INTENTIONAL HARM, ACCESSORIES AND CONSPIRACIES

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Clarity in relation to the tort of conspiracy has suffered from uncertainty in the analysis of other "economic torts" and the consequent uncertainty regarding the relationship between conspiracy and those torts. This has unsettled both sides of the relationship as the courts have struggled to explain how the law fits together in a coherent way. But reflection on the leading decisions of *OBG Ltd. v Allan*,[1] *Revenue and Customs Commissioners v Total Network*[2] and *Fish & Fish Ltd. v Sea Shepherd*[3] offers scope for movement to a clearer framework of legal principles. Although important uncertainties remain, we argue that two principles of liability can now be regarded as anchors to provide a vantage point from which critical engagement with the tort of conspiracy can be attempted: (i) primary liability in tort for intentional infliction of harm by unlawful means (the main subject of discussion in *OBG*: we will refer to this as "the unlawful means tort") and (ii) accessory liability for involvement in a civil wrong committed by another (the subject of discussion in *OBG* and *Fish & Fish*). We conclude that acceptance of these two key principles leaves no need or justification for an independent tort of conspiracy.

In *OBG*, the House of Lords unanimously adopted an explanation of the main (so-called) economic torts revolving around (i) and (ii) as two distinct principles of liability.[4] In this, they followed the lead given by Lord Watson in *Allen v Flood*.[5] The idea of a unified theory of the economic torts was rejected and it was held that liability for interfering with another's contract (where that did not involve inducing a breach of contract) is to be assimilated with the unlawful means tort.[6] The first section of this article will consider the nature and scope of the two key principles of intentional infliction of harm by unlawful means and accessory liability. The second section will deal with two potential distractions which we suggest are unhelpful when considering civil liability for conspiracy: the analogy often made with the criminal law and considering conspiracy under the umbrella heading of

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[1] [2007] UKHL 21; [2008] 1 A.C. 1.

[2] [2008] UKHL 19; [2008] 1 A.C. 1174.

[3] [2015] UKSC 10; [2015] A.C. 1229.

[4] [2008] 1 A.C. 1 at [32] (Lord Hoffmann), and at [168]-[173], [194]-[195] (Lord Nicholls).

[5] [1898] A.C. 1 at 96; cited in *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [13] (Lord Hoffmann).

[6] [2008] 1 A.C. 1 at [26]-[33] (Lord Hoffmann), [174]-[190] (Lord Nicholls).

the "economic torts". The third section considers further the tort of conspiracy in the light of the decision of the House of Lords in *Total Network.* We suggest that there should be no theoretical scope for a separate tort of conspiracy; what we identify as the two key principles should have been sufficient on the facts of *Total Network.*

I) Two Key Principles: intentional infliction of harm by unlawful means and accessory liability

1) Intentional infliction of harm by unlawful means

In *OBG* Lord Hoffmann (with whom the majority agreed) and Lord Nicholls propounded different accounts of the ambit and ingredients of the unlawful means tort, specifically revolving around what should count as unlawful means for the imposition of liability. Taking the standard case of unlawful means used by a defendant in relation to an intermediary with the intention of harming the claimant, Lord Hoffmann argued for a conception based on the limited notion of action by the defendant which would, ordinarily, give the intermediary a free-standing, civil cause of action against him. In other words, unlawful means are limited to actions capable of constituting wrongs in civil law, and the claimant and intermediary are treated as a sort of composite unity for the purposes of analysing the wrongfulness of the action and the harm suffered.[7] What underlies this more restrictive approach to unlawful means is a concern to avoid the undue "tortification" of criminal and regulatory laws, breach of which does not create a cause of action in ordinary circumstances; a related concern to avoid excessive intrusion of the law of tort into the workings of commercial competition in a capitalist economy; and scepticism that any other control mechanisms in the ingredients of the tort, in particular a refined notion of intent to injure, could supply any adequate alternative control mechanism.

Lord Nicholls, on the other hand, preferred a wider view of unlawful means and a different rationale for the tort. The tort exists to curb clearly excessive conduct: "[t]he law seeks to provide a remedy for intentional economic harm caused by unlawful means".[8] In that context, the law regards all unlawful means as unacceptable, including crimes, whether or not independently actionable by anyone.[9] This conception of unlawful means provides a known, objective criterion setting the boundary of liability[10] where the defendant seeks to injure the claimant through the instrumentality of a third party. Lord Nicholls' view is in line with the balance of previous authority, and in particular with the speeches of Lord Reid and Lord Devlin in *Rookes v Barnard*.[11] Lord Devlin observed in relation to the tort of intimidation:[12]

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[7] [2008] 1 A.C. 1 at [45]-[64] (Lord Hoffmann).

[8] [2008] 1 A.C. 1 at [153] (Lord Nicholls).

[9] [2008] 1 A.C. 1 at [143]-[163] (Lord Nicholls).

[10] [2008] 1 A.C. 1 at [147]; see too *Rookes v Barnard* [1964] A.C. 1129 at 1206-1207 (Lord Devlin).

[11] [1964] A.C. 1129 at 1168-1169 (Lord Reid), 1206-1207 (Lord Devlin). Lord Nicholls emphasises this in *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [150], [152] and [162].

[12] Which Lord Hoffmann accepts is a species of the unlawful means tort, at least in the three-party context: *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [25] and [47].

> "I find … nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal threat. The nature of the threat is immaterial, because … its nature is irrelevant to the plaintiff's cause of action. All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of—whether it is a physical club or an economic club, a tortious club or an otherwise illegal club. If an intermediate party is improperly coerced, it does not matter to the plaintiff how he is coerced."[13]

Lord Nicholls' formulation of the ingredients of the unlawful means tort proceeds with reference to harm to economic interests.[14] This reflects the main focus of the authorities as the tort has developed and was the focus of all three appeals in the *OBG* case. Nonetheless, it is questionable whether this is a coherent limitation on the ambit of the tort. Lord Hoffmann did not limit it in this way: see Section II below.

The coherence of Lord Hoffmann's and Lord Nicholls' competing visions of the basis and scope of the tort can now be assessed in the retrospective light cast by the discussion in *Total Network* of the tort of conspiracy to injure by unlawful means. In that case, a different constitution of the appellate committee[15] unanimously held that unlawful means for the purposes of the tort of conspiracy did include crimes which were not independently actionable by the claimant or anyone else. Their analysis was rooted firmly in the older authorities on conspiracy, which ran in parallel (and often overlapped) with the authorities on which Lord Nicholls drew for his analysis in *OBG*. As Lord Walker said:[16]

> "In searching for a general principle I start with a very simple, even naïve point. The man in the street, if asked what an unlawful act was, would probably answer 'a crime'. He might give as an example theft, obtaining money by false pretences, or assault occasioning actual bodily harm. He might or might not know that each of these was also a civil wrong (or tort) but it is unlikely that civil liability would be in the forefront of his mind."

This bears more than a passing resemblance to Lord Nicholls' speech in *OBG*: "[i]t would be very odd if … the law were to afford the claimant a remedy where the defendant committed or threatened to commit a tort or breach of contract against the third party but not if he committed or threatened to commit a crime against him".[17]

Concerns regarding "tortification" of the criminal law did not deter the House of Lords in *Total Network* any more than they did Lord Nicholls in *OBG* or the Law Lords in *Rookes v Barnard.* There is an important issue here: the law in this area may best aspire to

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[13] [1964] A.C. 1129 at 1209.

[14] [2008] 1 A.C. 1 at [141], [143], [144] and [146]. Cf. [2008] 1 A.C. 1 at [8], [32] and [47]-[48] (Lord Hoffmann).

[15] Lord Walker was the only Law Lord who also sat in *OBG Ltd. v Allan*, in which his speech was notably more nuanced and cautious than that of Lord Hoffmann.

[16] [2008] 1 A.C. 1174 at [90].

[17] [2008] 1 A.C. 1 at [152]

comprehensibility and legitimacy by making reference to broad social understandings of what is prohibited and allowed by the law.

At first glance there may seem something odd about using laws designed for wholly different purposes to provide some of the ingredients for the unlawful means tort governing liability between claimant and defendant.[18] However, this applies not just to the criminal law, but to civil wrongs as well. Tort liability and contract liability between a defendant and an intermediary arise for the purpose of defining the proper relationship between *those* parties, not the relationship between claimant and defendant, so it can equally be asked why the law should "tortify" for the benefit of the claimant civil wrongs not involving the claimant.[19] The answer is that the law here is using the limitations on the defendant's freedom of action given by other laws as a ready-made, objective and accessible marker for what is to count as illegitimate conduct if deliberately targeted at harming the claimant. Viewed in that light, reference to the criminal law makes considerable sense.

The core ingredients of the tort of conspiracy to injure by unlawful means are an agreement between a number of persons, who have a joint intention to injure the claimant, to use unlawful means to that end, where loss is caused to the claimant as a result of such use. If non-actionable crimes constitute relevant unlawful means for the tort of conspiracy to injure by unlawful means, the question why they should not qualify as unlawful means for the purposes of the unlawful means tort arises in an acute form. In both cases, the deliberate use of unlawful means to inflict harm on the claimant appears to be the essential core of the tort. Is there a normative basis to be found elsewhere in the formulations of the two torts which might provide a justification for such a difference of approach?

Although there may be shades of difference between the intention required for unlawful means conspiracy and the unlawful means tort,[20] the differences are slight and it is difficult to see that they could provide a sufficient basis for differentiating the torts.[21] In *OBG*, Lord Hoffmann's view was that a far more substantive difference, between an intention to use unlawful means to harm a defendant and no such intention, was insufficient to justify treating non-actionable crimes as unlawful means for the purposes of the unlawful means tort.[22] Although we question below whether he was correct to do so, he was surely right to focus on the issue and his scepticism on the point should inform analysis of whether there is any convincing distinction on this ground between conspiracy to injure by unlawful means and the unlawful means tort.

