 "There are … two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly … induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor … it may yet be to the detriment of a third party; and in that case … the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party", *Allen* [1898] A.C. 1, 92–93, 97–98.

36 *OBG Ltd.* [2007] UKHL 21; [2008] 1 A.C. 1, at [159] per Lord Nicholls. What Viscount Cave L.C. termed the "famous trilogy of cases" (in *Sorrell v Smith* [1925] A.C. 700 (HL)) which helped establish the economic torts – *Mogul SS. Co. v McGregor, Gow & Co.* [1892] A.C. 25; *Allen* [1898] A.C. 1 and *Quinn v Leathem* [1901] A.C. 495 – followed this intermediary-use attack scenario. Lord Hoffmann, in *OBG Ltd.* [2007] UKHL 21, at [20], referred to *Clifford v Brandon* (1810) 170 E.R. 1183; *Gregory v Brunswick* (1846) 136 E.R. 192 (the obstruction of stage actors by concerted hissing) where direct harm rather than intermediary use was involved. However, whether these are truly based on conspiracy liability remains unclear and they did not lead to any discernible development in the common law.

37 *Quinn* [1901] A.C. 495.

38 Though Salmond in 1924 doubted whether the tort existed, *Salmond on Torts*, 6th edn (London 1924), 576–78.

39 Both its lawful and unlawful means varieties – has been accepted by the highest courts in Canada, Australia (see below), and New Zealand (in *Wagner* [2014] NZCA 336, at [48]).

However, it heralded an unsettling pattern in the twentieth-century development of these torts in England. Given industrial disputes involve economic pressure, the scope of the economic torts was explored by employers in their attempt to prevent or limit such pressure (and often to circumvent the statutory immunities). The attempt to expand these torts led to success in some notable cases. The muddle that ensued led to the boundaries between inducing breach of contract and the unlawful means tort becoming blurred, in the so-called "unified theory" of economic tort liability and to the emergence of a hybrid tort – the tort of unlawful interference with contractual relations. This hybrid tort was devised as a method of avoiding the limits placed on the established economic torts. At the same time, and more central to this article, Lord Denning, a major player in the interventionist camp, propounded in *Torquay Hotel v Cousins* a wide definition of unlawful means – an act which the defendant "is not at liberty to commit".[40] Within the definition of this liability spark, he subsequently included aiding and abetting the breach of an injunction[41] and contravention of a non-criminal competition statute.[42]

What is interesting is that, despite the uncertainties that bubbled away throughout the twentieth century, the unlawful means tort and the conspiracy tort *in England* continued to be pleaded only where there was an indirect infliction of harm through intermediary use.[43] Their function continued to be that of policing conflict in competition. And ultimately the House of Lords in *OBG*, because of that function, reasserted the abstentionist policy established in *Allen v Flood*. Though *OBG* itself did not consider the unlawful means conspiracy tort, there was no reason to suspect at this time that the conspiracy tort would involve a different function, shape, or scope to the unlawful means tort. Indeed, throughout the twentieth century, the tort of conspiracy in England appeared to be an unimportant "legal backwater",[44] adding little to economic tort liability. Thus, commentators and leading judges alike dismissed the lawful means form as of little use[45] and anomalous,[46] while largely side-lining the unlawful means form as "unnecessary"[47] or as parallel to joint tortfeasance liability.

40 *Torquay Hotel v Cousins* [1969] 2 Ch. 106, 139 (he relied on dicta from Lord Macnaghten in *Quinn* [1901] A.C. 495).
41 *Acrow (Automation) Ltd. v Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676.
42 *Daily Mirror v Gardner* [1968] 2 QB 762 (a case rejected by Lord Hoffmann in *OBG Ltd.* [2007] UKHL 21, at [36]).
43 Lord Denning deviated from the intermediary-use template in his campaign to protect the record industry against bootleggers. But in these (interim) cases – *Carlin v Collins* [1979] FSR 548; *ex parte Island Records* [1978] Ch. 122 – the harm to the claimant's contractual partners looks foreseeable rather than targeted.
44 G. Mitchell Q.C., "Conspiracy: A Wide Ranging Tort" (2008) N.L.J. 773.
45 P. Sales, "The Tort of Conspiracy and Civil Secondary Liability" [1990] C.L.J. 491.
46 *Lonrho v Fayed* [1992] 1 A.C. 448, 463, per Lord Bridge.
47 Lord Dunedin, "mere surplusage", *Sorrell* [1925] A.C. 700, 716.

Indeed, in *Lonrho v Shell*, Lord Diplock appeared to reject the unlawful means form of the conspiracy tort.[48]

III. The Quest for Expanded Economic Tort Protection

It has become apparent that litigants in both England and the Commonwealth seek to question the traditional function ascribed to the unlawful means and conspiracy torts. Not content to see these torts as limited to policing competitive conflict, they seek to expand these torts to counter commercial malpractice, to become in essence "the staple of commercial litigation",[49] "resolving the boundaries of commercial ethics".[50]

To achieve this, they must persuade the courts that these torts should play a gap-filling role and no longer be limited to the indirect infliction of economic harm.

Thus, there are examples of litigants seeking to use these torts to overcome the limits of existing civil wrongs.[51] This phenomenon became apparent in the *OBG* litigation itself.[52] The consolidated appeals in *OBG* involved (inter alia) an attempt to use the economic torts to improve on the tort of conversion and protect third parties economically harmed by a breach of confidence. In *A.I. Enterprises* at Court of Appeal level, the court was willing to apply the unlawful means tort to activity judged akin to the tort of abuse of process.[53] The limits of contractual protection were tested using the economic torts in *Barber v Vrozos*,[54] *Hardie Finance Corp Pty Ltd. v Ahern (no3)*,[55] *Agribrands Purina Canada Ltd. v Kasamekas*,[56] and *Diver v Loktronic Industries Ltd*.[57] Indeed, an abuse of a contractual right to first refusal was the background to the litigation in *A.I. Enterprises*.

There is a similar trend to plead these economic torts when seeking to achieve civil redress where a non-actionable breach of statutory provision is involved. This was the case in the seminal Canadian conspiracy case,

48 *Lonrho v Shell* [1982] A.C. 173 (HL), 189. P. Burns contended at the time "thus in the UK today there is only the tort of conspiracy to injure", "Civil Conspiracy: An Unwieldly Vessel Rides a Judicial Tempest" (1982) 16 U.B.C.L.R. 229.

49 In Canada, "they are now the staple of commercial litigation", B. Kain and A. Alexander, "The 'Unlawful Means' Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?", in T.L. Archibald and R.S. Echlin (eds.), *Annual Review of Civil Litigation, 2010* (Toronto 2010).

50 Janet O'Sullivan, "Intentional Torts, Commercial Transactions and Professional Liability" (2003) 3 P.N. 164.

51 Mitchell, "Conspiracy", notes that the transaction in *Meretz v ACP Ltd.* [2007] EWCA Civ 1303; [2008] Ch. 244 "ordinarily would only have been considered from a conveyancing or mortgage/guarantee point of view".

