COMPETITION AND OTHER INTENTIONAL ECONOMIC TORTS: A COMPARISON OF ENGLISH AND CHILEAN LAWS

Cristián A. Banfi
Pembroke College
Cambridge

30th November, 2009

This dissertation is submitted for the degree of Doctor of Philosophy
PREFACE

This thesis is dedicated principally to my wife (Marfa Elisa), my son (Pedrito) and my parents (María Elena and Antonio), without their love and constant encouragement I could not have completed this work. I am particularly indebted to my wife who has accompanied me all these years with immense patience and sacrifice. Likewise, I thank the rest of the family for their permanent support.

I owe special thanks to Professor John Bell, my supervisor, whose wise advice, optimism and generosity enabled me to carry out this research. I too am grateful to Facultad de Derecho of Universidad de Chile, my home institution, particularly to Professor María Dora Martinic and Professor Enrique Barros, who in 2003 suggested me to study the economic torts. I also thank the staff from the Squire Law Library and Freya Baetens, Dan Carr, Matt Dyson, Jessie Hohmann, Josh Karton, Brian Sloan and Peter Turner, for proof-reading previous drafts of the thesis. All errors and omissions remain my own responsibility.

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration, except where specifically indicated in the text. This dissertation, including footnotes, does not exceed the permitted length.
PREFACE

This thesis is dedicated principally to my wife (María Elisa), my son (Pedrito) and my parents (María Elena and Antonio), without their love and constant encouragement I could not have completed this work. I am particularly indebted to my wife who has accompanied me all these years with immense patience and sacrifice. Likewise, I thank the rest of the family for their permanent support.

I owe special thanks to Professor John Bell, my supervisor, whose wise advice, optimism and generosity enabled me to carry out this research. I too am grateful to Facultad de Derecho of Universidad de Chile, my home institution, particularly to Professor María Dora Martinic and Professor Enrique Barros, who in 2003 suggested me to study the economic torts. I also thank the staff from the Squire Law Library and Freya Baetens, Dan Carr, Matt Dyson, Jessie Hohmann, Josh Karton, Brian Sloan and Peter Turner, for proof-reading previous drafts of the thesis. All errors and omissions remain my own responsibility.

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration, except where specifically indicated in the text. This dissertation, including footnotes, does not exceed the permitted length.
This is a comparative study of the English and Chilean tortious liability for economic harm caused between business competitors as developed by case-law and legal scholarship, including aspects of American, French and Spanish laws as influences on the English and Chilean regimes. The title, somewhat redundantly, alludes to the “intentional” economic torts to contrast them with the tort of negligence which is outside this research. The main argument is that this kind of liability should reflect the balance between claimants’ interests and defendants’ liberty to compete. Merely suffering economic harm does not entitle a competitor to compensation: liability must further be restricted through a mental element more stringent than ordinary carelessness (including a certain form of intention and, by extension, recklessness or gross negligence) and unlawful means (comprising the violation of the claimant’s right or protected interest). It is maintained that in the novel problem-area in Chile relating to harm between traders, the principle of liability for culpa should be qualified congruently with competition freedom, and that a suitable method for this purpose consists of requiring a mental element rather than mere fault (negligence). It is argued that English law offers an invaluable experience for Chilean jurists and courts of enforcing economic-tort liability moderately, refraining from undermining business competition which is essentially a statutory matter. The thesis analyses the English modern common-law economic torts and statutory competition torts, assessing their roles and impact on commercial competition. It also criticises the Chilean law of delict, both generally and specifically in relation to unfair practices and antitrust conduct, suggesting that liability is subjected to intention because damage is a side-effect of legitimate competition and rivals owe no duty of care to one another.
I. OVERVIEW
1. Legislation and the CHCC
2. Case-law

II. EXTRA-CONTRACTUAL CIVIL LIABILITY
1. Fundamental categories
2. Fault-based liability
3. Intention

III. PURE ECONOMIC LOSS
1. Conceptual structure
2. Uncertainty and remoteness
3. Compensating without hindering competition

IV. ABUSE OF RIGHTS
1. Introduction
2. The academic debate
3. The Chilean approximation
4. Beyond tort

V. WRONGFULNESS
1. Role and justification
2. The Spanish case
3. Wrongfulness under question
4. Breach of statutory duty

VI. CONCLUSIONS

CHAPTER VII
TORT LIABILITY FOR ANTITRUST AND UNFAIR PRACTICES
1. Competition law context
2. Connecting antitrust law with the law against unfair competition
3. Interfacing anticompetitive conduct and unfair competitive behavior

II. TORT LIABILITY FOR ANTITRUST CONDUCT
1. Administrative liability for anticompetitive conduct
2. The difficult case for stand-alone tort actions

CHAPTER VI
FUNDAMENTALS OF CHILEAN TORT LAW
1. The nature of antitrust tort liability
2. The overlap with the economic torts

III. CONCLUSIONS
LIABILITY FOR INTERFERENCE WITH PROSPECTIVE OR EXISTING CONTRACTS

CHAPTER VIII

CONCLUSIONS ........................................................................................................................................... 265

BIBLIOGRAPHY ........................................................................................................................................... 279

REFERENCES IN ENGLISH .......................................................................................................................... 279

Books ............................................................................................................................................................... 279

Contributions to Books .................................................................................................................................. 283

Articles ............................................................................................................................................................. 288

Unpublished PhD theses .................................................................................................................................... 300

REFERENCES IN SPANISH .............................................................................................................................. 300

Books ............................................................................................................................................................. 300