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[18] See e.g. R. Bagshaw, "Lord Hoffmann and the Economic Torts", in P Davies and J. Pila (eds) *The Jurisprudence of Lord Hoffmann* (Oxford: Hart Publishing, 2015) at 72-78.

[19] In *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [48] Lord Hoffmann noted Viscount Radcliffe's disquiet in *Stratford & Son Ltd. v Lindley* [1965] A.C. 269 at 329-330 about using breach of contract as the touchstone of liability.

[20] The difference is more marked in relation to the distinction between unlawful means conspiracy and lawful means conspiracy; for the latter, a predominant intention to injure must be shown: *Lonrho Ltd. v Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173.

[21] In *Baldwin v Berryland Books* [2010] EWCA Civ 1440 at [48] Etherton L.J. relied upon *OBG Ltd. v Allan* for the intention requirement in conspiracy; see too *Meretz Investments NV v ACP Ltd.* [2007] EWCA Civ 1303; [2008] Ch. 244 at [146] (Arden L.J.).

[22] [2008] 1 A.C. 1 at [60].

As to the next element of the tort of conspiracy, the agreement between a number of persons, the reference to this as a reason for adopting a different approach to what should qualify as unlawful means is notoriously fragile and insubstantial. As explained by Lord Diplock in *Lonrho v Shell (No. 2)*[23] and again by Lord Bridge in *Lonrho plc v Fayed*,[24] in the circumstances of modern society[25] it is difficult to see how an agreement between a number of weak and poorly placed defendants to use particular means (whether lawful or unlawful) to injure the claimant can explain the imposition of liability where the deliberate decision of a single very powerful actor to use those same means to injure the claimant, with potentially far greater effect, does not. The anomalous nature of the imposition of liability on the basis of conspiracy was highlighted in these cases. There is no "magic"[26] in plurality. In *Crofter Hand Woven Harris Tweed Co v Veitch,* Lord Wright commented that "[t]he distinction between conduct by one man and conduct by two or more may be difficult to justify".[27] We suggest that it is in fact unsustainable. One potential justification offered is that "a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise".[28] In *Total Network*, Lord Walker recognised that this reason "is not very satisfactory".[29] Given that the law recognises incorporation, it is hard to see how two natural persons who choose to act in combination represent a greater threat to a claimant than a large corporation such as Tesco acting by itself.[30] As Lord Diplock put it, "to say that ... a multinational conglomerate ... does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century".[31]

In the light of these decisions and the obvious force of the reasoning on this point, it is difficult to understand how the fact of agreement between a number of persons could justify the different approach to what qualifies as unlawful means in the tort of conspiracy as against the unlawful means tort. Looking at the position of a single defendant who deliberately uses unlawful means to injure the claimant, the presence and agreement of others to use unlawful means to the same end may appear a matter of happenstance. The search to find another conspirator and agreement between them (even if that other ended up taking no action at all) seems a distraction from what is far more important, namely the relationship between defendant, claimant and the deliberate choice of the defendant to use unlawful means to injure the claimant.

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[23] [1982] A.C. 173 at 189.

[24] [1992] 1 A.C. 448 at 463-464.

[25] In historic social circumstances, too, there were radical differences in power between persons, e.g. between a rich landowner and a labourer.

[26] P Heffey, "The Survival of Civil Conspiracy: A Question of Magic or Logic" (1974-1975) 136 Monash University L.R. 136.

[27] [1942] A.C. 435 at 467-468; cf. at 448 (Viscount Maugham).

[28] *Mogul Steamship Co. Ltd. v McGregor, Gow & Co.* (1889) 23 Q.B.D. 598, at 616 (Bowen L.J.).

[29] *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [77].

[30] R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 252. Even if intra-corporate conspiracy were to be recognised (see e.g. C. Witting, "Intra-corporate conspiracy: an intriguing prospect" [2013] C.L.J. 178) the general point concerning powerful individual actors remains pertinent.

[31] *Lonrho v Shell* [1982] A.C. 173 at 189.

This discussion highlights, rather than assuages, the dissonance between *OBG* and *Total* on the issue of unlawful means. The practical effect of having the torts operate alongside each other does the same. If a claimant can identify a co-conspirator, however peripheral to the real gravamen of his complaint against the defendant, he can plead unlawful means conspiracy and can rely upon non-actionable crimes and other wrongs committed by the defendant (even if in the event nothing was actually done by the co-conspirator). This will often be possible to do.[32] The claimant does not even need to sue the co-conspirator. The constraint in *OBG* regarding what counts as unlawful means on the majority's approach simply pushes claimants to plead their claims in conspiracy. Yet it begins to look arbitrary that a defendant's liability depends upon the imaginativeness of the claimant and his advisers in casting around to identify someone who might count as a co-conspirator.

For these reasons, *Total Network* casts serious doubt on the move by Lord Hoffmann in *OBG* to limit the concept of unlawful means for the purposes of the unlawful means tort. The distinction drawn between the unlawful means tort and unlawful means conspiracy in *Total Network*, in an effort to escape from the view of Lord Hoffmann and the majority in *OBG*, cannot bear the weight put upon it. In *Total Network*, Lord Walker recognised that "it has been generally assumed, throughout the 20th-century cases, that 'unlawful means' should have the same meaning in the intentional harm tort and in the tort of conspiracy".[33] This was a sensible approach and it is unfortunate that the conspiracy dimension was left out of account in Lord Hoffmann's analysis in *OBG*. Lord Hoffmann has since suggested extra-judicially that "[c]onspiracy is an anomalous cause of action and one simply has to accept that".[34] But logical, principled development of the law is much to be preferred. We suggest that the map of the law in this area needs to be revisited to make better sense of the authorities and the normative underpinning of tort liability. As Carty has recognised, "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".[35] Unlike Carty,[36] we suggest it would be desirable to favour the approach of Lord Nicholls in *OBG* to that of Lord Hoffmann, on the grounds that it provides a better fit with other authorities and a more coherent and principled account of tort liability in this field.

In *OBG*, Lord Hoffmann put forward the notion that the unlawful means tort is limited to cases of interference with the intermediary's freedom of economic activity.[37] But this is not inherently attractive and is contrived: the natives who had cannon balls fired at them in *Tartleton v M'Gawley*[38] feared for their lives, not the interference with their freedom of economic activity. Nor does it provide a viable point of distinction from unlawful means

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[32] *Concept Oil Services v En-Gin Group LLP* [2013] EWHC 1897 (Comm) at [49]-[50] (Flaux J).

[33] *Revenue and Customs Commissioners v Total Network* at [89].

[34] Lord Hoffmann, "The Rise and Fall of the Economic Torts" in S. Degeling, J. Edelman, and J. Goudkamp (eds), *Torts in Commercial Law* (Pyrmont: Thomson Reuters, 2011) at 116.

[35] H. Carty "The Modern Functions of the Economic Torts: Reviewing the English, Canadian, Australian and New Zealand Positions" [2015] C.L.J. 261, 265.

[36] See too *A.I. Enterprises Ltd. v Bram Enterprises Ltd.* 2014 SCC 12.

[37] e.g. *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [51]; see too Lord Hoffmann, "The Rise and Fall of the Economic Torts" in *Torts in Commercial Law* (2011) at 115.

[38] (1790) 1 Peake N.P.C. 270.

conspiracy. It is inconsistent with the reasoning in *Rookes v Barnard* and a string of earlier authorities.[39] It may be possible to argue the tort of intimidation exists alongside *OBG*, such that *Rookes* and *OBG* operate in different spheres, but "[t]his is a result with which nobody concerned with doctrinal coherence in tort law can feel particularly happy".[40] It would be preferable to depart from Lord Hoffmann's approach in *OBG* in this area and abandon the requirement of civil actionability concerning economic activity. Indeed, Lord Walker in *OBG* recognised that the speeches in that case were unlikely to be "the last word" on the subject.[41]

Lord Hoffmann's approach in *OBG* is grounded in an exception to the doctrine of privity.[42] This is unsatisfactory. The doctrine defines a right/obligation relationship between relevant parties and it is difficult to see why a third party to that relationship (the claimant) should take the benefit of it simply because the defendant intended to cause him loss.[43] On the other hand, on Lord Nicholls' approach the unlawfulness of the means is used as a marker of what is to be regarded as illegitimate when action is taken targeted to harm a claimant. On that approach there is, if anything, an even stronger basis for imposing liability where the defendant engages in actions which the criminal law prohibits. The criminal law reflects the public interest in prohibiting such conduct; is the strongest form of marker of the illegitimacy of such conduct;[44] its importance is readily understood by ordinary people; and, unlike the position for civil wrongs, the unlawfulness is in principle not capable of waiver by anyone. By contrast, where the unlawful means consist of civil wrongs on the part of the defendant in relation to an intermediary, it would be possible for the intermediary to forgive the defendant and thereby cancel out the unlawfulness of the means as between those two, yet the liability of the defendant to the claimant would persist.[45] Admittedly, there remains scope for some public policy restriction on what crimes may count as unlawful means. For example, it seems that perjury does not, because of the policy interest of encouraging witnesses to speak freely in court without fear of harassment by civil actions.[46] But if high value is attached to the

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[39] Particularly those referred to by Lord Nicholls in *OBG Ltd. v Allan*; as he observes ([2008] 1 A.C. 1 at [155]), Lord Hoffmann's account represents a radical departure. See also *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [93] (Lord Walker).

[40] S Deakin and J. Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519, at 547. Cf. J. Murphy, 'Understanding Intimidation' (2014) 71 M.L.R. 33.

[41] [2008] 1 A.C. 1 at [269].

[42] Cf. Stevens, *Torts and Rights* (2007) at 188-189.