52 *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [97], per Lord Walker.

53 *Torquay Hotel v Cousins* 2012 NBCA 33, at [82]–[83].

54 *Barber v Vrozos* 2010 ONCA 570: contract breach causing inevitable harm to plaintiff sub contractor.

55 *Hardie Finance Corp Pty Ltd. v Ahern (no3)* [2010] WASC 403, discussed below, repossession on a lessee causing economic harm to the plaintiff lessor.

56 *Agribrands Purina Canada Ltd. v Kasamekas* 2011 ONCA 460. For facts, see note 118.

57 *Diver* [2012] NZCA 131.

Canada Cement LaFrage Ltd. v British Columbia Lightweight Aggregate Ltd.[58] There are more recent English High Court cases where claimants have sought to use non-actionable breaches of non-criminal statutes as unlawful means for the conspiracy tort.[59] And of course the background to *Total Network* was the statutory VAT rules.

More broadly, litigants have sought to use the economic torts where the defendant has rendered the claimant's exercise of an economic right more difficult. So there are cases where the economic torts[60] have been pleaded where the allegation is that there has been asset stripping of debtor companies to cause loss to the claimant;[61] or circumvention of a charge on a loan made by the claimant[62] or the restructuring of a fund to defeat the claimant's economic interests.[63] Beyond such cases, the torts have been pleaded based on (in effect) an allegation of an abuse of power by a regulatory body and by a trade association[64] and where misstatements to a regulatory body caused economic harm.[65]

The reaction of the courts in all these jurisdictions reveals a new dichotomy between the application of the two torts. This will now be revealed.

IV. The Modern Shape and Scope of the Unlawful Means Tort

Following the muddle that the economic torts got into in the twentieth century (noted above), in *OBG*,[66] Lord Hoffmann took the economic torts back to basics, and underlined the return to an abstentionist policy. He did so in order to provide a "coherent shape" to this area of tort law. With this clarification, Lord Hoffmann accepted that the unlawful means tort requires both potentially actionable civil wrongs[67] and intermediary use.[68] This

58 *Canada Cement LaFrage Ltd. v British Columbia Lightweight Aggregate Ltd*. [1983] S.C.J. 33. The definition of unlawful means included a non-actionable statutory criminal offence.

59 *Digicel (St. Lucia) Ltd. v Cable & Wireless Plc* [2010] EWHC 774 (Ch), Morgan J., *Concept Oil Services v En-Gin Group LLP* [2013] EWHC 1897 (Comm), at [50], per Flaux J. See note 153 below.

60 Usually but not exclusively conspiracy.

61 *Bank of Tokyo-Mitsubishi UFJ Ltd. v Baskan Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch), per Briggs J.; *Meretz* [2007] EWCA Civ 1303; [2008] Ch. 244; *HSBC Bank Canada v Fuss* [2013] ABCA 235; *Fatimi Pty Ltd. v Bryant* (2004) 59 NSWLR 678 (New South Wales Court of Appeal); *Wagner* [2014] NZCA 336; *Erste Group Bank AG v JSC (VMZ Red October)* [2013] EWHC 2926 (Comm).

62 *Thames Valley Housing Association v Elegant (Guernsey) Ltd.* [2011] EWHC 1288 (Ch), per Lewison J.

63 *Fortress Value Recovery Fund v Blue Skye Special Opportunities Fund* [2013] EWHC 14, per Flaux J.; *Concept Oil Services Ltd.* [2013] EWHC 1897 (Comm), per Flaux J.

64 *Ontario Racing Commission v O'Dwyer* (2008) 293 DLR (4th) 559 (Ont. CA): official from the horse-racing agency decided the plaintiff could no longer work as a race starter; *Reach M.D. Inc. v Pharmaceutical Manufacturers Assn of Canada* [2003] O.J. No. 2062 227 D.L.R. (4th) 458 (Ont. CA), the defendant trade association directed its members to refrain from advertising in the plaintiff's calendar, contrary to the defendant's code.

65 *Dresna Pty Ltd.* [2004] F.C.A.F.C. 169 (Federal Court of Australia Full Court) (discussed below).

66 There were three consolidated appeals.

67 I.e. where the means are civilly actionable or where the only reason the means are not actionable "is because the third party has suffered no loss", *OBG Ltd.* [2007] UKHL 21, at [49].

68 Lord Hoffmann added a new additional requirement: the intermediary had to be one in whom the claimant has an economic interest, *OBG Ltd.* [2008] 1 A.C. 1, at [47]. Lord Nicholls preferred the "instrumentality" test.

narrow view of the unlawful means tort was summarised by Lord Nicholls as affording the claimant "a like remedy if the defendant intentionally damages him by committing an actionable wrong against a third party".[69] It was confirmed that this tort stretches existing civil liability but does not act as a gap-filler – "the defendant's civil liability is expanded thus far, but no further."[70] And the reason for this narrow approach to the tort was the perceived function: only enforcing "basic standards" where economic competition was concerned. Writing extra-judicially, Lord Hoffmann accepted that the common law should remain modest in its ambitions when regulating competition.[71]

OBG's confirmation of the narrow remit of the unlawful means tort is also to be found in the recent Supreme Court of Canada decision, *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*[72]

The unlawful means tort had been bubbling away for years in Canadian case law.[73] It became accepted that this tort requires intermediary use[74] but there were conflicting approaches to the requirement for unlawful means. So crimes,[75] breaches of a court order,[76] and statutory infringement[77] had all been found to constitute the necessary unlawful means and some courts even favoured Lord Denning's "not at liberty to commit" test.[78] The most notable example of this was *Reach M.D. Inc v Pharmaceutical Manufacturers Assn of Canada*,[79] where the defendant trade association's *ultra vires* command to its members (to refrain from advertising in the plaintiff's calendar) was held to constitute unlawful means. Laskin J.A. characterised the Denning test as involving acts "without legal justification", noting it was a test based on common sense.[80]

This uncertainty as to the definition of unlawful means was compounded by a tangle of conflicting decisions, particularly in the Ontario Court of Appeal, post *OBG*. In *Alleslev-Krofchak v Viacom Ltd.*, Goudge J.A. stated that the Ontario Court of Appeal "has now opted for Lord Hoffmann's side