Contributions to Books .................................................................................................................................. 303

Articles ............................................................................................................................................................. 304

Unpublished LL.B. theses .................................................................................................................................. 306

REFERENCES IN FRENCH ............................................................................................................................... 306

Books ............................................................................................................................................................. 306

Contributions to books .................................................................................................................................... 307

Articles ............................................................................................................................................................. 307

APPENDIXES ................................................................................................................................................. 308

LIST OF CASES ............................................................................................................................................. 308

LIST OF STATUTES ....................................................................................................................................... 319

TREATIES AND CONVENTIONS .................................................................................................................. 319

LEGISLATIVE REFORM PROPOSALS & OTHER INSTRUMENTS .................................................................. 319

ABBREVIATIONS

A.C. = Law Reports, Appeal Cases (3rd Series)
A.L.J.R. = Australian Law Journal Reports
All E.R. = All England Law Reports
AVC = Average Variable Costs
BGB = Bürgerliches Gesetzbuch (German Civil Code)
Bull.civ = Bulletin des arrêts des chambres civiles de la Cour de Cassation
CA = Court of Appeal
Cal.App. = California Appellate Reports (3d, Third Series; 4th, Fourth Series)
Cal.3d = California Reports, Third Series
CAT = Competition Appeal Tribunal
Ch. = Law Reports, Chancery Division (3rd Series) or Court of Chancery
CHC = Chilean Constitution 1980
CHCA = Chilean Competition Act 2003
CHCC = Chilean Civil Code
Ch.D. = Chancery Division
CFAs = Conditional Fee Agreements
CFI = Court of First Instance
Civ(1) = First civil chamber of the Cour de cassation
Civ(2) = Second civil chambre of the Cour de cassation
Civ(3) = Third civil chambre of the Cour de cassation
Col.Leg. = Colección Legislativa (Spanish law reports)
C.L.Rev. = Columbia Law Review
Com = Commercial chambre of the Cour de cassation
Cowp. = Cowper's King's Bench Reports
CPC = Chilean Civil Procedure Code
CPvCen = Comisión Preventiva Central (Former Chilean Competition Tribunal)
CR = Comisión Resolutiva (Former Chilean Competition Tribunal)
CS = Corte Suprema de Justicia de Chile (Chilean Supreme Court)
D = Recueil Dalloz
DDE = Doctrine of Double Effect
DFL = Decree with Force of Law
DL = Decree of Law
EC = European Community
E.C.C. = European Commercial Cases
E.C.R. = European Court Reports
E.C.J. = European Court of Justice
E.M.L.R. = Entertainment and Media Law Reports
E.R. = English Reports
E.W.C.A. Civ = Court of Appeal (Civil Division)
E.W.H.C. = England & Wales High Court
Ex/Exch. = Exchequer Reports or Court of Exchequer
Ex.D. = Law Reports, Exchequer Division
F = Federal Reporter
F.2d = Federal Reporter, Second Series
F.3d = Federal Reporter, Third Series
FM = Fallos del Mes (Chilean law reports)
F.S.R. = Fleet Street Reports of Patent Cases
Gaz.Pal. = Recueil de la Gazette de Palais
GJ = Gaceta Jurídica (Chilean law reports)
JCP = Jurisclasse (Spanish law reports)
C.H.A. = High Court of Australia
H.L. = House of Lords
H.L.R. = Harvard Law Review
CHAPTER I
INTRODUCTION

1. Overview

This thesis analyses and discusses the functions that tort law can and should fulfill vis-à-vis pure economic harm caused between business competitors. It describes the criteria and ways whereby English and Chilean courts and jurists respectively use the laws of torts and delict to tackle this phenomenon from preventive, compensatory, punitive and restitutionary angles. It explains the results achieved in both systems, while exploring and criticising the reasons for the differences or similarities between their techniques and outcomes. Since Chilean law is less developed in this area, the thesis attempts in particular to draw lessons from the English experience concerning the manner in which Chilean courts and legal scholars could approach fact-situations corresponding to those embodied in the economic torts and competition torts and that can realistically be introduced in Chile, thus refraining from irrationally transplanting foreign methods.

The main argument of this dissertation is that tortious liability for pure pecuniary damage inflicted between commercial rivals should reflect the balance between the victims’ right to be fully compensated for their losses and the wrongdoers’ liberty to compete. It will be suggested that this goal can be accomplished if tortious liability is restricted consistently with the essence of competition through the requirement of a mental element more stringent than ordinary negligence (that is, the intention to harm or to produce other similar effects depending on the circumstances) or at least gross negligence (as the civil counterpart of criminal recklessness). There are alternative ways of controlling this kind of liability at a later stage of tort proceedings which can attain results comparable to the solution I propose, particularly the use of causation to treat pure economic loss as uncertain and/or as too remote a consequence of the defendant’s act. Nevertheless this technique is rooted in fault-based liability whereas competitors do not owe duties of care to one another. Rivals should not be labelled “victims” for merely suffering economic harm carelessly caused by their opponents. In turn, intention and wrongfulness are formal categories which in
English law have proved relatively successful for converting tort law into a discrete instrument for redressing pure economic loss arising from business rivalry in specific situations, while the regulation of competition is predominantly a legislative function. English law conveys solutions which merit attention in Chile, where harm between commercial competitors is a new niche of tort law which needs an appropriate method of administering the principle of liability for *culpa* congruently with competition freedom.