[43] Cf. J. Neyers, "Causing Loss by Unlawful Means: Should the High Court of Australia follow *OBG Ltd. v Allan*?" in S. Degeling, J. Edelman, J. Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) at 125-131.

[44] Lord Devlin's speech in *Rookes v Barnard* proceeds from crimes as the paradigm case of unlawful means to torts and breaches of contract; and see *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [90]-[92] (Lord Walker).

[45] Bagshaw, "Lord Hoffmann and the Economic Torts" in *The Jurisprudence of Lord Hoffmann* (2015) at 76-77, gives further reasons for rejecting the idea of extension of privity as a normative foundation for the tort.

[46] See e.g. *Marrinan v Vibart* [1963] 1 Q.B. 528; see too Lord Nicholls in *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [156]-[158] (regarding Parliamentary intention preventing breach of patent from qualifying) and Lord Walker in *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [96] (regarding an action for breach of statutory duty). In *Digicel (St. Lucia) Ltd v Cable & Wireless* [2010] EWHC 774 (Ch), at Annex I, Morgan J held that breaches of regulatory statutory duties which are not civilly actionable and not criminal would not qualify as unlawful means for the purposes of conspiracy; compare *Associated British Ports v T.G.W.U.* [1989] 1 WLR 939, CA, and *Department of Transport v Williams* [1993] Times L. Rep. 627, CA. It may be that the common law

clarity which the general approach proposed by Lord Nicholls provides, the presumption in relation to any particular crime that it does qualify as unlawful means will be a very strong one.

There are a variety of other approaches the law *could* have adopted, but did not. It would have been possible not to have the unlawful means tort at all and to allow unfettered competition;[47] but this is unpalatable and has never been seriously supported. At the other extreme, liability could have been imposed purely on the basis of improper motive or abuse of rights.[48] But it is too late to go back on foundational decisions such as *Mayor of Bradford v Pickles*[49] and *Allen v Flood*.[50] These decisions express a principle which is now deeply embedded in English law, which has made the strategic choice to avoid the uncertainty associated with acceptance of bad motive as a ground for liability, as is encountered in other legal systems which do impose liability on this ground.[51] It would also have been possible to adopt a more nuanced and fact-sensitive approach, under which, for instance, the degree of targeting in the intention required varied with the severity of the unlawful means used: the more serious the unlawfulness, the wider the concept of intention to injure, and *vice versa*. However, there is no support for this in the authorities and it is vulnerable to a similar charge of uncertainty. As Lord Nicholls observed in *OBG*,[52] there is a value judgment to be made, and there is more to be gained in terms of predictability and comprehensibility of the law by using the general criterion of unlawfulness, including criminal unlawfulness, to set the boundary between acceptable and unacceptable conduct for the purposes of the unlawful means tort.[53]

A defendant is entitled to act with the intention of harming a claimant, and in the context of commercial competition will frequently do so, provided that he does not deliberately employ unlawful means to strike at the claimant. Put the other way round, there will be a sufficient nexus between the claimant and the defendant to establish liability where the defendant deliberately employs unlawful means (i.e. does things which the law prohibits him from doing) with the intention of harming (i.e. in order to harm) the claimant. This defines a relationship which is at least as compelling as a foundation of liability as in the tort of negligence, in which Lord Atkins' neighbour principle[54] leads to liability on a far weaker

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operates its own screening of what forms of unlawful action are serious enough to qualify as illegitimate unlawful means: see also *JSC BTA Bank v Khrapunov* [2017] EWCA Civ 40 at [45]-[56] (civil contempt of court does qualify for conspiracy).

[47] Although claims for other torts and breaches of contract would still be possible, and crimes might still be prosecuted.

[48] See further J. Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts L.J. 162.

[49] [1895] A.C. 587 (HL).

[50] If these decisions are to be respected, then even a principle of abuse of rights would need to require some unlawful means, and the most natural choice consistent with the idea of "abuse" would be to favour Lord Nicholls' approach in *OBG Ltd. v Allan*.

[51] See *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [14], further affirming the rationality of that choice. The aberration in this context is the tort in *Quinn v Leathem*, criticised below: see text to nn. 166-184.

[52] [2008] 1 A.C. 1 at [146]-[163].

[53] Cf. Bagshaw, "Lord Hoffmann and the Economic Torts" in *The Jurisprudence of Lord Hoffmann* (2015) at 72-78.

[54] *Donoghue v Stevenson* [1932] A.C. 562.

normative foundation (failure to take reasonable care in engaging in otherwise lawful conduct where it is foreseeable, but may not in fact be foreseen, that the claimant will suffer harm of a requisite kind). The point about referring to unlawfulness of the means used (which may involve a civil wrong committed vis-à-vis someone else, but may not) is that it supplies a ready-made and reasonably accessible criterion, understandable to ordinary people, to demarcate the boundary of acceptable conduct as between claimant and defendant.

Some commentators have criticised the approach we propose on the grounds that no "right" of the claimant has been infringed.[55] One answer to this is to doubt how helpful it really is to analyse liability here in terms of rights, especially if an inability to identify a "right" infringed leads to a rejection of the unlawful means tort being characterised as a tort.[56] Courts have consistently and sensibly recognised liability in this area to be tortious. In any event, we suggest that there is in fact no particular difficulty in saying that the claimant has a right that the defendant not intentionally cause him loss by unlawful means.[57] In the context of a general view of the law of torts as concerned with relational wrongs between persons,[58] it is natural to say that the fact that the defendant specifically targeted the claimant and deliberately used unlawful means to injure him is relevant to the question of liability in tort.

Before leaving this section, two difficulties with the intention element of the tort should be addressed. First, Lord Nicholls in *OBG* endorsed the view of intention to harm in *Sorrell v Smith*,[59] that a trader in a limited market who seeks to increase his share of that market necessarily intends in the requisite sense to harm his trade competitors.[60] However, he also seemed to enter a qualification to that view by suggesting that something more than this might be required in some contexts before it could really be said that the defendant who commits a crime or a civil wrong, like a breach of patent, to further his own economic interest has targeted the claimant trade competitor by such action or struck at him through the instrumentality of such unlawful conduct.[61] Secondly, and related to this, in many contexts the *Sorrell v Smith* view of intention to harm seems to come adrift from a view of intention to harm in the sense of specifically targeting the use of unlawful means against a particular person such as was discussed in *Rookes v Barnard*. For instance, a defendant might be broadly aware that he is competing against others in a limited market but have only a hazy idea who those others are or which of them might actually be harmed by his own actions:

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[55] e.g. J. Neyers, "Rights-based Justifications for the Tort of Unlawful Interference with Economic Relations" [2008] L.S. 215 at 223.

[56] R. Stevens, "Disaggregating the 'Economic Torts'" [2017] S.J.L.S. (forthcoming). Stevens explains liability on the basis of a notion of "abuse of liberty", which is often described as "abuse of rights". It is suggested that even on Stevens' proposal, Lord Nicholls' approach should be preferred to that of Lord Hoffmann when identifying what qualifies as unlawful means for the purposes of "abuse".

[57] We agree with the view that "[i]f Parliament can put it in a statute, then you can have it as a right": N. McBride, "Rights and the Basis of Tort Law" in D. Nolan and A. Robertson (eds) *Rights and Private Law* (Oxford: Hart Publishing, 2011). See too R. Bagshaw, "Tort law, concepts and what really matters" in A. Robertson and H.W. Tang (eds) *The Goals of Private Law* (Oxford: Hart Publishing, 2009). Cf. D. Nolan, "Rights, Damage and Loss" (2016) 36 O.J.L.S. 1, 7-16.

[58] See J. Goldberg and B. Zipursky, "Torts as Wrongs" (2010) 88 Texas L.R. 917.

[59] [1925] A.C. 700.

[60] [2008] 1 A.C. 1 at [167]; see similarly [134] (Lord Hoffmann).

[61] [2008] 1 A.C. 1 at [159]-[160].

would that create a sufficient nexus between the defendant and the (unknown) claimant competitor to give rise to liability? We suggest not. A more specific intention to use unlawful means to harm a particular person should be required, using those means as the club to hit him, in Lord Devlin's language. This suggests that adoption of the *Sorrell v Smith* model of intention in this area is too simplistic and too wide. Although we contend that in this context a narrower concept of intention to harm is the better way forward, it has to be acknowledged that if one seeks to articulate a concept of intention which is narrower than this but is wider than the "predominant intention to injure" concept used for the purposes of *Quinn v Leathem* liability, a different source of uncertainty creeps back into the analysis. The shades of difference in the *mens rea* required become somewhat refined.

2) Accessory liability

Accessory liability is more well-known in the criminal law than in the private law, but it is also important in the latter context. A person who participates in a primary wrong committed by another may be liable as an accessory. This has been accepted throughout private law. For example, in *Royal Brunei Airlines Sdn Bhd v Tan* Lord Nicholls explicitly recognised an "accessory liability principle" in the context of dishonestly assisting a breach of trust or fiduciary duty.[62] Where the primary wrong is a breach of contract, in *OBG* the House of Lords held that liability under *Lumley v Gye*[63] is accessorial in nature.[64] More recently, in *Fish & Fish Ltd. v Sea Shepherd*, the Supreme Court used the language of "accessory liability" in tort.[65]

Accessory liability can be justified on a variety of bases, but essentially rests upon principles of responsibility, culpability and protecting rights.[66] The defendant must have participated in the primary wrong in a more than minimal way such that he can be held to bear some responsibility for the infringement of the claimant's rights. The defendant must be culpable in that he acted with a certain mental element. It is not always easy to pin down exactly what constitutes "participation" or the appropriate "mental element". A balance needs to be struck: a more restrictive approach to the elements of accessory liability would afford potential defendants greater freedom to pursue their own interests in the most effective way possible, whereas a more expansive approach would provide greater protection for claimants' rights. It is possible to use this model to debate whether different types of rights should attract a wider or narrower penumbra of protection through accessory liability, depending on the importance of the interest reflected in the right in question.[67] But it is difficult to identify any clear basis for distinguishing between different forms of civil rights in respect of the extent to which they should be protected from external intervention by a third party defendant. In our view, there is much to be said in favour of a general principle of accessory liability that could operate throughout private law: knowingly assisting or inducing a wrong is itself prima facie

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[62] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378 (P.C.).