69 *OBG Ltd.* [2007] UKHL 21; [2008] 1 A.C. 1, at [153]–[155]. He of course rejected this narrow view.
70 Ibid., at paras. [153]–[155], per Lord Nicholls.
71 Hoffmann, see note 20 above, at p. 114.
72 *A.I. Enterprises Ltd.* 2014 SCC 12.
73 Apparently accepted by the SCC in *I.B.T., Local 213 v Therien* [1960] S.C.R. 265.
74 This is the phrase used by the Ontario CA in *Correia* (2008) 91 O.R. (3d) 353, at [107].
75 E.g. bribery in *ONSC 671122 Ontario Ltd. v Sagaz Industries Canada Inc.* [1998] 40 O.R. (3d) 229 (ONSC).
76 *Conway v Zinkhofer* 2008 ABCA 392. The defendant registered encumbrances against the plaintiff's property in contempt of a court order. As a result, a third party refused to extend financing to the plaintiff.
77 In *I.B.T., Local 213* [1960] S.C.R. 265, the SCC determined that, to ascertain whether the means employed were illegal, "enquiry may be made both at common law and of the statute law", at p. 280. However, note the views of Cromwell J. in *A.I. Enterprises Ltd.* 2014 SCC 12, at [62].
78 Roberston J.A. in the NBCA level of *A.I. Enterprises* commented that Lord Denning's treatment of the unlawful means issue in *Torquay Hotel*, 2012 NBCA 33, "has been a mainstay of the Canadian jurisprudence", at [4], [47].
79 *Reach M.D. Inc.* [2003] O.J. No. 2062 227 D.L.R. (4th) 458 (Ont. CA).
80 Ibid., at para. [52].

of the debate"[81] but, in *Barber v Vrozos*, a near-simultaneous decision, the Ontario Court of Appeal applied the *Reach* definition, unlawful means including an act without legal justification.[82] To add to the confusion, though the Ontario Court of Appeal in *Alleslev-Krofchak* and the New Brunswick Court of Appeal in *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*[83] accepted Lord Hoffmann's narrow view, they were also prepared to accept qualifications: gap-filling was a possibility.

Against this uncertainty, the Supreme Court of Canada in *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*[84] had its first opportunity to consider this tort in 40 years.[85]

The case concerned family members who owned an apartment building. There was a syndication agreement whereby, if the majority decided to sell, the minority had the right to purchase at the appraised value. Failing this, the building could be sold to a third party. The defendants/appellants (a dissenting family member and his company) refused to offer to buy at the appraised value and pursued a campaign of blocking tactics to inhibit any other sale.[86] They did this by starting arbitration proceedings, encumbrancing the title,[87] and denying possible purchasers access to the property. Two offers higher than the appraised value were lost as a result. The plaintiffs ultimately sold the property to the defendants (after a two-year delay) for its appraised value, but sued for the difference between that and the higher of the two offers that fell through. They relied on the unlawful means tort.

Though there was no actionable wrong committed against the potential purchasers, the plaintiffs argued there should be a "broad bright line rule"[88] for establishing unlawful means. They contended that the required unlawful acts comprised the erection of legal barriers based on spurious claims, in order to prevent the sale to the interested third parties.[89] They succeeded both at first instance – the trial judge applying the lack of legal justification test – and on appeal, the New Brunswick Court of Appeal deciding that there should be principled exceptions to the *OBG* actionability test.

81 *Alleslev-Krofchak v Viacom Ltd.* 2010 ONCA 557 (conspiracy to defame set against inter-linked contractual relationships). And see *Agribrands Purina Canada Ltd.* 2011 ONCA 460, at [33] (though obiter).
82 *Barber* 2010 ONCA 570.
83 *A.I. Enterprises Ltd. v Bram Enterprises Ltd.* 2010 NBQB 245 (unreported).
84 *A.I. Enterprises Ltd.* 2014 SCC 12.
85 *Roman Corp. v Hudson's Bay Oil and Gas Co.* [1973] S.C.R. 820.
86 A series of actions "to thwart the sale", *A.I. Enterprises Ltd.* 2014 SCC 12, at [1].
87 With groundless notice of right of first refusal and certificate of pending litigation.
88 *A.I. Enterprises* 2014 SCC 12, at [22], per Cromwell J.
89 They sought to define unlawful means as including an act that violates an obligation under the law for which legal proceedings (whether by the plaintiff, the third party, or even the state) could be brought to challenge the legitimacy of an act – the plaintiffs complaining that, though they could attack the encumbrances, that would not compensate them for the loss incurred in the meantime.

However, the Supreme Court (in a unanimous decision delivered by Cromwell J.) accepted Lord Hoffmann's approach in *OBG* and the narrow function he ascribed to the unlawful means tort. It was decided that the tort's shape remained based on intermediary use and that its scope should be kept within narrow bounds[90] acting as a type of "parasitic liability", based on actionable wrongs.[91] So the tort applied to "three party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff". They rejected the gap-filling function for the unlawful means tort – whether that function be sparked by unjustified harm or the more modest spark of "cheating".[92] Furthermore, there was no "wriggle room" of principled exceptions which would confer "an unstructured judicial discretion to do what appears to the particular judge to be just in the particular circumstances".[93]

No new tort liability would be created. Instead, tort law would be kept "within its proper bounds".[94] For the Supreme Court, the unlawful means tort needed to comply with tort law's approach to regulating economic and competitive activity – an approach that afforded less protection to economic than other interests – was based on a reluctance to develop rules to enforce fair competition and a concern not to undermine certainty in commercial affairs.[95]

In Australia, there has been less debate over the unlawful means tort; there is as yet no authoritative determination by the High Court of Australia as to its existence in that jurisdiction. Though, in both *Northern Territory v Mengel*[96] and *Sanders v Snell*,[97] the High Court recognised the emergence of the tort in the UK, they did not decide whether it should be accepted in Australia, in part because the tort in the UK was at an embryonic stage. However, it is likely that this tort will ultimately be accepted by the High Court. Pritchard J. in *Hardie Finance Corp Pty Ltd. v Ahern (no.3)*,[98] noted that a number of Australian decisions since *Snell* have acknowledged the possibility that the tort exists or may ultimately be adopted.[99] Indeed, she even opined that the reluctance of the High Court should no longer be an issue as the unlawful means tort had been identified and defined in *OBG*.[100] Furthermore, Refshauge J. in *Canberra Data*

90 *A.I. Enterprises* 2014 SCC 12, at [5], per Cromwell J. The respondents won on grounds of breach of fiduciary duty, the company being liable for assisting.
91 Ibid., at para. [23].
92 Ibid., at paras. [39]–[42].
93 Ibid., at paras. [5], [84], respectively (though note he added at para. [74] that "details relating to the scope of what is 'actionable' may need to be worked out in the future").
94 Ibid., at para. [74].
95 Ibid., at para. [29]. "The common law in the Anglo-Canadian tradition has generally promoted legal certainty for commercial affairs" (at para. [33]).
96 *Northern Territory v Mengel* (1995) 185 C.L.R. 307, 345.
97 *Sanders* (1998) 196 C.L.R. 329, at [30]: no unlawful means had been used.
98 *Hardie Finance Corp Pty Ltd.* [2010] WASC 403.
99 Ibid., at para. [712].
100 Ibid., at para. [714].