This thesis offers a critical analysis of the English law of torts and Chilean extra-contractual civil liability for harm flowing from business competition, as opposed to labour competition. Without seeking to give any complete account of the theme, the thesis encompasses the foundational case-law, the main theoretical propositions and further judicial and academic developments. It attempts to comment on and to discuss the major principles, court decisions and legal doctrines involved. The thesis emphasises the core policy arguments involved, whether economic, social, political, moral-philosophical, historical, constitutional, justice-based, utilitarian or consequentialist. It explains how the relevant cases have been decided or, particularly in Chile where the case-law on the topic is still inchoate, might be handled.

2. Scholarly debate

As will be seen in the thesis, several leading Anglo-American jurists have proposed different ways of systematising the untidy economic torts. At the end of the nineteenth century Pollock and Holmes advanced the principle of liability for intentionally caused (economic) harm unless justified: the "prima facie tort theory". Much later, Weir championed a rule of liability for intentionally inflicted harm by impermissible (unlawful) means, widely defined as those which tortfeasors are not at liberty to use. Subsequently, Heydon advocated the prima facie tort as an adaptable procedure for tackling novel forms of excessive commercial misconduct deferent to competitive freedom. Conversely, Cane relies on a narrowly conceived mental element alongside the employment of wrongful means as requisite for managing tort liability for damage caused between business adversaries in accordance with the freedom to compete. Analogously, Sales and Stilitz promoted a rule of liability for intentionally and wrongfully caused economic harm unless justified by policy reasons. They suggested that the mental ingredient comprises the defendant’s intention to injure the claimant (as an end or as a means to another end), while the unlawful means cover all those which wrongdoers are not at liberty to apply despite not being autonomously actionable as torts. In turn, from the 1980s Carty has endeavoured to organise the economic torts around a common notion of wrongful means, emphasising that these torts make a limited contribution to the control of abusive competitive practices as compared with Parliament’s overriding role.

Notwithstanding these efforts, there is a continuous discussion on alternative approaches to the economic torts. To take a very recent example in point, Deakin and Randall have suggested that these torts should be analysed from a practical perspective. The economic torts, they postulate, aid to conserve ‘the integrity of the competitive process’, safeguarding claimants’ interests in business, trade or employment (concerning both commercial and industrial struggle) against the direct interference with (and aimed at) such interests by defendants; unless it is justified, *inter alia*, by the furtherance of economic self-interest or the exercise of pre-existing contractual rights. Moreover, judges have called for intensifying the academic study of the economic torts, particularly to shed light on whether the latter should merely accord redress for harm arising from excessive competitive misbehaviour or perform the more ambitious function of determining legally correct or fair commercial conduct. The landmark case of *OBG v. Allan, Douglas v. Hello! & Mainstream v. Young* ("*OBG*) showed

---

1 Here “policy” connotes the extra-legal goals pursued by the law, whereas “principle” concerns the bases upon which a legal system (and its specific rules) is built.
2 Pollock (1887), (1890) *passim*.
3 Holmes (1894) *passim*.
4 *Justifications* negate wrongful conduct, while “excuses” exoner liability for lack of control over one’s mind (e.g., insanity and infancy): Epstein (1975) 409-410; Cane (2002) 90.
5 Weir (1964) *passim*.
6 Heydon (1978) *passim*.
7 Cane (1968), (2000a) *passim*.
8 Sales/Stilitz (1999) *passim*.
12 [2008] 1 A.C. 1, HL.
notoriously discrepant opinions about the function that one concrete economic tort should play.\(^\text{13}\) This illustrates the relentless tension pervading this area.

Within this context, the thesis explains the economic torts as specific causes of action which cannot be encapsulated in a single principle because their constituent parts vary significantly between one another. Thus, the economic torts reflect the common law’s piecemeal framework and illustrate that the fragmented forms of action remain alive. These torts protect different interests, in diverse ways (for instance, through injunctions to prevent unfair practices or compensation for harm already inflicted), against distinct sorts of wrongful conduct. The serious, perhaps insurmountable, difficulty in synthesising the economic torts does not inhibit from attempting to demonstrate that tortious liability actually fulfils, and normatively should perform, moderate though important preventive, compensatory, punitive and even restitutionary tasks as regards harm between business competitors. The economic torts discharge a circumscribed role, as they trigger liability provided that wrongdoers act with some form of intention, use wrongful means or meet both requirements.

The thesis also analyses the competition torts as an independent category. It argues that these torts and the economic torts fulfil separate though complementary needs due to their distinct origins, goals and elements. The competition torts are statutory; constitute the chief private-law way of enforcing competition law; and basically offer compensation for harm arising from anticompetitive conduct regardless of the defendant’s fault or intention. The economic torts are created by courts; serve to repair and prevent damage derived from unfair or even antitrust practices; and presuppose a specified intention related to a given result or to conduct itself. Nonetheless, I will show that both categories disclose the narrow mission that case-law ascribes to tort law in the regulation of commercial strife.

I shall argue that civil systems such as the Chilean should grasp that the law of delict can clash with the overarching competition freedom if liability is enforced without any qualification. I shall suggest that the Chilean economy has reached such a level of complexity that tort law needs to recognise the specificity of business competition and approach the topic by refining the generic concept of \textit{culpa}. Chilean tort law could become a more consistent legal body if courts restricted the principle of \textit{neminem laedere} deploying a technique closer to the English economic torts, specifically requiring an intentional element. Competitors should not be held liable for negligently caused economic harm even if the claims are eventually rejected on the ground of damage being regarded as uncertain and/or too indirect a consequence of the defendant’s act.