[63] (1853) 2 E. & B. 216.

[64] e.g. [2008] 1 A.C. 1 at [8] (Lord Hoffmann), [172] (Lord Nicholls), [320] (Lord Brown).

[65] [2015] UKSC 10; [2015] A.C. 1229, e.g. at [1] (Lord Toulson), [38] (Lord Sumption), [68] (Lord Neuberger).

[66] P. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015), esp. ch. 2.I.

[67] J. Dietrich and P. Ridge, *Accessories in Private Law* (Cambridge: Cambridge University Press, 2016).

wrongful.[68] Alternatively, if one wishes to emphasise the stringency of the requisite mental state on the part of the defendant, one might speak of dishonest assistance or inducement, the formulation used in equity. Certain defences apply, such as justification.[69] Clearly, it would be easier to justify participation in some wrongs rather than others.

The law has not (yet) explicitly recognised such a general principle. Instead, accessory liability falls under "dishonest assistance" in equity, "the tort in *Lumley v Gye*" in contract, and "joint tortfeasance" in tort. But a clear understanding of these instances of accessory liability is important, since they cover much of the ground that might otherwise fall within the domain of "conspiracy". Indeed, once their scope is properly understood, it must be questioned whether there is any terrain left for conspiracy legitimately to occupy.

Where the primary wrong is an equitable wrong, such as breach of trust or breach of fiduciary duty, then liability is not often imposed on the basis of a conspiracy.[70] Instead, the focus is upon dishonest assistance. This is understandable given the wide scope of "assistance" in this context. *Lewin on Trusts* states that accessory liability arises "where the assistance takes the form of inducement".[71] Assistance is broadly understood to encompass inducement and encouragement, and this covers many cases which might otherwise be considered to be conspiracy cases. The very act of agreeing with the unlawful purpose may encourage the primary wrongdoer actually to commit the wrong.[72]

In the contractual sphere too, accessory liability can do much of the work often considered to be achieved by unlawful means conspiracy. This parallels the experience in equity. Although the tort in *Lumley v Gye* is often described as "intentionally inducing a breach of contract", neither "intention" nor "inducement" seem to be understood in a restrictive manner. As regards the former, it appears to suffice that the defendant knew of the primary wrong of breach of contract. In *Stratford & Sons v Lindley*, Lord Pearce observed that "[t]he relevant question is whether [the defendants] had sufficient knowledge of the terms to know that they were inducing a breach of contract".[73] As regards the latter, liability is not limited to acts of inducement, since acts of facilitation or assistance appear to suffice.[74] This was recently accepted by David Richards J. in *Lictor Anstalt v Mir Steel UK Ltd*, at least

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[68] P. Sales, "The Tort of Conspiracy and Civil Secondary Liability" [1990] C.L.J. 491; Davies, *Accessory Liability* (2015).

[69] See generally Davies, *Accessory Liability* (2015), ch. 7.

[70] Cf. *Prudential Assurance v Newman Industries (No. 2)* [1981] Ch. 257.

[71] L. Tucker, N. Le Poidevin, J. Brightwell (eds), *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell, 2008) para 40-033.

[72] If the agreement does not have even this effect, then it may be doubted whether liability should arise at all: see text to nn.147-156 below.

[73] [1965] A.C. 269 (HL), 332. See too *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [202] (Lord Nicholls) and [39] (Lord Hoffmann).

[74] See e.g. *British Motor Trade Association v Salvadori* [1949] Ch. 556 (Roxburgh J.); *D.C. Thomson & Co. Ltd. v Deakin* [1952] Ch. 646 at 694 (Jenkins L.J.); *Rickless v United Artists Corporation* [1988] Q.B. 40 at 59 (Bingham L.J.).

for the purposes of arguability at trial.[75] The judge explicitly rejected the notion that inducement was limited to persuasion or enticement.

Perhaps the most important area of accessory liability for present purposes concerns situations where the primary wrong is a tort. Helpful guidance on this issue can be found in *Fish & Fish Ltd. v Sea Shepherd*.[76] Sea Shepherd Conservation Society ("SSCS"), a US-based conservation charity, launched Operation Bluerage. The campaign involved using a ship to confront those who caught endangered bluefin tuna and, if necessary, to use violence to release the tuna. In the course of Operation Bluerage around 33 tonnes of fish that had been caught by Fish & Fish Ltd. were released by divers from the ship. On the basis that it had suffered acts of trespass and/or conversion, Fish & Fish Ltd. brought a claim against SSCS's associated United Kingdom charity, Sea Shepherd UK ("SSUK"). One preliminary issue was whether SSUK could be liable as a joint tortfeasor with SSCS. SSUK had assisted the campaign by allowing a mailshot to be sent out in its name, which led to SSUK receiving and paying to SSCS £1,730 in public donations. SSUK also recruited two people who transported a pump to the ship and performed one day's work when she was in port.

A majority of the Supreme Court agreed with the decision of the trial judge that SSUK's acts constituted only a *de minimis* contribution to SSCS's tortious conduct, so SSUK could not be liable as an accessory. But the Supreme Court unanimously recognised that the defendant could have been liable as an accessory for assisting a tort if it had been acting pursuant to a "common design" with the primary tortfeasor. Although once strictly interpreted,[77] it has become increasingly easy to satisfy this requirement of a "common design",[78] such that Lord Sumption recognised that "the evidence of common design may fairly be regarded as thin" in some of the decided cases.[79] Lord Neuberger departed from the formulation of Peter Gibson L.J. in *Sabaf SpA v MFI Furniture Centres Ltd*[80] that the defendant must have "made [the tortious act] his own", since "this formulation is ultimately circular and risks being interpreted as putting a potentially dangerous gloss on the need for a common design".[81] This might indicate that the mental element of accessory liability in tort could be more relaxed in the future:[82] a defendant might be liable as an accessory if he knew that he was participating in a tort, but he does not need to intend to harm the claimant. In any event, it appears that where there is a conspiracy to commit a tort, there is little need for an independent tort of conspiracy. The conspiracy will inevitably amount to a "common design" and, as in other areas of private law, the agreement itself is likely to encourage the primary

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[75] *Lictor Anstalt v Mir Steel UK Ltd.* [2011] EWHC 3310 (Ch); [2012] 1 All E.R. (Comm.) 592. This issue was not considered on appeal: [2012] EWCA Civ 1397; [2013] 2 All E.R. (Comm.) 54.

[76] [2015] UKSC 10.

[77] e.g. *The Koursk* [1924] P. 140.

[78] e.g. *Unilever Plc v Gillette (UK) Ltd.* [1989] R.P.C. 583 at 609 (Mustill L.J.).

[79] [2015] UKSC 10 at [38], citing *Monsanto Plc v Tilly* [2000] Env. L.R. 313 (CA); *Shah v Gale* [2005] EWHC 1087 (Q.B.); *Dramatico Entertainment Ltd. v British Sky Broadcasting Ltd.* [2012] EWHC 268 (Ch); [2012] 3 CM.L.R. 14.

[80] [2002] EWCA Civ 976; [2003] R.P.C. 264 at [59].

[81] [2015] UKSC 10 at [59].

[82] See e.g. G McMeel, "Joint and Accessory Liability for Wrongs in Private Law" [2016] L.M.C.L.Q. 29; P. Davies, "Accessory Liability in Tort" (2016) 132 L.Q.R. 16.

wrongdoer to act unlawfully. As the editors of *Clerk & Lindsell* have observed, "[i]t would appear that the question whether a person is a party to a combination constituting a conspiracy is essentially the same as whether he is liable as a joint tortfeasor in procuring a wrong, by reason of a common design".[83] Principles of accessory liability can therefore be of great significance when analysing liability in situations where the parties have agreed to pursue an unlawful course of conduct. We consider in section III below whether there should be any scope for conspiracy liability to arise where a claim in accessory liability would fail.

II) Two potential distractions: the criminal law and the "economic torts"

Before analysing *Total Network*, we deal with two areas of the law to which reference is often made when considering civil liability for conspiracy: the criminal law and the "economic torts". We suggest that neither is very helpful when determining the nature and scope of conspiracy in private law.

1) The influence of the criminal law

The roots of conspiracy liability lie deep in the common law. The origins of conspiracy can be found in medieval statutes.[84] Although conspiracy liability was initially applied in a similar manner in both the criminal and civil law, the two soon parted ways. The criminal law quickly developed an offence based upon the agreement itself.[85] The inchoate nature of the criminal offence has been maintained in section 1 of the Criminal Law Act 1977. Criminal liability arises regardless of whether the intended offence is committed. The civil law has not accepted inchoate liability. This distinction is important.

The need for inchoate liability in criminal law is readily understandable. Group behaviour can be particularly worrisome, and the task of tackling gangs who plot criminal offences is facilitated by allowing the prosecution of inchoate offences.[86] Inchoate liability is prophylactic in nature, designed to catch schemes at a stage well before they are brought to fruition in view of the public interest in preventing the harm in question. But the same concerns are not mirrored in the private law, which generally responds to the infringement of a claimant's right.[87]

It is not entirely clear whether there is any overlap left between the civil and criminal law. This is not only because criminal liability can be inchoate, unlike civil liability, but also because where the principal offence has actually been committed, it appears that conspiracy

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[83] M. Jones (ed) *Clerk & Lindsell on Torts* 21st edn (London: Sweet & Maxwell, 2014) [24-97]. Although the quotation refers to "procuring", the judgment of the Supreme Court in *Fish & Fish* indicates that it must apply equally to "assistance" and other forms of participation.