Centres Pty v Vibe Constructions (ACT) Pty Ltd. advised plaintiffs to plead the unlawful means tort in terms consistent with *OBG*.[101]

This emerging Australian tort would seem to be framed on intermediary use. In *Canberra Data Centres Pty*, it was described as "wrongful interference with the actions of a third party in which the plaintiff has an economic interest".[102] And, in *Ballard v Multiplex*[103] and in the cases referred to by Pritchard J. in *Hardie Finance*, its possible existence was debated within an intermediary-use setting. Similarly, though there are dicta otherwise, *OBG* would seem to be the likely guide on what constitutes unlawful means. Some years earlier, the High Court in *Sanders v Snell* was clearly of the view that unlawful means would not include acts that are "unauthorised in the sense that they are ultra vires or void" yet involve no "infringement of some right" of the third party.[104] Post *OBG*, Pritchard J. in *Hardie Finance* adopted Lord Hoffmann's actionability test, contending "the clarification in *OBG* of what is required for 'unlawful means' is not inconsistent with aspects of the discussion of "unlawful means" by the majority in *Sanders*".[105]

All this indicates that the perception in Australia is that the function of this tort is protection against excessive competitive conflict and that its shape and scope are as Lord Hoffmann determined. Thus, it is not surprising that Cromwell J., in his review of other common law authorities in *A.I. Enterprises*, predicted "it is clear that the unlawful means tort will have at most a modest role to play in [Australia]".[106]

As for New Zealand, the Court of Appeal in *Diver v Loktronic Industries Ltd.*[107] applied Lord Hoffmann's *OBG* definition of the unlawful means tort.

V. The Modern Shape and Scope of the Conspiracy Tort

It was arguable that the House of Lords' analysis in *OBG* did not reveal any important role for the conspiracy tort. And this would not be surprising given that, as has been noted, throughout the twentieth century in England at least, it was perceived as unimportant. However, within 10 months of the *OBG* decision, a different panel of the House of Lords in *Total Network* breathed new life into this tort in England.

101 In the Supreme Court of the Australian Capital Territory, (2010) ACTSC 20, at [141], [139], respectively.
102 *Canberra Data Centres Pty v Vibe Constructions (ACT) Pty Ltd.* [2010] ACTSC 20.
103 *Ballard v Multiplex* [2012] NSWSC 426, per McDougall J.
104 *Sanders v Snell* [1998] HCA 65, at [343]. This applied *Dunlop v Woollahara Municipal Council* [1982] A.C. 158 (PC) that a breach of procedural fairness by a public official was insufficient.
105 *Hardie Finance Corp Pty Ltd.* [2010] WASC 403, at [715].
106 *A.I. Enterprises Ltd.* 2014 SCC 12, at [54].
107 *Diver* [2012] NZCA 131, at [100]–[101].

Here, the House of Lords was presented with a direct infliction of economic harm by a conspiracy using methods that did not constitute an actionable wrong but amounted to the common law crime of cheating the Revenue. Clearly, the shape and scope confirmed for the unlawful means tort in *OBG* were lacking.[108] However, the House of Lords agreed with the Revenue that the conspiracy tort was not subject to the narrow limits of the unlawful means tort. That was because it was not constrained by a trade conflict function, Lord Walker noting that "the claimant need not be a trader who is injured in his trade".[109] Rather, the function of this tort was accepted to be that of gap-filling: Lord Hope expressly acknowledging this.[110] So this tort could protect against "loss directed against the claimants themselves"[111] and civil wrongs were not required to spark liability.

The legacy of *Total Network* is yet to be established. It is yet to be settled whether the conspiracy tort has been revitalised not only where direct harm is inflicted, but also where an intermediary is used to inflict harm and exactly what may constitute the additional liability spark for this tort is unclear. These uncertainties are debated below.

What is interesting is that a vital tort of conspiracy – with a gap-filling function – was evident in Canada and Australia before *Total Network*. And some of the uncertainty raised by *Total Network* has already been answered in those jurisdictions.

In Canada, Burns and Blom[112] note that the popularity of the tort may be accounted for by two Supreme Court decisions: *Gagnon v Foundation Maritime Ltd.*[113] and *Canada Cement LaFrage Ltd. v British Columbia Lightweight Aggregate Ltd.*,[114] the seminal Canadian conspiracy case decided as a riposte to the uncertainty generated by the *Lonrho v Shell* case in England.

It has been accepted to have both a direct shape and an intermediary-use shape,[115] and in neither shape is liability limited by the spark of civil wrongs. So the liability spark includes crimes and also breach of statutory

108 The defendant conspirators allegedly participated in a VAT carousel or missing trader fraud, by produced invoices, "in order to pretend to the revenue that genuine commercial transactions had taken place and thereby to deceive the commissioners into paying up on a spurious input tax repayment claim", *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [55], per Lord Scott.

109 Ibid., at para. [100].

110 Lord Hope, "a gap that needs to be filled", *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [44]; Lord Mance referred to "lacuna" at para. [120].

111 Lord Hope, ibid., at para. [42]–[43].

112 P. Burns and J. Blom, *Economic Interests in Canadian Tort Law* (Markham 2009).

113 *Gagnon v Foundation Maritime Ltd.* [1961] S.C.J. No. 23; [1961] S.C.R. 435.

114 *Canada Cement LaFrage Ltd.* [1983] 1 S.C.R. 452.

115 So a direct shape seemed accepted by the earlier Supreme Court decisions in *Gagnon* [1961] S.C.J. No. 23; [1961] S.C.R. 435 and *Hunt v Carey Canada Inc.* (1990) 74 D.L.R. (4th) 321, 339, per Wilson J. (SCC). And intermediary use or indirect harm appeared to be accepted in *Gagnon* and more recently in *Alleslev-Krofchak* 2010 ONCA 557, re the conspiracy alleged against one plaintiff, ARINC via the defamation of another plaintiff.

prohibition. This was accepted in both *Gagnon*, where the defendant used means "prohibited by statute",[116] and in *Canada Cement*, where the definition of unlawful means was held to include a non-actionable breach of a competition statute, "quasi-criminal conduct".[117]

But the Canadian courts have gone even further in their definition of unlawful means for the conspiracy tort. Since the decision in *Total Network*, both the Ontario and Alberta Courts of Appeal – in *Agribrands Purina Canada Ltd. v Kasamekas*[118] and *HSBC Bank Canada v Fuss*,[119] respectively – have proposed the test of "wrongful in law" to define unlawful acts for conspiracy liability. Though stated not to be synonymous with Lord Denning's "not at liberty to commit" test, Goudge J.A. in *Agribrands* appeared to take a wide view of this concept. He referred (*obiter*) to the decision of the Ontario Court of Appeal in *Reach*, a case on the unlawful means tort, discussed above. This involved an *ultra vires* order issued by the defendant voluntary association to its members. This conduct was identified by Goudge J.A. as "wrongful in law",[120] as the association's members could have had the order set aside by a court.