Apart from a monograph,\(^\text{14}\) some journal articles,\(^\text{15}\) brief references to the French liability for interference with contract in textbooks\(^\text{16}\) and a recent major tort treatise which introduces the economic torts using Anglo-American, German and French sources,\(^\text{17}\) tortious liability for harm between competitors remains underdeveloped in Chilean legal doctrine, and the relevant case-law is negligible.\(^\text{18}\) Yet recent legislation suggests the increasing social relevance of the proper management of damage inflicted among business competitors, as it enshrines the right to compensation for harm arising from anticompetitive and unfair practices.\(^\text{19}\)

The thesis partially seeks to fill these gaps. Further, the use of the common law as a model is novel among Chilean private-law scholars, who habitually rely on European continental systems, especially the French and Spanish. Anglo-American ideas can enrich this line of research, illuminating the peculiarities of the conflict between trade competitors for whose solution an unqualified fault tenet is not the best response.

\(^{13}\) For Lord Hoffmann, the tort of unlawful interference with business merely helps to punish commercial misconduct. In Lord Nicholls’ view, it should be deployed against all types of abusive practices: [2008] 1 A.C. 1, at [152-153]-[162].

\(^{14}\) González (1995) \textit{passim}.


\(^{17}\) Barros (2006) \textit{passim}.

\(^{18}\) See below Chapter VII, sections II, III and IV, pp.235ff, pp.245ff and pp.251ff, respectively.

\(^{19}\) Law 1991/2003 (DRL 1/2005), i.e., the Chilean Competition Act 2003 ("CHCA"), and Law 2016/2007, i.e., the Chilean Unfair Competition Act 2007 ("UCU").
3. Structural differences, practical similarity

The English law of torts handles harm between trade competitors through the common-law economic torts and the statutory competition torts. The thesis focuses on the foundational cases and covers eight economic torts:

- **inducing breach of contract** (the "Lumley-tort"), by which the defendant knowingly and intentionally procures the promisor to break her contract with the promisee who is thereby injured;21
- **causing economic loss by using unlawful means,** alternatively called "three-party unlawful interference with another's business or trade";23 "intentional-harm-tort" or, more concisely, "unlawful-interference tort". The defendant uses wrongful means against a third party (independently actionable as torts by the latter had she been damaged) with the intention to harm (as an end or as a means) the claimant, who is actually injured;
- **conspiracy to injure** (simple conspiracy): two or more persons, without using wrongful means, act in concert with the predominant intention to harm, and indeed harm, the claimant;25
- **unlawful means conspiracy,** through which the conspirators use wrongful means with the intention (even secondary) to injure, and do injure, the claimant;26
- **three-party intimidation.** The defendant, with the intention (not necessarily principal) to harm the claimant in her economic interests, coercively threatens a third party with committing an unlawful conduct against her,

unless she acts or refrains from acting to the claimant's detriment. The third party yields to the threat, thus the claimant ending up injured;27

- **deceit (fraud),** whereby the defendant makes a false representation intending that the claimant should act on it and knowing that the statement is untrue, without believing in its reality or being recklessly indifferent to its veracity or falsity. Deceit will succintly be contrasted against liability for negligent misstatments. Deceit is limited to two-party cases which rarely involve competitors and is superseded by the tort of negligence and specific statutes;30
- **malicious (injurious) falsehood.** The defendant, knowing or being recklessly indifferent to the untruth of his declaration, communicates to third parties written or oral lies about the claimant's business, calculated to harm the claimant who is consequently injured;31
- **passing-off,** whereby the defendant passes his goods/services as if they were those of the claimant.32

For their part, the competition torts entail liability for damages flowing from the infringement of articles 81 and 82 of the European Community ("EC") Treaty of Rome 1957 and Chapter I (Prohibition: Restrictive Agreements) and Chapter II (Prohibition: Abuse of Dominant Position) of the Competition Act 1998, as amended by the Enterprise Act 2002. The terms "antitrust" or "anticompetitive" will be used interchangeably to indicate conduct in breach of competition (antitrust) law: (i) agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade and have as their object or effect the prevention, restriction or distortion of competition; and, (ii) the abuse of a dominant position in the relevant market. Expressions like "unfair competition" and "unfair practices" signal behaviour contrary to the good commercial customs, the subject-matter of an independent

---

21 Lumley v. Gye (1853) 118 E.R. 748, Q.B. ("Lumley").
22 OBG [2008] 1 A.C. 1, at [6], Lord Hoffmann.
24 Sales/Stellis (1999) 411 (stressing the mental element).

---

27 Rookes v. Barnard [1964] A.C. 1129, HL ("Rookes"). Whether the threat to break a contract constitutes the tort of "two-party intimidation" is controversial: see below Chapter III, section 2.3.9, pp.93-94.
31 Ratcliffe v. Evans [1892] 2 Q.B. 524, CA ("Ratcliffe"); 527, Bowen LJ.
32 Reddaway v. Banham (1896) A.C. 199, HL ("Reddaway").
legal field called “unfair competition law”, which English tort law mainly combats through passing-off and malicious falsehood.

In turn, civil liability implies the defendant’s obligation to compensate for the claimant’s losses for breach of contract (contractual liability) or the infringement of the duty not to harm others (alterum non/neminem laedere), the latter amounting to a wrongful act that triggers extra-contractual (delictual) liability. In Chile, extra-contractual liability is based on the general principle of culpa which strictly speaking means negligence (fault) but broadly understood covers intention (dolo). This principle is enshrined in the Chilean Civil Code of 1855 (“CHCC”), thus mirroring the French Civil (Napoleonic) Code of 1804.