[84] E.g. Statutum de Conspiratoribus (20 Edw. 1, 1292); see generally P.H. Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (Cambridge, Cambridge University Press, 1921).

[85] See e.g. *Poulterer's Case* (1611) 9 Co. Rep. 55b; F.B. Sayre, "Criminal Conspiracy" (1922) 35 Harvard L.R. 393.

[86] See e.g. *Simester & Sullivan's Criminal Law: Theory and Doctrine* 6th edn (Oxford: Hart Publishing, 2016) at 337-338.

[87] Although there may perhaps be some scope for "preventive damages": D. Nolan, "Preventive Damages" (2016) 132 L.Q.R. 68.

is not, in itself, a qualifying mode of participation for criminal accessory liability.[88] At least in England and Wales, the criminal law appears to work on the basis that general principles of accessory liability – based upon assistance, encouragement and inducement – are sufficient without relying upon conspiracy.[89] So conspiracy does not do any significant work in situations where the principal offence has been committed. It might further be suggested that if even the criminal law does not employ concepts of conspiracy in situations where a wrong has been carried out, then it is doubtful whether the civil law should take this extra step.

The criminal law of conspiracy had some influence in the early development of its civil law counterpart. The remnants of such influence can sometimes still be discerned in more modern judgments. For example, in *Sorrell v Smith*, Lord Dunedin said that "the essence of conspiracy on which civil action is founded is a criminal conspiracy,"[90] and in *Quinn v Leathem* Lord Brampton said that "[t]he essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved".[91] But it now seems that the criminal and private law should be considered to be distinct.[92] As a result, Lord Walker's references in *Total Network* to the criminal law in order to explain the private law's "intense focus, in the tort of conspiracy, on intention"[93] should be treated with caution. The inchoate nature of the criminal offence of conspiracy inevitably requires a focus upon the parties' intention. But the same approach does not necessarily govern when a claimant's rights have been infringed: in those circumstances, the common law has principles of accessory liability to apply.

In any event, it is worth noting that even in the criminal law conspiracy liability will not arise unless the parties intend to use unlawful means to injure. In *Crofter Hand Woven Harris Tweed Co v Veitch*, Lord Porter observed that "in recent times I do not think that it has been held criminal merely to combine to injure a third party provided no unlawful means are used or contemplated and it is doubtful whether such a combination ever was criminal".[94] Yet the private law appears to take a different approach, since in *Quinn v Leathem*[95] lawful means conspiracy was recognised. But this is a controversial step which seems anomalous.[96]

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[88] See e.g. K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: Clarendon Press, 1991) at 47-54; S.H. Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" (1985) 73 California L.R. 323 at 362-363. For criticism, see A. Simester, "Accessory Liability and Unlawful Common Purpose" (2017) 133 L.Q.R. 73.

[89] This is made clear by the recent decision of the Supreme Court in *R. v Jogee* [2016] UKSC 8; [2016] 2 W.L.R. 681. The common law position in Australia is more complicated: see *Miller v The Queen* [2016] HCA 30.

[90] [1925] A.C. 700 at 725, quoted by Lord Walker in *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [77].

[91] [1901] A.C. 495 at 528-529. See too *Crofter v Veitch* [1942] A.C 435 at 439 (Viscount Simon L.C.).

[92] E. Peel and J. Goudkamp, *Winfield and Jolowicz on Tort* 19th edn (London: Sweet & Maxwell, 2014) [19-035].

[93] *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [77].

[94] *Crofter v Veitch* [1942] A.C 435 at 488.

[95] [1901] A.C. 495.

[96] See text to nn. 166-184 below.

2) Grouping the "economic torts" together

The "economic torts" have long proved to be problematic. In *Total Network*, Lord Neuberger said that "[u]nlawful means conspiracy is one of the so-called economic torts, which include procuring a breach of contract, unlawful interference, causing loss by unlawful means, intimidation, and conspiracy to injure (or lawful means conspiracy)".[97] But analysing all these wrongs together as a part of a coherent whole is at best difficult and probably misleading. There is "no inherent unity"[98] amongst these torts, and grouping them together only serves to confuse.

Lord Wedderburn famously observed that the "economic torts" are "still awaiting their Atkin".[99] This has often been quoted since, and Partlett has even written that "[t]he economic torts require a Cardozo or Atkin to tell them where they belong".[100] But Wedderburn was critical of attempts to look "for a quick solution in principle";[101] he was not making a plea for unity. And indeed such unity is unlikely ever to transpire, given the different bases for the torts.

The very word "economic" is misleading. It is not only "economic" interests that are protected by these torts. In *OBG* Lord Hoffmann recognised that under the unlawful means tort "[i]t is sufficient that the intended consequence of the wrongful act is damage in any form; *for example*, to the claimant's economic expectations".[102] The tort protects all interests, not just economic ones. Once one rejects a conception of the tort based on interference with a right to trade, as the House of Lords has done in *Allen v Flood* and *OBG*,[103] there is no magic in the economic nature of the claimant's interest.[104] The usual priority in the law of tort is for protection of individuals' physical integrity and property[105] and there is no reason why those interests should not be protected by this tort. This is a point of some significance for discussion of conspiracy. If the unlawful means tort only protected some limited class of

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[97] [2008] 1 A.C. 1174 at [216]

[98] Stevens, *Torts and Rights* (2007) at 297.

[99] Lord Wedderburn "Rocking the torts" (1983) 46 M.L.R. 224 at 229.

[100] D.F. Partlett, "From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry" (1992) 66 Tulane L.R. 771 at 773.

[101] Wedderburn "Rocking the torts" (1983) 46 M.L.R. 224 at 227.

[102] *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [8] (emphasis added); see too [32] (the unlawful means principle "is indifferent as to the nature of the interest which is damaged") and [48]. This sets the context for Lord Hoffmann's focus upon economic interests at [47] – he was not saying that *only* economic interests are protected. Although Lord Nicholls referred (at [141]) to the tort as "interference with a trade or business by unlawful means", the case did not turn on the nature of the protected interest and he did not say the tort had to be confined to protection of this type of interest nor analyse why that should be so. See also Bagshaw, "Lord Hoffmann and the Economic Torts" in *The Jurisprudence of Lord Hoffmann* (2015) at 62-63; cf. J. Murphy, "Misleading Appearances in the Tort of Deceit" [2016] C.L.J. 301 at 309-313.

[103] See [2008] 1 A.C. 1 at [9]-[14]. See also J. Neyers, "Rights-based Justifications for the Tort of Unlawful Interference with Economic Relations" [2008] L.S. 215 at 220-222; P. Sales and D. Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999) 115 L.Q.R. 411 at 430-431.

[104] *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [8], [32], [48] (Lord Hoffmann); see too *Allen v Flood* [1898] A.C. 1 at 96, 104 (Lord Watson).

[105] Cf. the readiness with which these interests are protected in the law of negligence, by contrast with protection against pure economic loss: see e.g. *Spartan Steel & Alloys Ltd. v Martin* [1973] 1 Q.B. 27; *Greenway v Johnson Matthey* [2016] EWCA Civ 408.

interests, it might be said that there is a role for conspiracy to injure by unlawful means to protect wider forms of interest;[106] but since the unlawful means tort protects the same range of interests, this proves to be something of a dead-end.

The fact that economic interests are protected by the tort tends to show that, *a fortiori*, other interests which are more readily treated as worthy of protection under the law of tort generally should also be protected in this context. In *Rookes v Barnard*, Lord Evershed specifically contemplated that physical harm could found liability for the tort of intimidation.[107] In *Godwin v Uzoigwe* the Court of Appeal recognised that damages could be awarded for distress suffered as a result of intimidation where the claimant had worked for the defendant without pay for over two years.[108] The principles identified are of general application beyond the confines of economic competition. Similarly, in *Fish & Fish Ltd. v Sea Shepherd*, the Supreme Court recognised that many of the cases of accessory liability in tort law have concerned intellectual property rights, but these are just instances of participation in a tort, and the principles of accessory liability apply to any wrong.[109]

Trying to unify the "economic torts", or at least ensuring a degree of commonality between them, runs a serious risk of distorting the fundamental elements of each type of wrong. For example, there is no reason for the mental element to be the same for accessory liability, which is parasitic upon a wrong, as for the tort of intentionally inflicting harm by unlawful means, which is free-standing.[110] In *Lumley v Gye*, liability did not depend upon whether or not Gye set out to injure Lumley: the fact that Gye knew that a breach of contract would occur was sufficient. Yet under the unlawful means tort it is necessary to target the claimant.[111] The mental elements are different. For this reason, it is suggested that Lord Hoffmann's comment in *OBG* that "the concept of intention is in both cases the same"[112] should be treated with caution. In the unlawful means tort, the necessary nexus between the claimant and defendant is provided by the defendant's intention to harm the claimant. But under *Lumley*, the link between the defendant and the claimant is provided by the former's participation in the breach of the latter's contract committed by the primary wrongdoer; the defendant's intention only concerns the breach of contract.[113] It is therefore unfortunate that in *OBG* Baroness Hale said that "[t]he underlying rationale of both the *Lumley v Gye* ... and the unlawful means torts is the same: the defendant is deliberately striking at his target

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[106] Indeed, Lord Walker makes this move in *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [100].

[107] [1964] A.C. 1129 at 1194. Cf. *Mbasogo v Logo Ltd. (No.1)* [2006] EWCA Civ 1370; [2007] Q.B. 846.

[108] [1993] Fam. Law 65. See too Murphy, "Understanding Intimidation" (2014) 71 M.L.R. 33 at 44-47.