In Australia, like Canada, it has been accepted (well before *Total Network*) that unlawful means for the conspiracy tort extend beyond civilly actionable wrongs. Menzies J. in *Williams v Hursey* reviewed the case law on what constitutes unlawful means in the tort of conspiracy and noted that beyond torts and breaches of contract, criminal offences[121] sufficed. There are also dicta that indicate that infringements of statutory prohibitions suffice, even if they do not provide a private right (on a par with the Canadian position).[122]

116 *Gagnon* [1961] S.C.R. 435, at 446. Judson J. dissented on the basis that, for conspiracy, unlawful means in the form of torts or crimes must be involved.

117 See Goudge J.A. in *Agribrands Purina Canada Ltd.* 2011 ONCA 460, at [37]. He accepted that unlawful means could involve a different definition as between the unlawful means and conspiracy torts (at [34]). In *Canada Cement LaFrage* [1983] S.C.J. 33, the defendants had engaged in a cartel agreement to drive out competition – an offence under the Combines Investigation Act 1970, s. 32. On the facts, however, no causation for the loss was shown.

118 *Agribrands Purina Canada Ltd.* 2011 ONCA 460. The defendant granted an exclusive dealership in a particular territory to the plaintiff but continued to supply their former exclusive licensee inter alia via other dealers; the plaintiff joined these dealers who knew of the breach. The ONCA found that there was no unlawful means conspiracy on the basis that neither the second or third defendant had actually committed a legal wrong.

119 *HSBC Bank Canada* [2013] ABCA 235, at [29]. Here, a conspiracy involved a scheme to prevent the creditor bank from realising on its security: new companies were set up to receive the business and assets of the debtor company (held to be the conversion of the debtor company's property as the transfer was not for fair market value) and preferential payments made to another creditor company in breach of bankruptcy laws.

120 Lord Hoffmann, in *OBG Ltd.* [2007] UKHL 21; [2008] 1 A.C. 1, at [55], distinguishes between acts "contrary to law" and those that are actionable.

121 *Williams* (1959) 103 C.L.R. 30. And see *Ansett Transport Industries (Operations) Pty Ltd. & Ors v Australian Federation of Air Pilots* [1991] 1 VR 637, per Brooking J.

122 In *Williams*, ibid., there were torts committed but Taylor J. appears to suggest (at p. 34) that statutory prohibition suffices. However, Neyers argues that *Williams* is not in fact authority for this view, J.W. Neyers, "Causing Loss by Unlawful Means: Should the High Court of Australia Follow OBG Ltd. v Allan", in S. Degeling, J. Edelman and J. Goudkamp (eds.), *Torts in Commercial Law* (Sydney 2011), 138, note 133.

However, like Canada, there are cases that indicate an even wider spark of liability, Edmundson detecting "a relatively broad and unconstrained approach to determining unlawful means" for conspiracy liability.[123] So, in *Chen v Karandonis*, the court accepted the lower court's view that breach of directors' duties constituted "illegal means"[124] while, in *Fatimi Pty Ltd. v Bryant*,[125] a voidable conveyance (inter alia) was also held capable of constituting unlawful means.[126] Further, the Full Court of the Federal Court of Australia in *Dresna Pty Ltd. v Misu Nominees Ltd.*[127] accepted that the breach of enforceable undertakings given to the Australian Competition and Consumer Commission[128] and a deliberate failure to disclose relevant matters to that body were capable of constituting unlawful means in the tort.[129] Interestingly, Barker et al. contend "the action need only be independently unlawful (that is in breach of a legal standard), not independently actionable by the plaintiff".[130] This resonates with Goudge J.A.'s remarks in *Agribrands*, though Barker et al. would include some "improper" or "impermissible" actions in their definition of "unlawful". Indeed, the Full Court of the Federal Court of Australia in *Dresna* cited Heydon, that unlawful means could be constituted by actions which are improper, where conventional moral standards have been applied.[131]

And, as in Canada, this tort can be invoked where the harm is inflicted directly or via an intermediary, it being clear that the tort's vitality also applies to the intermediary-use version of the tort.[132]

In New Zealand, the Court of Appeal in *Wagner v Gill*[133] accepted that *Total Network* is now the authority for the conspiracy tort, though the court underlined the uncertainty as to the modern shape and scope of this tort flowing from *Total Network*, which uncertainty is debated below.[134]

123 P. Edmundson, "Conspiracy by Unlawful Means: Keeping the Tort Untangled" (2008) 16 T.L.J. 189, 202.

124 *Chen v Karandonis* [2002] NSWCA 412. The case essentially involved reducing the company, from the profits of which the plaintiff was to be paid, into a shell.

125 *Fatimi Pty Ltd.* (2004) 59 NSWLR 678 (New South Wales Court of Appeal).

126 Voidable under s. 37A of the Conveyancing Act 1919 (NSW) because of an intention to defraud creditors. The Court of Appeal also found that unlawful means would be constituted by a statutory criminal offence and the offence of perverting the course of justice. However, the plaintiff failed on causation.

127 *Dresna Pty Ltd.* [2004] F.C.A.F.C. 169 (Federal Court of Australia Full Court), per Kiefel and Jacobson JJ.

128 Under s. 87B of the Trade Practices Act 1974: "... the party giving the undertaking is not entitled to act in that way" (at [18]).

129 The result alleged by the plaintiff was that the Commission reached a decision that caused economic loss to the plaintiff (Marshall J. dissented on the basis that the statutory scheme did not proscribe behaviour).

130 K. Barker, P. Cane, M. Lunney and F. Trindade, *The Law of Torts in Australia*, 5th ed. (Melbourne 2012), 286. (They also note *Naidoo v Naidoo* [2005] WADC 254, false complaint to the Office of the Public Advocate, though that case was classified as involving lawful means conspiracy.)

131 *Dresna Pty Ltd.* [2004] F.C.A.F.C. 169 (Federal Court of Australia Full Court), at [28]. J.D. Heydon, *Economic Torts*, 2nd ed. (London 1978), 68–70.

132 See note 141 below.

133 *Wagner* [2014] NZCA 336.

134 The court stressed the limits that could be read into *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174.

VI. The Modern Functions of the Economic Torts

It is apparent that the courts in England, Canada, and Australia are setting the two torts on different tracks (though the New Zealand Court of Appeal has some reservations as to the possible width of the conspiracy tort).

The approaches of the English, Canadian, Australian, and New Zealand courts now appear to have reached a consensus on the function of the unlawful means tort.[135] The unlawful means tort remains linked to its history and to the prevention of excessive competitive conflict. And it is that function that determines its shape and scope. As a result, this tort is not a gap-filler. It is a liability stretcher that helps claimants who are intentionally economically harmed by a civil wrong but who are one step beyond the normal privity rules of tort law. The same two concerns guided both Lord Hoffmann in *OBG* and the Supreme Court of Canada in *A.I. Enterprises*: the need for certainty in the legality of commercial activity and judicial reluctance to assess fairness in competition.