Novel problems as about the economic torts are tackled through the overall canon of culpa. Conversely, the common law is reluctant to synthesise its piecemeal contents. Rather, it is inductively constructed to handle new social needs with a modest degree of theorisation. English tort law is arranged around actions, remedies and unlawfulness. Responsabilidad civil is harm-oriented, less complex and more coherent. English torts evolve incrementally and are subordinate to statutes in the control of social conduct. This fact, together with institutional and cultural factors, explains why tort litigation is in Britain less voluminous (and perhaps less important) than in America.

Nevertheless, civil courts must also solve disputes inductively. The divergence is that they infer the rules from legislation, whereas English courts must abide by stare decisis. French and Chilean case-law is not binding but merely influential upon lower courts whose decisions can be quashed when they are entirely rooted in precedents. Yet, extra-contractual liability is admittedly judge-made law. Courts specify the general clauses and react to social changes

quickier than statutes. Eventually, just like English and French courts, Chilean judges must decide cases having primary regard to the peculiar fact-situations they encounter.

4. Methodological issues

The thesis undertakes comparative research concerning the manner whereby the English law of torts and the Chilean law of delict really handle and should (prescriptively) deal with the situation of commercial competitors injuring each other. Notwithstanding the formal differences separating the common law from the Chilean civil system, I shall suggest that in neither can negligence be deemed a sound underpinning of tortious liability. Trade adversaries owe each other no duty of care and, moreover, often strive to gain market share at the expense of identifiable competitors. The English economic and competition torts will be taken as the paradigm from which Chilean judges and scholars can find the explicit affirmation of the liberty to compete to which they in fact subscribe and learn to enforce the law of delict in harmony with that value. This implies a reinterpretation of the general principle of culpa to reach coherence within the law rather than adopting specific causes of action.

The thesis entails a critical assessment of English classic and modern legal doctrine on the economic and competition torts, particularly the aforesaid attempts to construct general rules, along with examining the Chilean treatment of civil liability for pecuniary harm. I will concentrate on the major issues of legal policy and scholarly writing, selecting the principal and pertinent case-law and theories. Unlawfulness and intention will be examined as workable constraints and contrasted with fault and strict liability. The comparison stresses the rational structure by which cases have been decided and might be resolved in the future, above all in Chile where the subject-matter is fresh. Particularly relevant are the questions relating to the role that tort law does and should perform vis-à-vis pure economic harm between business rivals in line with freedom of competition; the search for coherence within the economic torts; the English courts’ technical and political approach to liability for harm inflicted between trade competitors as

33 I.e., responsabilidad extracual contractual or responsabilidad aquiliana, the latter term derived from the Lex Aquisila which did not require culpa but unlawful act (injuria) and harm: Tapia (1941/2006) 20; Alessandri (1943) 106-107.
34 Anyone who has committed a delict or quasi-delict which has caused damage to another is bound to compensate for it, without prejudice to any penalty the law may impose on him for the delict or quasi-delict (article 2314 CHCC): ‘As a general rule, all damage which can be imputed to another’s malice or negligence shall be repaired by that person’ (article 2329 CHCC).
35 Particularly, article 1382: ‘any human act whatever which causes damage to another obliges him by his fault it occurred to make repairation’. Similarly, article 1902 of the Spanish Civil Code (‘CC’) provides: ‘a person who, by action or omission, causes damage to another by fault or negligence, must repair the damage caused’.
38 Goodhart (1930) 175, 191, Lawson (1953) 65.
40 See above paragraph 2, pp.10ff.
opposed to industrial contenders and their impact on the consistency within the case-law; the significance of unlawfulness and intention as formal devices to restrict liability; the justification for strict liability as regards unfair practices (passing-off) and antitrust conduct (competition torts); the current status of the Chilean tortious liability related to similar fact-situations; and the criteria and issues emerging from the common law which might help to develop the Chilean law in this field as well as to determine the extent to which courts should involve themselves in regulating business competition.

However, one possible shortcoming of this research is that it compares the parent English legal system with Chilean law, which is affiliate to the parent French regime. Thus, the thesis departs from a significant functionalist hallmark. My linguistic limitations prevented me from thoroughly analysing French and German jurisdictions. Yet, I make continuous reference to French and Spanish legal regimes as influences on Chilean law. I also study relevant aspects of American law, given its similarity to English law and impact upon Chilean competition laws, which may render it a more straightforward comparison than the French and Spanish jurisdictions.

Another apparent limitation concerns the diverse levels of social, economic and technological development between the UK and Chile. It is usually argued that societies with similar degrees of economic and technological growth present similar pattern cases. Thus, the equivalent socio-economic contexts and values such as free competition in which English and French systems operate explain that contrasting tort regimes often confront similar misconduct through comparable remedies, as the Lummey-tort and the French liability for wrongful interference with another’s contract illustrate. Even so, systems with disparate levels of industrialisation can also face analogous problems. Chilean economic regulation resembles that governing highly evolved market-oriented countries: Chilean competition laws prohibit and punish the same antitrust misbehaviour than American and European legislations. Despite the different intensities of economic, social and legal development between Chile and Britain, Chilean case-

law on tortious liability for antitrust conduct and unfair practices, although still embryonic, is growing in quantity and sophistication.