[109] [2015] UKSC 10; [2015] A.C. 1229 at [40] (Lord Sumption); see e.g. *Shah v Gale* [2005] EWHC 1087 (QB) (accessory to battery and assault).

[110] *Pace* M. Arden, "Economic Torts in the Twenty-First Century" (2006) 40 Law Teacher 1.

[111] *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [62]-[64].

[112] [2008] 1 A.C. 1 at [62].

[113] See too *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [8].

through a third party".[114] Confusion can flow from attempting to consider the economic torts as a whole.

It is not surprising that Lord Neuberger remarked in *Total Network* that the economic torts "present problems even if they are considered individually (and yet more problems arise if they are treated as a genus)".[115] Nevertheless, attempts continue to be made to treat the "economic torts" as a coherent subject. Indeed, Deakin and Randall have argued from a functional perspective that the scope of these torts should be limited to the protection of economic interests and that only a "purist" would be influenced by the fact that these wrongs can protect rights beyond trade or business interests.[116] They contend that "[t]he economic torts exist to govern market relations and in particular to police the competitive process; they do not, and should not, form the basis for a more general principle of tortious liability based either on intentional infliction of harm or secondary liability for civil wrongs".[117] We disagree with Deakin and Randall's surmise that relying upon the two key principles of "wider application" which we have identified has "little prospect of surviving the narrowing of the law in *OBG*".[118] Especially after *Total Network*, it is important to return to first principles in order to bring coherence to the law.

Carty has also asked what the role of the "economic torts" as a set should be, and expressed her preference for the torts to "remain a modest common law contribution to policing excessive competitive behaviour and no more".[119] She has suggested that it would be a "startling conclusion" for liability to extend "even beyond purely economic interests" and that there be "a new generalized form of tort liability".[120] Admittedly, the language of interference with trade or business interests lingers on,[121] but a true understanding of the rationales for liability should help to advance the law towards a more satisfactory state. Although it is important to be sensitive to the context of the competitive process in which these torts often operate, that should not confine their proper ambit. The general principles of law are not confined to the business environment, and particular issues in that context might be better dealt with by statute.[122] As Lord Walker remarked in *Total Network*, "the claimant need not be a trader who is injured in his trade".[123] Indeed, it is not obvious that the interest of the Revenue in *Total Network*, although financial in character, fits within the sort of

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[114] [2008] 1 A.C. 1 at [306]. Similarly, in *Douglas v Hello! Ltd.* [2005] EWCA Civ 595; [2006] Q.B. 125 at [221] Arden L.J. held that "the gist of all the economic torts is the intentional infliction of economic harm".

[115] [2008] 1 A.C. 1174 at [216]. For the best attempt to mould a genus tort – which was roundly rejected in *OBG Ltd. v Allan* – see T. Weir, *Economic Torts* (Oxford: Clarendon Press, 1997).

[116] Deakin and Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519 at 536.

[117] Deakin and Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519 at 553.

[118] Deakin and Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519 at 520.

[119] Carty "The Modern Functions of the Economic Torts" [2015] C.L.J. 261. *Revenue and Customs Commissioners v Total Network* was not concerned with questions of control of competitive behaviour.

[120] H. Carty, *An Analysis of the Economic Torts*, 2nd edn (Oxford, Oxford University Press, 2010) at 181 (and see generally 169-181).

[121] See Lord Nicholls' speech in *OBG Ltd. v Allan* [2008] 1 A.C. 1 and *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [26] (Lord Hope).

[122] e.g. Competition Act 1998.

[123] *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [100].

interests which were the primary focus for discussion in *OBG*.[124] The defendants were not in competition with the Revenue, which just wanted to recover in respect of sums which it had to pay out as reclaimed VAT. The range of interests protected by conspiracy is not limited to economic interests and it is difficult to see why the unlawful means tort should be so constrained.[125]

It is clear that even if the "economic torts" were considered to be a single coherent set, their development is not yet complete.[126] It is to be hoped that future developments will focus upon the distinct rationales for each tort, without being blinkered by concerns of competition and business interests. In *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*, Cromwell J. in the Supreme Court of Canada observed that "[w]hile the economic torts may sometimes develop along parallel lines, they have distinct historical roots and roles to play in the regulation of the modern marketplace".[127] It is suggested that the distinct roots and roles are not limited to the marketplace, and that the elements of each so-called "economic tort" must be assessed independently. It is true that the law should strive to be coherent and consistent,[128] but this concern is not unique to the "economic torts". Each wrong must fit sensibly within the law of tort and private law more generally, so if the same language is used differently in different torts (such as "intention" and "unlawful means") then this must be carefully analysed and justified.

III) Analysing conspiracy: no room for an independent tort?

The tort of conspiracy to cause loss by unlawful means has attracted much attention in the wake of the decision of the House of Lords in *Revenue and Customs Commissioners v Total Network*. That case concerned a carousel fraud. Total Network SL ("Total") was a company incorporated in Spain. Total sold mobile phones to a company incorporated in the UK, and that company then sold them on to another UK-based company, who sold them on to another UK-based company, and so on until the ultimate UK-based purchaser completed the circle of the carousel by selling the phones back to Total. VAT was charged on the sales within the UK, but (at least) one buyer in the chain disappeared without paying VAT, becoming a "missing trader". In addition, the final sale back to Total constituted a sale out of the UK, meaning that it was zero-rated,[129] so the ultimate seller was entitled to reclaim from HMRC the VAT it had paid in purchasing the phones. This meant that HMRC lost out on unpaid VAT. The Court found that the phones were sold by Total to various missing traders for nearly £12.3 million, and re-purchased from ultimate sellers for a just over £11.6 million. The

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[124] Cf. Deakin and Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519 at 534.

[125] Neither intimidation nor deceit are restricted to the protection of economic interests: see Murphy, 'Understanding Intimidation' (2014) 71 M.L.R. 33 at 44-47; Murphy, "Misleading Appearances in the Tort of Deceit" [2016] C.L.J. 301 at 321-323.

[126] See e.g. *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [89] (Lord Walker); *Lonrho v Fayed* [1992] 1 A.C. 448 at 471 (Lord Templeman).

[127] 2014 SCC 12 at [68].

[128] See *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [220] (Lord Neuberger).

[129] Value Added Tax Act 1994, s.30.

total amount of VAT due but unpaid on the sales by the missing traders was around £1.9 million.

The Revenue was not able to recover the lost VAT from Total directly, since Total was a trader registered for VAT in Spain, not the UK.[130] The Revenue instead sued Total as a participant in "the tort known as unlawful means conspiracy".[131] There were two potential bases for the "unlawful means". One concerned deceit: the missing trader made a fraudulent misrepresentation when charging VAT. This was seen as the "weaker alternative" by Lord Hope,[132] perhaps for evidential reasons.[133] It is suggested, however, that in all probability such a claim would have succeeded. Yet the Revenue relied largely upon a different basis for "unlawful means": cheating the public revenue. This is a criminal offence at common law,[134] and the case proceeded on the basis that it is not civilly actionable.[135] As a result, had Total been acting entirely alone, it would not have incurred civil liability. Nevertheless, the House of Lords allowed the Revenue's appeal, overruling the earlier decision of the Court of Appeal in *Powell v Boladz*,[136] and held that Total could be liable for the "unlawful means conspiracy tort".

The result in the case seems sensible, but we respectfully submit that the reasoning of the House of Lords is largely unconvincing.[137] This is partly due to the "artificiality of the pleadings".[138] Not only did the Revenue refuse to rely upon the tort of deceit, but it also did not seek to argue that cheating the public revenue is a tort. This appears to be because the Revenue wanted to test whether it could generally rely upon unlawful means conspiracy when the unlawful means is not civilly actionable. Although this was perhaps an unwarranted and artificial concession,[139] it is necessary to deal with the unanimous opinion of the committee that the "unlawful means" in unlawful means conspiracy need not be civilly actionable and that the idea of conspiracy is itself important and meaningful in generating "fresh" liability.[140] As we have already highlighted, one major difficulty with the outcome in *Total Network* is that it is not at all clear how it fits with the decision of the House of Lords in *OBG* regarding unlawful means, handed down less than one year previously.[141] Simply

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[130] The Revenue can only pursue the recovery of VAT from a taxable person within the UK: Value Added Tax Act 1994, s.3.

[131] [2008] 1 A.C. 1174 at [10] (Lord Hope).

[132] [2008] 1 A.C. 1174 at [42].

[133] See too [2008] 1 A.C. 1174 at [215] (Lord Neuberger).

[134] Preserved by Theft Act 1968 s.32(1)(a).

[135] e.g. [2008] 1 A.C. 1174 at [45] (Lord Hope); [121]-[122] (Lord Mance).

[136] [1998] 1 Lloyd's Rep. Med. 116.

[137] See e.g. H. Carty, "The Economic Torts in the 21st Century" (2008) 124 L.Q.R. 641 at 660-666.

[138] Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts L.J. 162 at 200.

[139] See *Revenue and Customs Commissioners v Total Network* at [121] (Lord Mance).

[140] H. Carty, "The Tort of Conspiracy as a Can of Worms" in S. Pitel, J. Neyers and E. Chamberlain (eds.), *Tort Law: Challenging Orthodoxy* (Oxford: Hart Publishing, 2013).

[141] See e.g. Carty "The Modern Functions of the Economic Torts" [2015] C.L.J. 261 at 279-280. Carty helpfully highlights that England and Wales is not alone in adopting a broader view of "unlawful means" for conspiracy than the unlawful means tort: see e.g. *A.I. Enterprises v Bram Enterprises* 2014 SCC 12.

stating that the two torts are "different in their nature"[142] is too bald. The torts may be different, but that does not explain why the concept of "unlawful means" is defined differently in the two contexts. In this section we will consider the decision in *Total Network* from two alternative viewpoints. First, on the basis that Lord Nicholls' view in *OBG* should be preferred and "unlawful means" not be restricted to civilly actionable wrongs; and secondly on the basis of Lord Hoffmann's view that unlawful means are so restricted.