As for the conspiracy tort, however, it is striking that it now has a life of its own, independent of the unlawful means tort. Its function has been expanded to fill in gaps in the existing civil law,[136] thereby providing a wider common law control of commercial misbehaviour that intentionally causes economic harm to the claimant. Having been the poor relation of the economic torts, it is now revitalised as a commercial tort.

Commentators have underlined the potential of the conspiracy tort to function as a commercial tort. Burns and Blom note that, in Canada, "modern illustrations of the [conspiracy] tort … reveal it to be … a judicial device in controlling 'unfair' business practices in increasingly unregulated markets"[137] while, in Australia, Edmundson writes that the conspiracy tort has evolved from an industrial and competition remedy to apply in disputes concerning "commercial disputes more generally".[138] And it should be noted that English practitioners comment on the attractiveness of this tort to "innovative litigators",[139] one leading Q.C. suggesting that the conspiracy tort, post *Total Network*, may be the answer where claimants seek to find an easier route in "cutting through the jungle" to establish liability, where evidence is complex

135 However, it should be noted that Lord Hoffmann's additional requirement of an "economic link" between the intermediary and the claimant (see note 3 above) was criticised by Cromwell J. in *A.I. Enterprises Ltd.* 2014 SCC 12, at [87]; he uses Lord Nicholls's instrumentality test (at [78]).

136 The need for a gap was indeed stressed by the NZCA in *Wagner* [2014] NZCA 336, at [73]: in the case itself, there was held to be adequate civil redress for the plaintiff elsewhere. Interestingly as far as the unlawful means tort was concerned, the SCC in *A.I. Enterprises* 2014 SCC 12, at [5(2)] and [77], rejected the so-called tort of last resort rule, namely that, to qualify as "unlawful means", the defendant's actions cannot be actionable directly by the plaintiff.

137 Burns and Blom, *Economic Interests in Canadian Tort Law*, at note 10.

138 Edmundson, "Conspiracy by Unlawful Means", p. 199.

139 Mitchell, "Conspiracy".

and to overcome the daunting obstacles of "impenetrable relationships and multiple duties".[140]

Of course, how wide a gap the conspiracy tort can fill depends whether its shape extends to both the direct and indirect infliction of harm and what definition of unlawful means shapes its liability spark.

In Australia and Canada, it is accepted that this tort has both a direct and an intermediary-use shape and that the same definition of unlawful means applies regardless of that shape[141] (the New Zealand the Court of Appeal in *Wagner* was not prepared to decide this issue).[142] However, it is not clear what the position is in England. One of the reasons the House of Lords in *Total Network* felt able to distinguish *OBG* was that, in *Total Network*, direct harm was involved, unlike the context of intermediary-use harm that formed the basis for Lord Hoffmann's discussion in *OBG*.

However, it is more than arguable that, even in England, the conspiracy tort will be revitalised in its intermediary-use form as well as its direct form. In *Total Network*, the conspiracy cases cited in support of the decision were in fact ones involving intermediary use by the defendant.[143] Thus, McBride and Bagshaw believe it unlikely that courts in the future will apply Lord Hoffmann's narrow view of function to intermediary-use conspiracy cases. Rather, they suggest that "an independent set of rules" on what amounts to unlawful means for the conspiracy tort will be established, the same rules applying to both direct and indirect infliction of harm.[144]

Of course, the definition of unlawful means – the additional liability spark – is of crucial importance in determining the usefulness of this revitalised tort to commercial claimants. On the one hand, it might be argued that *Total Network* only added common law and statutory crimes to the list of unlawful means that attract liability (and only where the purpose behind creating criminal liability is the protection of the particular claimant).[145] This was certainly the view of Lord Hoffmann writing extrajudicially[146] and his view is mirrored in some of the discussion of the New Zealand Court of Appeal in *Wagner*.[147]

140 M. McLaren Q.C., "A New Lease of Life for Unlawful Means Conspiracy", The In-House Lawyer.co.uk (18 March 2009).

141 For Canada, see note 115 above; in Australia, *Dresna* involved non-actionable "wrongs" and intermediary use; in *Fatimi*, non-actionable direct harm was involved.

142 *Wagner* [2014] NZCA 336, at [80]. The court did note that, in *Total Network SL*, the court was careful to limit their comments to direct harm.

143 Indeed, this was the form debated by the House of Lords in *Lonrho* [1992] 1 A.C. 448, the case that confirmed the existence of the unlawful means tort. Lord Hope, *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [43], reserved opinion on indirect conspiracy harm.

144 McBride and Bagshaw, *Tort Law*, p. 691.

145 Lord Mance cautioned "not every criminal act committed in order to injure can or should give rise to tortious liability", *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [119].

146 See note 20 above, pp. 115–16. And he limits the tort to direct harm.

147 *Wagner* [2014] NZCA 336, at [73]. By analogy, it is interesting to note that the NZCA in *Wagner* (at [78]) determined that the breach of fiduciary duty involved in that case would not constitute unlawful means for the conspiracy tort inter alia because the duty was owed to the company and was not imposed for the purpose of protecting creditors like the plaintiff.

However, both Canada and Australia do not seem to limit unlawful means in this narrow way – "wrongful in law" or "breach of a legal standard" being suggested[148] – while, in *Total Network* itself, indications can be found of a liberal definition of unlawfulness. So Lord Scott refers to "sufficiently reprehensible" behaviour,[149] while stressing "the essential flexibility of the action on the case".[150] And Lord Neuberger, in his analysis of this tort, seemed to break down the distinction between the lawful means and the unlawful means versions of the conspiracy tort.[151] As can be seen in *Digicel (St. Lucia) Ltd. v Cable & Wireless Plc* and *Concept Oil Services v En-Gin Group LLP*,[152] English claimants are already arguing that contravention of regulatory statutory provisions (non-actionable breaches of non-criminal statutes) should constitute unlawful means in the conspiracy tort.[153] Indeed, though not necessary on the facts to decide this matter, Flaux J. in the latter case saw "no reason in principle why it should not be".

It is hardly surprising that the Ontario Court of Appeal in *Laurence v Peel Regional Police Force* remarked that "the tort of … conspiracy [is] still developing and [its] outer limits have not been defined".[154] Claimants will seek to explore the outer limits against the real uncertainty that has been created. In order to guide the judicial reaction, three key issues are now raised. Unless these are resolved, incoherence will result.

A. What Is the Justification for the New Function Ascribed to the Conspiracy Tort?

Thus far, the courts have failed to provide persuasive reasons why the function, and therefore the shape and scope, of the conspiracy tort should be different to that of the unlawful means tort. To simply state that they were "different in their nature"[155] or that "there is no need for consistency in the unlawful means component of unlawful means conspiracy and of the tort of causing loss by unlawful means"[156] or that they are "altogether

148 See (respectively) e.g. *Agribrands Purina Canada Ltd.* 2011 ONCA 460 and Barker *et al*., *The Law of Torts in Australia*.