Three decades ago Chilean tort litigation was undeveloped: victims associated life’s misfortunes with bad luck or inevitable events before blaming others; the costs and evidentiary obstacles alongside the teaching of obsolete doctrines discouraged the bringing of tort claims; and the legal rules were slowly modernised according to new needs. Nowadays Chilean tort law tackles the same kind of harmful activities as those affecting the first world and insurance has enhanced. So, the currently incipient Chilean case-law on the economic torts and competition torts offers the historic opportunity to search for examples in English law worth emulating in Chile. Additionally, I am not assuming any hypothesis of similarity or difference as regards the results accomplished by English and Chilean laws concerning the economic torts and competition torts. I will however endeavour to stress factual issues over façades without overlooking the methods deployed and the outcomes achieved by each of them.

Finally, this investigation cannot but briefly speculate about whether tort law gives a sound response to the social need for regulating harm among competitors. This research is not empirical but concentrates on the formal primary and secondary legal sources: case-law, legislation and scholarship. The descriptive and cultural formants exceed the scope of this dissertation and my competence. I have not examined English and Chilean tort systems as expressions of diverse cultures (as Legrand championed) nor have I considered the meta-legal or sociological implications of the economic and competition torts. This thesis can best contribute to the current debate on the theme by academics and judges, particularly in Chile, if it confines itself to the formal principles, rules and sources, leaving to the specialists the assessment of the extra-legal consequences.

---

45 Sacco (1991) passim, distinguishing three kinds of legal formants: the formal sources (case-law, statutes and legal doctrine) through which a legal system solves specific problems; the descriptive formants, i.e., the motives why lawyers feel bound by the answers arising from those sources; and the meta-legal (cultural) formants, i.e., the policy and economic reasons which determine the solutions offered by the formal sources.
5. Framework

In light of the above, a valid way of structuring and analysing the economic and competition torts from a comparative standpoint is to assess first the chief modern English authorities and legal doctrine which have treated this problem-area from the mid-nineteenth century onwards. I shall therefore split the material into the common-law economic torts and the statutory competition torts. After evaluating the principal aspects of both types of torts I will examine the status of the Chilean law of delict, particularly as regards business opponents. The thesis is divided into eight chapters, the last of which contains the main conclusions and proposals of this research.

Chapter II scrutinises the English law of torts as a set of specific causes of action which lack a single governing canon and serve compensatory, deterrent, punitive and even restitutionary purposes. The economic torts are part of this scheme and are the main exception to the general refusal of compensation for pure economic harm, which is very occasionally recoverable through the tort of negligence. Since pure pecuniary loss is the type of damage usually flowing from legitimate competition, potential victims must prove a recognised economic tort to secure redress. Broadly speaking, the economic torts require that the defendant acts with a certain intention, whether directed to conduct or to a detrimental effect, and wrongful means, save for conspiracy to injure and malicious falsehood. English law rejects an all-inclusive intentional tort such as the abuse of rights and the prima facie tort theories.

Chapter III evaluates the cardinal aspects of the economic torts developed in England from mid-nineteenth century. Whereas the control of trade competition has largely belonged to statutes, the economic torts being limited to repress extreme misbehaviour, courts have intensively regulated labour competition by creating and extending old and new economic torts, a move relentlessly counterbalanced through statutory immunities. The principal contention is that English case-law opted for safeguarding the commercial rivals' financial interests and balancing the claimant's right to compensation against the tortfeasor's competitive freedom through particular torts which require a certain intention and wrongful means, discarding any far-reaching standard of intentionally caused damage. Nevertheless, the theoretical debate between the relative appropriateness of having specific torts or a generic intentional tort has not finished.

Chapter IV assesses the torts of passing-off and malicious falsehood as the central, although discrete devices by which English tort law deters and compensates for pecuniary damage stemming from unfair competitive conduct. These torts uncover the common law's unwillingness to regulate commercial competition beyond abnormal, intentional and wrongful misbehaviour. This chapter also shows that passing-off is rooted in deliberate conduct which aims at injuring known competitors. In practice, however, passing-off triggers strict liability for outcomes, thus dispensing the claimant from proving the defendant's intention to harm.

Chapter V analyses the competition torts which aid to deter antitrust conduct and chiefly to compensate for damages consequently sustained by individual victims, especially competitors. Antitrust tort liability is complex. It is based on deliberate conduct, the object or effect of which is to cause detriment to consumers, competitors and markets at large, even though antitrust conduct is often meant to harm recognisable rivals. Yet, liability for damage is strict. The claimant need not prove that the defendant intended to harm her but only that she suffered determined losses as a consequence of the defendant's act. Furthermore, the defendant's intention to injure the claimant is presumed from harm and causation. A prime reason for this mixed regime is that it is a statutory creation designed to supplement the enforcement of antitrust law by the competition authorities. However, proving damage and causation is hard and in itself a useful manner of restricting liability. Moreover, the formal differences between the competition torts and the economic torts do not necessarily generate inconsistent results. Both categories are to be applied by courts circumspectly to protect competitive freedom. Tort liability has a restricted role to play in commercial battle whether it originates in the common law or in statute.

Chapter VI, after explaining the basic rules governing Chilean law of delict, underlines the importance of balancing the principle of full compensation for culpably caused harm against the right to compete. The fundamental proposition is that carelessly inflicted pure economic loss is a side-effect intrinsic to lawful competition. Accordingly, liability for this kind of damage must be qualified through the defendant's intention to harm the claimant or the
defendant’s gross negligence, as opposed to ordinary fault, if it is to be implemented coherently with the liberty to compete and with the structure of competition. Chilean courts are familiar with other methods for limiting negligence-based liability which are widely used in France, namely, the treatment of pure economic loss as uncertain damage or as too remote a consequence of the defendant’s act. Yet, these techniques presuppose the existence of duties of care amongst business contenders whereas the converse is true.