1) If Lord Nicholls' view of unlawful means is preferred

If "unlawful means" encompasses crimes as well as torts then the result in *Total Network* can be easily explained. The missing trader committed the tort of intentionally inflicting harm upon the Revenue by unlawful means (the crime of cheating the Revenue). Total could be sued as an accessory to that tort.[143] This straightforward, coherent explanation makes it clear that the elements which need to be established against the different parties would be different. The missing trader would be liable for the free-standing tort based upon intentional infliction of harm, for which the Revenue would need to prove the infliction of harm, the deliberate use of unlawful means, and that the missing trader did intend to harm the Revenue. On the other hand, Total would be an accessory and therefore further removed from the "direct" infringement of the Revenue's rights. As against Total, the Revenue would need to establish that the tort has indeed been committed by the missing trader, and then that Total participated in the tort "pursuant to a common design". This only requires a common design that the unlawful means tort be carried out, but does not demand that Total itself "aimed at" or "targeted" the Revenue.

Adopting this view might mark a shift away from what Lord Walker described in *Total Network* as "the intense focus, in the tort of conspiracy, on intention".[144] But that does not seem inappropriate. There is no need to target a claimant for accessory liability to arise.[145] Demanding such a stringent mental element may have been thought necessary by the House of Lords in *Total Network* in order to justify liability in situations where no actionable primary wrong was committed pursuant to the conspiracy (other than the conspiracy itself). But this does not seem to be a desirable development: that an act was carried out by two defendants rather than one does not change the fact that the claimant's private law rights have not been violated and that no private law claim should lie. As Stevens has put it, "[f]or conspirators to be criminals what they must conspire to do must be a crime, and for conspirators to be tortfeasors, what they must conspire to do must be a tort".[146] Even an "intense focus" upon intention should not be able to alter this position.

One consequence of explaining the result in *Total Network* as being based upon accessory liability in relation to the unlawful means tort is that unlawful means conspiracy

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[142] *Revenue and Customs Commissioners v Total Network* at [123] (Lord Mance). See too e.g. *A.I. Enterprises v Bram Enterprises* 2014 SCC 12 at [62] (Cromwell J.).

[143] See too K. Oliphant, "The Economic Torts" in K. Oliphant (ed.) *The Law of Tort* 3rd ed (LexisNexis, 2014).

[144] *Revenue and Customs Commissioners v Total Network* at [77].

[145] See text to nn.66-68 above.

[146] R. Stevens, "Salvaging the Law of Torts" in Davies and Pila (eds) *The Jurisprudence of Lord Hoffmann* (2015) at 96. See too *OBG Ltd. v Allan* at [57] (Lord Hoffmann).

would effectively be rendered otiose. The two key general principles of (i) intentional infliction of harm by unlawful means and (ii) accessory liability would suffice. Would conspiracy liability be missed? It is suggested that the answer to this question is No. Although not all instances of accessory liability involve a conspiracy,[147] conspiracies can be analysed as instances of accessory liability (where there is an actionable primary wrong). This is because a party to a conspiracy will — either through the agreement itself or other acts — assist, encourage or induce the primary wrong. The agreement is only relevant to determining whether there has been assistance, encouragement or inducement, but the agreement itself is not a basis of liability. Liability should not be imposed for conspiracy where no liability could arise in respect of an individual acting alone.

Perceived advantages of bringing a claim for conspiracy also turn out to be bogus. For example, it is sometimes suggested that there are certain evidential advantages to bringing a claim in conspiracy, such as the ability to avoid proving precisely which party actually carried out the primary wrong.[148] But this advantage can also be derived from accessory liability, without resort to conspiracy. If it is clear that either A or B carried out the wrong, and that whichever of A or B did not carry out the wrong was an accessory to it, then the claimant should be able to sue both parties on the basis that they were at the very least accessories to the wrong.[149]

McBride and Bagshaw have written that it "seems implausible" that a defendant could be liable as an accessory to the unlawful means tort such that unlawful means conspiracy is redundant. This is because "the tort of unlawful means conspiracy existed long before the tort of intentional infliction of harm by unlawful means was explicitly recognised by the courts".[150] However, it does seem plausible to argue that when unlawful means conspiracy originally existed it had to do much of the work of, and in fact laid the ground for, the unlawful means tort,[151] and this aspect of conspiracy is no longer required. Since the unlawful means tort has now been recognised and its conceptual basis can be clarified as we suggest, the tort of conspiracy is stripped of normative justification which may have existed previously. Another feature of conspiracy liability in its early evolution involved a parallel with the criminal law, but there is no reason for inchoate agreements to lead to civil liability and this facet of conspiracy liability can again properly be allowed to wither away. Now that accessory liability in the private law has been clearly recognised, the need for conspiracy liability appears to fall away. Modern law and society is very different from a time when conspiracy was at the fore;[152] its longevity alone is not a good enough reason for imbuing conspiracy with a core role to play in private law.

Might conspiracy be useful to cover a situation where defendants D1 and D2 together hatch a plan to commit a tort against an intermediary victim, V, with a view to harming the

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[147] For a clear exposition of this point, see e.g. *Halberstam v Welch* 705 F. 2d. 472 (Col. 1983) at 478.

[148] e.g. J. Eekelaar, "The Conspiracy Tangle" (1990) 106 L.Q.R. 223 at 224.

[149] This mirrors the position in the criminal law: see e.g. *R. v Swindall and Osborne* (1846) 2 Car. & Kir. 230; *R. v Giannetto* [1997] 1 Cr. App. Rep. 1 (CA)*; R. v Mercer* [2001] EWCA Crim 638.

[150] N. McBride and R. Bagshaw, *Tort Law* 5th edn (Harlow: Pearson, 2015) at 883.

[151] See too Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts L.J. 162 at 198.

[152] See e.g. *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [78] (Lord Walker).

claimant, C? For example, D1 and D2 might agree to kidnap a singer (V) in order to harm an impresario (C).[153] But in such circumstances there would still be no need for C to rely upon conspiracy. If D1 kidnapped V with the requisite intention to harm C for the unlawful means tort, then D2 might be an accessory to that tort if D2 knew that that tort would be committed. Even if D1 did not have the requisite intention to harm C, but D2 did, then C would still be able to sue D2. D2 would not be an accessory to any unlawful means tort by D1, since D1 did not commit that tort, but D2 would be directly liable to C for the unlawful means tort: by participating in the tort against V, D2 employed unlawful means and did so with the intention of harming C by those means.

It is perhaps unfortunate that in *Total Network* the argument that conspiracy liability could usefully be excised from English law was not made. This is, of course, understandable, particularly in light of the turn the law had taken on the majority view in *OBG* to restrict the scope of the unlawful means tort. It would be a bold move for the Supreme Court to depart from a common law doctrine of such antiquity, particularly where it might leave a gap in areas in which the law had previously appeared to impose liability (whether on the basis of the unlawful means tort or unlawful means conspiracy). Perhaps such a step might have to be taken by Parliament. But the Supreme Court is conscious of its role to achieve coherence in the common law and has recently shown itself willing to depart from previous judgments to do that;[154] it is not inconceivable that the common law might abandon its own creation of civil conspiracy. Indeed, Lord Neuberger might have preferred to find that the tort of unlawful means conspiracy was redundant[155] but felt unable to in part because the existence of the tort was accepted in argument in *Total Network*.[156]

In any event, it is unsatisfactory for the doctrine of conspiracy to expand simply in order to give it something to do. In *Total Network* Lord Walker thought that the conspiracy did not have to relate to actionable wrongs, since "[t]o hold otherwise would, as has often been pointed out, deprive the tort of conspiracy of any real content, since the conspirators would be joint tortfeasors in any event".[157] Similarly, Lord Neuberger commented that "it is hard to see what role the tort of unlawful means conspiracy, whose existence is accepted by Total, could have if it did not apply in a case such as this".[158] This may be so, but it does not follow that some role must be found for unlawful means conspiracy. It might simply have no useful role to play in private law.[159]

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[153] McBride and Bagshaw, *Tort Law* 5th edn (2015) at 883.

[154] See e.g. *Patel v Mirza* [2016] UKSC 42; [2016] 3 W.L.R. 399; *R. v Jogee* [2016] UKSC 8. Cf. S. Hershovitz, "The Search for a Grand Unified Theory of Tort Law" (2017) 130 Harv. L.R. 942, 962-963: torts should be refined as recognised interests change. In relation to the tort of conspiracy, this has occurred since its foundations in the eighteenth and early nineteenth centuries: see text to nn. 23-31 above and to n. 165 below.

[155] [2008] 1 A.C. 1174 at [226]-[228].

[156] [2008] 1 A.C. 1174 at [230]; although, somewhat troublingly, he thought it important that lawful means conspiracy be maintained: see see text to nn. 166-184 below.

[157] [2008] 1 A.C. 1174 at [94]; see too [118] (Lord Mance).

[158] [2008] 1 A.C. 1174 at [225].

[159] Heydon paid very little intention to unlawful means conspiracy, apparently believing that it had very little role to play: J.D. Heydon, *Economic Torts*, 2nd edn (London: Sweet & Maxwell, 1978).

In *Total Network*, Lord Walker thought that the need for an actionable wrong as an essential element – based upon ideas of accessory liability – was a "circular argument which assumes what it sets out to prove".[160] Lord Hoffmann's narrowing of the unlawful means tort in *OBG* meant that the Law Lords in *Total Network* had to emphasise the separateness of conspiracy from accessory liability in order to maintain the historically established coverage by the law of tort of deliberate infliction of harm using unlawful means in the form of non-actionable crimes. But, with respect, Lord Walker's statement is unconvincing. Principles of accessory liability apply throughout private law. What is needed is a sound justification for going beyond accessory liability in relation to primary wrongs, explaining why conspiracy should generate some form of distinct liability. Whether this is possible will be analysed in the next section.