149 *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [56], per Lord Scott. Lord Walker noted that the unacceptable conduct must be the means or instrumentality for intentionally inflicting harm on the claimant (at [94]–[100]).

150 *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [56].

151 Lord Neuberger stated that unlawful means conspiracy is "merely an application of … lawful means conspiracy", *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [228].

152 *Digicel (St. Lucia) Ltd.* [2010] EWHC 774 (Ch), per Morgan J.; *Concept Oil Services Ltd.* [2013] EWHC 1897 (Comm), per Flaux J. respectively. And see McLaren, "A New Lease of Life".

153 Whether such can constitute unlawful means is uncertain in England, see *Digicel (St. Lucia) Ltd.* [2010] EWHC 774 (Ch), Annex I, at [59], per Morgan J.; *Concept Oil Services Ltd.* [2013] EWHC 1897 (Comm), at [50] (obiter), per Flaux J.

154 *Laurence v Peel Regional Police Force* (2005) 250 D.L.R. (4th) 287, at [8].

155 Lord Mance, *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, adding "and the interests of justice may require their development on somewhat different bases", at [123].

156 *A.I. Enterprises* 2014 SCC 12, at [62], per Cromwell J.

different torts"[157] hardly suffices. And, though Cromwell J. in *A.I. Enterprises* stressed their "distinct historical roots",[158] the House of Lords earlier in *Total Network* had decided that the issue was one of policy and that they could work with a clean slate.[159]

In *Total Network* itself, which Edmondson believes "confirmed the potential potency of the tort and left it ready to evolve",[160] we are provided in essence with two unconvincing justifications, namely that it was "in the fact of the conspiracy that the unlawfulness resides"[161] and "the intense focus, in the tort of conspiracy, on intention".[162] Cromwell J. in *A.I. Enterprises* echoed the former justification: "... it may well be that the presence of an agreement in the tort of conspiracy justifies a different and broader definition of 'unlawful means' for the tort of 'unlawful means' conspiracy than is appropriate for the unlawful means tort."[163]

However, neither justification explains what sets conspiracy apart from the unlawful means tort. To propose "the law of tort takes a particularly censorious view where conspiracy is involved"[164] per se is mere affirmation, not justification. As for the second reason – that of an intense focus on intention – this, too, is debatable, as is discussed below.[165] Without a clear justification, the scope of unlawful means will remain unclear.

B. Can a Different Function for the Unlawful Means Tort Be Sustained?

Can the courts continue to apply a different, narrow function to the unlawful means tort if it has abandoned this for the conspiracy tort? As Pritchard J. in *Hardie Finance* noted, "it remains to be seen" what effect *Total Network* would have on the unlawful means tort.[166]

So the tort of conspiracy may be used to *circumvent* the *OBG* requirements of intermediary use and actionability in the unlawful means

157 Lord Hoffmann, "The Rise and Fall of the Economic Torts", p. 115, the unlawful means tort being concerned with the limits of competitive behaviour, the conspiracy tort providing a direct cause of action to fill the gap (though he suggests only in rare cases). He appears to be attempting to reconcile the House of Lords' decisions in *OBG Ltd.* and *Total Network SL*.

158 *A.I. Enterprises Ltd.* 2014 SCC 12, at [68]; and see Goudge J.A., in *Agribrands Purina Canada Ltd.* 2011 ONCA 460, at [34].

159 *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [219], per Lord Neuberger; at [89], per Lord Walker.

160 Edmundson, "Conspiracy by Unlawful Means".

161 Lord Walker, *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [55], citing Lord Wright in *Crofter v Veitch* [1942] A.C. 435, 462.

162 *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [76].

163 *A.I. Enterprises Ltd.* 2014 SCC 12, at [68].

164 *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [222], per Lord Neuberger. There are hints that there is concern about commercial malpractice through group activity: see Lord Mance at [122], Lord Hope at [42], and Lord Walker at [77], but this needs to be addressed in more detail – and explanations offered why existing civil law is not adequate.

165 Of course, *lawful* means conspiracy in theory requires a more intense intention – predominant purpose. However, in *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174 itself, the discussion of this concept became in essence synonymous with intentional harm without justification (see in particular at [228], per Lord Neuberger).

166 *Hardie Finance Corp Pty Ltd.* [2010] WASC 403, at [709].

tort.[167] Proving a conspiracy element may not be too difficult where the claimant can place the intentional economic harm in a corporate context,[168] given a company having a separate legal status can conspire with its directors and shareholders[169] and given the background to a commercial dispute may involve complex commercial arrangements. This will indirectly undermine the narrow function of the unlawful means tort.

However, there is also the possibility that, once the courts become used to dealing with the economic tort of conspiracy in a very different setting to trade conflict, claimants will demand a wider function be ascribed to the unlawful means tort. In short, they will argue that it too should be used for gap-filling, by abandoning the need for civil wrongs and intermediary use.[170]

It may well be, therefore, that the revitalisation process that started with the conspiracy tort will insinuate itself into the application of the unlawful means tort. If it does so, that will mean, rather than Lord Hoffmann's view, it was Lord Nicholls's (minority) view of the unlawful means tort in *OBG* that revealed the future function of that tort.[171] Lord Hoffmann's narrow analysis of the unlawful means tort was rejected by Lord Nicholls, who saw the function of the unlawful means tort as curbing "clearly excessive behaviour".[172] For this reason, he disagreed with Lord Hoffmann both as to the scope of the tort – favouring doing what the defendant has "no legal right to do" or what he is "not permitted to do" – and as to the shape of this tort – accepting that it could apply both where there was intermediary use and a direct application of harm.[173] Thus, he favoured a wider, gap-filling function for this tort (though he saw the need for the control mechanism of instrumentality). It should be further noted that *Total*

167 This indeed was suggested Lord Glennie in the Scottish case, *McLeod v Rooney* [2009] CSOH 158; 2010 S.L.T. 499, Court of Session (Outer House). There is a wider discussion of this in H. Carty "The Tort of Conspiracy as a Can of Worms" in S. Pitel, J. Neyers and E. Chamberlain (eds.), *Challenging Orthodoxy* (Oxford 2013).

168 So conspiracy is alleged in the asset stripping/restructuring cases referred to in notes 61–63 above.

169 *Wagner* [2014] NZCA 336, at [27]. Gloster J., in *Barclay Pharmaceuticals Ltd. v Waypharm LP* [2012] EWHC 306 (Comm), found the proposition that an agreement between a natural person and a company that person controlled could be a conspiracy for unlawful means conspiracy to be persuasive. See C. Witting "Intra-Corporate Conspiracies: An Intriguing Prospect" [2013] C.L.J. 178.

170 In *Tiscali UK Ltd. v British Telecommunications Plc* [2008] EWHC 3129 (QB), Eady J. permitted the claimant to plead the unlawful means tort inter alia on the basis of an alleged breach of a statutory criminal provision.