Chapter VII analyses Chilean tortious liability for anticompetitive conduct as well as for unfair practices. This chapter, like the preceding one, proposes the restriction of tortious liability through a procedure both compatible with the nature of competition (involving foreseeable and accidental damage) and with the competition constitutional policy. In other words, the principle of *culpa* ought to be qualified through the requirement of the defendant’s intention to harm the claimant or to cause the breach of contract, or at the very least gross negligence. Neither negligence nor strict liability is adequate to balance the clashing interests of rivals who necessarily harm one another as a foreseeable side-effect of their legitimate activity.

CHAPTER II
AN INSIGHT INTO THE ECONOMIC TORTS

This chapter evaluates the general theory of economic-tort liability in trade competition, explaining fundamental aspects which have affected the development of English tort law. Most of the concepts, principles and problems analysed here impact upon the Chilean law of delict, as this is still a rudimentary means of regulating commercial competition.

The economic torts lack a common rationale and have different ingredients. They mainly provide compensation for harm but can also serve deterrence, punishment, vindication and even restitution. English law generally rejects compensation for negligently caused pure economic loss (the "exclusionary rule"). I will argue that, as regards commercial rivals, the main reason for non-recovery rests on this harm being a foreseeable and inevitable side-effect of legitimate competition: business opponents owe no duty not to injure carelessly one another. Moreover, English law denies liability for intentionally occasioned financial harm (encapsulated in the prima facie tort theory and the strongest version of the abuse of rights doctrine). Accordingly, at common law defeated competitors can only seek redress through the specific economic torts which presuppose a certain kind of intention (related to a particular effect or, as in passing-off, to the conduct itself) and wrongful means (save for simple conspiracy and malicious falsehood). Otherwise traders can harm each other as part of their liberty to compete. The economic torts allow courts to distinguish damage concomitant of lawful competition from harm deliberately inflicted through abusive or unfair practices.

Section I briefly describes and criticises the untidy framework of tort law (indeed, the law of "torts"). Section II assesses tort law’s principal compensatory function, although underscoring deterrence, retribution and restitution as important, supplementary goals to be performed through exemplary damages, since the economic torts enable injurers to profit at their victims’ expense. Section III evaluates the various technical, consequentialist and policy grounds for the exclusionary rule, attempting to link them to the harm trade rivals do one another. Section IV examines the basic constituents of the economic torts and supports
them as independent categories which fulfil important albeit narrow functions vis-à-vis damage caused between commercial competitors. Section V summarises the central implications for the next chapters.

I. Structure

I. Miscellaneous torts without an all-inclusive principle

Following scholars as Weinrib and Postema I understand tort law as an autonomous private-law discipline, composed of substantive and procedural rules, which governs the bilateral relationship between wrongdoers and victims by imposing liability for harm. I see tort law basically (though not exclusively) shaped from inside, rooted in corrective justice, policy and consequentialist bases. Tort law, I believe, is primarily concerned with repairing the losses inflicted by tortfeasors on victims.

I support two different theories of corrective justice: Weinrib's "formalist" notion of corrective justice, as intrinsic to tort law, and Coleman's "mixed" conception of corrective justice as a social practice that imposes the duty to repair losses flowing from wrongs (invasion of rights) and from wrongdoing (unjustifiable interference with legitimate interests). As O'Connell says, while Weinrib analyses the structure of corrective justice without endorsing a particular morality, Coleman takes a functionalist approach with normative content incorporating some formalist elements. However, I am also aware about Aristotelian corrective justice which is to restore the balance set by distributive justice, so that liability serves to shift losses from victims to wrongdoers without rectifying wrongful harm, as it indeed never disappears. Conversely, I am sceptical about the adequacy of tort law to achieve purely distributional or extrinsic goals, like welfare maximisation, as Law and Economics postulates, albeit I acknowledge the usefulness of some of its criteria.

I apprehend that tort law lacks a unifying principle, comprising a plethora of particular and gradually constructed wrongs, each of which has its own elements and protects distinct interests through diverse remedies. Although abolished, the forms of actions have persistently influenced tort scholarship and legal practice. Litigants must still indicate the facts and torts to seek judicial redress. Specifically, from the foundational economic-tort cases onwards, English courts have dismissed a comprehensive tenet, allowed the infliction of damage if no wrongful means are employed (save for conspiracy to injure) and malicious falsehood and denied liability outside the established economic torts. The harm arising from the exercise of the liberty to compete is generally justified: *dannum absque (sine) iniuria*.