2) If Lord Hoffmann's view of unlawful means is preferred

If Lord Hoffmann was correct in *OBG* to decide that the unlawful means for the unlawful means tort must be civilly actionable, then the decision in *Total Network* is much more difficult to explain.[161] It means that although Total's conduct would not lead to a private law claim if it had been acting individually and in isolation, the fact of combination enabled the Revenue successfully to bring a civil claim. But as explained above, there is no sound "magic" in plurality. It is sometimes said that where there is a combination then it is "no longer possible to say that motive or purpose is immaterial",[162] and this justifies a distinction between individual acts and those pursuant to a conspiracy. But this is really a question of evidence and it is not obvious that motive or purpose alone should turn lawful conduct into unlawful conduct.[163] Neyers has suggested that the distinction between acts of an individual and conspirators rests "on the grounds of (incoherent) pragmatism";[164] but the incoherence is fundamentally problematic. A major reason driving forwards conspiracy liability in the late eighteenth and early nineteenth centuries was the "deep suspicion which the governing class had … of collective action in the political and economic spheres",[165] but this is not a sound justification today.

In *Total Network*, the House of Lords placed some emphasis upon the existence of "lawful means conspiracy" under *Quinn v Leathem*[166] when justifying the independent existence of conspiracy liability. For example, Lord Hope said that "[i]f the predominant intention of the combination is to injure, what is done is actionable even though the means used were lawful. Harm caused by a conspiracy where the means used were unlawful would seem no less in need of a remedy".[167] Similarly, Lord Neuberger thought that "given the existence of that [*Quinn v Leathem*] tort, it would be anomalous if an unlawful means

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[160] [2008] 1 A.C. 1174 at [104].

[161] Unless the tort of deceit was established as the relevant "unlawful means".

[162] *Crofter v Veitch* [1942] A.C 435 at 443 (Viscount Simon LC); *Mogul Steamship v McGregor* 23 Q.B.D. 598 at 616 (Bowen L.J.).

[163] *Bradford v Pickles* [1895] A.C. 587; *Allen v Flood* [1898] A.C. 1.

[164] Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts L.J. 162 at 201.

[165] *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [78] (Lord Walker).

[166] [1901] A.C. 495.

[167] [2008] 1 A.C. 1174 at [41]; see too [56] (Lord Scott).

conspiracy could not found a cause of action where, as here, the means 'merely' involved a crime".[168] This reliance upon lawful means conspiracy as a foundation for analysis is unfortunate. Lawful means conspiracy is itself recognised as "anomalous";[169] is out of line with and an over-reaction to *Allen v Flood*;[170] and is not a solid basis from which to build any stable doctrine of unlawful means conspiracy. An attempt to bring lawful and unlawful means conspiracy together in *Lonrho v Shell (No. 2)*[171] was rejected. In *Lonrho plc v Fayed*[172] the House of Lords again made it clear that the conspiracy torts should not be assimilated and held that the requirement of a "predominant intention to injure" is only required for lawful means conspiracy, not unlawful means conspiracy. It appears that on the facts of *Total Network* a claim for lawful means conspiracy under *Quinn v Leathem* would have failed because the Revenue accepted that injury to the Revenue was not the primary aim of the carousel fraud.[173]

It has been suggested that *Quinn v Leathem* is now "too well established to be discarded"[174] by the common law, but perhaps that is not necessarily so if the Supreme Court wishes to promote coherence in the law. There was possibly little need to jettison *Quinn v Leathem* when it seemed that lawful means conspiracy had little practical application, since it was very difficult to establish and claims seldom arose – let alone succeeded – in litigation.[175] Yet if *Quinn v Leathem* were now to become the foundation for more wide-ranging liability, generating uncertain and often speculative litigation,[176] then this is a cause for concern and a decisive move to depart from that decision would be welcome. To retain this form of tort liability based on bad motive undermines the benefits identified by Lord Hoffmann in *OBG* accruing from English law's general rejection of bad motive as a ground for liability.[177] There is no convincing justification for this tort. Although it has been said that the unlawfulness resides in the conspiracy itself,[178] inchoate liability for conspiracy belongs only in the criminal and not civil law realm. In a sophisticated recent analysis, Neyers has suggested that

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[168] [2008] 1 A.C. 1174 at [221].

[169] See e.g. *Lonrho v Fayed* [1992] 1 A.C. 448 at 463-464 (Lord Bridge); *Lonrho v Shell* [1982] A.C. 173 at 188-189 (Lord Diplock).

[170] See e.g. R.F.V. Heuston, "Legal Prosopography" (1986) 102 L.Q.R. 90.

[171] [1982] A.C. 173.

[172] [1992] 1 A.C. 448

[173] [2008] 1 A.C. 1174 at [226] (Lord Neuberger), although his Lordship did wonder (at [228]) whether this may have been a preferable route to the same result on the facts.

[174] *Lonrho v Shell* [1982] A.C. 173 at 189 (Lord Diplock); *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [37] (Lord Hope).

[175] See e.g. *OBG Ltd. v Allan* [2008] 1 A.C. 1 at [14] (Lord Hoffmann). In *Crofter v Veitch* the House of Lords effectively sidelined *Quinn v Leathem* conspiracy since the loss had to be inflicted for no good reason, and if a defendant acted for his own self-interest that would count as sufficient justification.

[176] See e.g. *Digicel (St. Lucia) Ltd. v Cable & Wireless Plc* [2010] EWHC 774 (Ch); *Concept Oil Services v En-Gin Group LLP* [2013] EWHC 1897 (Comm); *JSC BTA Bank v Ablyazov* [2016] EWHC 230 (Comm); [2016] 3 W.L.R. 659; *Emerald Supplies Ltd. v British Airways Plc* [2015] EWCA Civ 1024; Carty "The Modern Functions of the Economic Torts" [2015] C.L.J. 261, 268-269.

[177] [2008] 1 A.C. 1 at [14].

[178] See e.g. *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [41] (Lord Hope), citing *Crofter v Veitch* [1942] A.C. 435 at 462 (Lord Wright).

it might be justified on a principle of abuse of rights,[179] but this is potentially a very wide-ranging and uncertain notion unless fashioned using an independent requirement of unlawfulness.[180] *Allen v Flood* might be accommodated within such a view of "abuse of rights", but not *Quinn v Leathem.*[181]

Quinn v Leathem is based on the unjustified idea that the fact of combination can make unactionable conduct actionable. To the extent that the reasoning in *Total Network* follows this approach, it is open to criticism for that very reason. The House of Lords in *Total Network* appealed to an unarticulated sense of policy to justify the result. Whilst the result is satisfactory, the explanation of the principles underpinning the law cannot simply be fact-specific. Lord Hope said that "[o]ne has to ask why, in this situation, the law should not provide a remedy";[182] but there are many situations where the law does not provide a remedy despite the negligent or deliberate infliction of harm.[183] The starting point should not be that all losses give rise to a remedy. Rather, the reasons underpinning the claimant's cause of action must be explained. Lord Mance was of the opinion that unlawful means conspiracy was necessary to avoid a "lacuna" in the law;[184] but there would be no gap to fill, and principled coherence would be achieved, if Lord Nicholls' broader approach to the unlawful means tort were adopted. If Lord Hoffmann's view of unlawful means really is to be preferred, then it is suggested that the result in *Total Network* may be best explained on the basis that the defendant was an accessory to an actionable wrong, namely deceit. There remains no good reason why an independent tort of conspiracy should extend beyond the boundaries set by accessory liability.

IV Conclusion

This area of the law is replete with different analyses and normative accounts, some very recent and novel. Any conclusion has to be provisional. We suggest that the most coherent and best justified account of the law in this area is this: (i) the unlawful means tort applies whatever form of unlawful means are deliberately employed by the defendant to injure a claimant - i.e. Lord Nicholls' explanation of the tort should be preferred to Lord Hoffmann's; (ii) the principle of accessory liability for civil wrongs on the basis of knowing inducement and knowing assistance is of general application; and (iii) there is no remaining space for the separate existence of the tort of conspiracy in either of its forms, whether using lawful means or unlawful means. Cases in the past involving liability for unlawful means conspiracy can all be satisfactorily explained on the basis of a combination of (i) and (ii), or on the basis of (ii)

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[179] Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts L.J. 162 at 201. See too J. Neyers, "Explaining the Inexplicable? Four Manifestations of Abuse of Rights in English Law" in *Rights and Private Law* (2011).

[180] See text to nn.48-53 above.

[181] Neyers rightly recognises that his explanation based on abuse of rights does not explain why there is no liability in a case like *Quinn v Leathem* without the conspiracy: Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts L.J. 162 at 186. We suggest that there should be no liability in either situation.

[182] *Revenue and Customs Commissioners v Total Network* [2008] 1 A.C. 1174 at [43]; see too e.g. [56] (Lord Scott).

[183] "… the world is full of harm for which the law furnishes no remedy": *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [2005] 2 A.C. 73 at [100] (Lord Rodger).

[184] [2008] 1 A.C. 1174 at [120].

in conjunction with other civil wrongs. Both (i) and (ii) have sound roots in authority and principle. There is no need for a separate tort of conspiracy and no normative justification for one. There is no reason why conduct which is not actionable when committed by one party should be actionable just because that party acted in combination with another. The law in this area has been subject to important re-shaping and analysis by the House of Lords and Supreme Court in recent years and is in such a state of development that we would tentatively suggest that there is scope for the Supreme Court to articulate the law along the lines mapped out in this article, notwithstanding that this would require re-visiting some aspects of legal analysis in some of the authorities.