171 The Supreme Court of Canada in *Gagnon* [1961] S.C.J. No. 23; [1961] S.C.R. 435 in fact appeared to envisage the same definition for unlawful means ("prohibited means") in both the conspiracy and unlawful means torts.

172 *OBG Ltd.* [2007] UKHL 21; [2008] 1 A.C. 1, at [153]. In *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, Lord Mance found force in the argument that cheating alone – even in the absence of conspiracy – should constitute unlawful means, at [121].

173 *OBG Ltd.* [2007] UKHL 21; [2008] 1 A.C. 1, at [150] (unlawful means); at [161] (direct harm liability). Interestingly, the Ontario CA in *Correia* (2008) 91 O.R. (3d), at [98], liken Lord Nicholls's view in *OBG Ltd.* to the approach taken in *Reach M.D. Inc.* [2003] O.J. No. 2062 227 D.L.R. (4th) 458 (Ont. CA), which reflected Lord Denning's liberal view of unlawful means.

Network contains undertones of approval for Lord Nicholls's version of the unlawful means tort.[174]

C. What Is the Modern Definition of Intention and Is It the Same for the Two Torts?

For the moment, it would appear that the unlawful means conspiracy tort has a wider function than the unlawful means tort. This raises a further question as to the intention required for these two torts: what is it and is it the same for them both? At the moment, the position is unclear.

The orthodoxy at least in England had been that the *same* intention applied to the unlawful means conspiracy tort as to the unlawful means tort. (Of course, the lawful means conspiracy tort required intention and an illegitimate predominant purpose.)[175] And the traditional test for intention in both economic torts had been that of "targeted" or "aimed-at" harm.

However, in *OBG*, a wider definition of intention was adopted by Lords Hoffmann and Nicholls. They preferred the test of "desired end or means of achieving a desired end". This has been applied to the unlawful means tort by the Supreme Court in Canada (*A.I. Enterprises*),[176] by Pritchard J. in Australia (*Hardie*),[177] and by the New Zealand Court of Appeal (*Diver*).[178]

Acknowledged as a wider definition of intention by Lord Hoffmann himself in *OBG*,[179] the ends/means test might mean that inevitable harm could suffice for liability. Yet this expanded view of intention sits badly with the narrow function that in theory continues to apply to the unlawful means tort.[180] The traditional definition of intention in the economic torts, equating intention to an attack, flows from their traditional function of policing competitive conflict. However, an ends/means test for intention is more coherent where the function of the tort is not limited to preventing attacks on the claimant, but rather extends to preventing commercial misbehaviour that inevitably causes economic harm.[181]

174 E.g. Lord Walker, *Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [93]: "... all the statements of principle in the classic cases seem to me to be consistent with the principle that unlawful means, both in the tort of causing loss by unlawful means and the tort of conspiracy, include both crimes and torts."

175 It should be noted, however, that, in *Canada Cement LaFrage Ltd.* [1983] 1 S.C.R. 452, the Supreme Court of Canada established that where the unlawful means conspiracy tort is pleaded, a constructive intent suffices (with the caveat that the act be directed towards the plaintiff).

176 *A.I. Enterprises Ltd.* 2014 SCC 12.

177 *Hardie Finance Corp Pty Ltd.* [2010] WASC 403, at [723].

178 *Diver* [2012] NZCA 131, at [103].

179 Lord Hoffmann expressly stated this was to widen the definition, *OBG Ltd.* [2007] UKHL 21, at [60]. It should further be noted that the NZCA in *Wagner* [2014] NZCA 336 cautioned that "the distinction between means and foreseeable consequences is a very narrow one and in practice often difficult to apply in any meaningful way", at [105].

180 Indeed, at times, there is a negligence feel to the claims, e.g. in Canada, *Mraiche Investment Corp v McLennan Ross* LLP 2012 ABCA (conspiracy claim against the solicitor of a client who used unlawful means to cause economic harm to the plaintiff, its creditor), and in Australia, *Hardie Finance Corp Pty Ltd.* [2010] WASC 403.

181 Of course, Lord Hoffmann was happy to expand the definition of intention given he had kept the definition of unlawful means within narrow limits.

And should this ends/means test apply to the conspiracy tort? Subsequently to *OBG*, the Court of Appeal has confirmed that the same intention applies to the conspiracy tort as to the unlawful means tort.[182] Yet, in *Total Network*, part of the suggested rationale for conspiracy as a vital tort was the "intense focus on intention" which, according to Lord Walker, "sets conspiracy apart from other torts".[183] So it is arguable that the definition of intention must be narrower in the conspiracy tort compared to the unlawful means tort, though the function of the conspiracy tort is wider.[184]

VII. Conclusion

Throughout the Commonwealth, the function of the economic torts has been widened where the conspiracy tort is concerned. However, the justification for this remains obscure. It is argued that the function for the conspiracy and unlawful means torts should be the same, unless a clear difference in underlying rationales can be identified.

As for what that function should be, the courts here and in the Commonwealth need to consider the rationale that "best reflects the modern role that the tort[s] should play in the broader scheme of civil liability".[185] The answer to that essential question is whether the courts should be happy to expand these torts (to whatever extent) so that they set standards for commercial behaviour and fill gaps in the civil law. To do so, of course, they potentially encroach onto other areas of the civil law where a different policy has been set for liability. There are indications that the judiciary are aware of the perils of making that choice. Pritchard J. in *Hardie Finance* cautioned "it remains open to argument whether it is necessary or appropriate for the courts to venture into this field via the development of the common law, if the purpose in so doing is the regulation of commercial behaviour"[186] while Carnwath L.J. in *OBG* at Court of Appeal level warned that "the boundaries of the economic torts are a sensitive area in which it is difficult to anticipate the consequences of re-definition".[187] The cautious alternative, as this author has argued elsewhere,[188] is to accept that these torts should remain a modest common law contribution to policing excessive competitive behaviour and no more.

182 *Berryland Books Ltd. v BK Books* [2010] EWCA Civ 1440 (CA), at [48]; and see the English High Court cases noted at [103], fn. 43.

183 *Total Network* [2008] UKHL 19; [2008] 1 A.C. 1174, at [76]–[77], per Lord Walker.

184 This possibility was noted by the New Zealand Court of Appeal in *Wagner* [2014] NZCA 336, at [105]. They preferred "directed at" as the test (see [106]), a test found in all the *Total Network* [2008] UKHL 19; [2008] 1 A.C. 1174 speeches.

185 *A.I. Enterprises* 2014 SCC 12, at [36], per Cromwell J.

186 *Hardie Finance Corp Pty Ltd.* [2010] WASC 403, at [707].

187 *OBG Ltd. v Allan* [2005] QB 762, at [117]. Note the caution of the NZCA in *Wagner* [2014] NZCA 336, at [81]–[86] re conspiracy liability.

188 For a review of the academic and judicial debate on this topic, see H. Carty, *An Analysis of the Economic Torts*, 2nd ed. (Oxford 2010), especially 169–81.