The traditional academic discussion can be divided into two main currents. On one side, Clerk and Lindell thought it unrealistic to substitute all-embracing principles for the particular torts. Unless the defendant used unlawful means embodied in a concrete tort, the infliction of damage was justified by competition. Thus, the law detached itself from morality and permitted advancing one's interests at another's expense. Similarly, Salmond proposed a principle of non-liability, given the numerous exceptions justifying the causation of harm, unless the defendant's conduct fitted into a specific tort. Subsequently, Williams argued that liability was discretionarily and incrementally imposed in novel situations, while more recent scholars have noticed that the common law solved tort disputes as they arise without adopting any pre-conception. On the other side, Pollock championed the prima facie tort theory, that is, liability for intentionally caused economic harm unless justified, a key justification for damage being what he called "the common right to compete". Nevertheless, he

---

51 The forms of action we have buried, but they still rule us from their graves": Maitland (1965) 2; Williams/Hepple (1982) 3ff; Rogers (1994) 1ff; Zweigert/Kötz (1998) 605.
54 Quinn [1901] A.C. 495.
55 Racevile [1892] 2 Q.B. 524.
56 Clerk/Lindell (1889) 3.
57 Salmond (1907) 7, 429-430; (1937) 510. See also: Stallybras (1936) 17; Goodhart (1938) 6.
58 Williams (1939) passim.
admitted that the central case-law simply acknowledged an incoherent and heterogeneous collection of specific torts and remedies. Analogously, Winfield advocated a principle of liability for unjustifiable harm qualified by evidentiary and policy considerations, particularly the damage derived from exercising the freedom to compete or the right of property. Therefore, whereas the “classic” British jurists argued whether there should be a general principle affirming or rejecting liability for harm caused between commercial rivals, case-law has only recognised specific and different economic torts.

2. Organising criteria

Traditionally, the law of torts has been treated as a catalogue of diverse causes of action which resist any unification, rather like the inventory of criminal offences. As Waddams suggests, the complex interaction between the facts, sources (case-law, statutes and equity), institutions (torts, contracts, property and restitution) and policy issues which forge private law urges for an inductive approximation. Successful attempts at synthesis are confined to the “neighbour principle” in negligence; and even this pillar of moral responsibility for the avoidable consequences of deliberate acts is severely restricted with respect to pure economic loss. Tort law adapts to changing social needs without embracing immutable formulas. Classifications are welcomed for practical purposes before scientific order.

It is a customary view that the common law evolves from experience instead of strict rationality, striving for but never reaching consistency. Judicial reasoning is intuitive and persuasive rather than logical. But that the law is inconsistent (court decisions conflicting with each other) or incoherent (cases being incomprehensible under a common principle) seems problematic. The incremental protection through distinct torts of both different and identical interests generates inconsistencies unfamiliar to systems constructed from the abstract to the concrete. Thus, trespass to the person safeguards victims’ bodily integrity against wrongdoers’ deliberate interference without need for harm, whereas negligence protects this interest if damage is proved. Yet, the contradiction is only apparent given their dissimilar functions: trespass vindicates rights, negligence compensates for damage. Diverse rules may have different justifications, thereby explaining the distinction between intentional and negligent torts. Hence, conduct-based torts, such as negligence, cohabit with rights-based torts, like trespass, which triggers strict liability in a double sense: it is actionable per se, for the sole invasion of the claimant’s proprietary interest without requiring the victim’s injury; and the defendant’s fault or intention to harm the victim is immaterial. As has been suggested, trespass mirrors the criminal law’s influence: the defendant is strictly liable because he tried to exercise dominance over the victim by encroaching on her rights. However, this conduct can involve the intentional infliction of pecuniary harm embodied in the economic tort.

Concretely, the economic torts themselves exhibit notorious inconsistencies. Unlawfulness, a salient feature of them (Allen), is excluded from conspiracy to injure which just requires that the defendants predominantly intend to harm the claimant (Quinn). This contradiction is so evident that Lord Halsbury had to say that the law ‘is not always logical at all’. Likewise, the breadth of wrongfulness varies considerably from tort to tort: three-party intentional-harm tort comprises independently unlawful means (OBG) unlike

65 Pollock (1887) vi, 21-22, 129ff. See also: Landon (1951) 16-17, 40ff, 237ff.
70 Tunnicliffe (1972) passim.
71 [It is not...a sensible application of what Lord Atkin was saying for a Judge to be invited on the facts of any particular case to say whether or not there was “proximity” between the plaintiff and the defendant. That would be a misuse of a general concept and it is not the way in which English law develops].
72 Holmes (1881) 1, 36.
74 I am using MacCormick’s terminology: (1978) 101ff.
76 Weir (1998) 100ff.
77 Williams (1951) 138.
79 Fletcher (1953) 1672, 1677-78.
82 [1901] A.C. 495.
83 Ibid, 506.
unlawful means conspiracy (Total). Moreover, the economic torts contain different kinds of intention which prevent a common explanation. A word of warning must be said to understand this. As will be explained, intention mainly concerns the consequences of an action rather than the conduct itself. Cane refers to “deliberate conduct” (as opposed to inadvertent behaviour) to indicate situations where intention relates to the commission of a given act, whereas he applies the term “intentional conduct” to signal the intention aimed at causing a certain consequence, typically harming the victim. Cane accordingly argues that trespass to land is not “intentional”: it can be committed without the intention to invade another’s property, even ignoring that the land belonged to the claimant.

Yet, here I employ the denominations “intentional conduct” and “deliberate conduct” as synonymous, meaning that the action itself is intentionally (neither negligently nor accidentally) perpetrated. This use also suggests that passing-off and the competition torts hang on deliberate conduct (the invasion of another’s property in goodwill or anticompetitive behaviour, respectively) but trigger outcome-based strict liability (regardless of the defendant’s fault or mental element). Conversely, the other economic torts contain an intention to produce an effect which varies between the economic torts. Wrongful means conspiracy, intimidation and unlawful interference with business presuppose the defendant’s intention, preponderant or not, to harm the claimant. Simple conspiracy entails the defendants’ predominant intention to injure the victim. In Lumley the inducer knew or was recklessly indifferent to the claimant’s contract, intending to procure its breach. In deceit the fraudster knew or was reckless to the falsity of his statement intending that the claimant relies on it. Finally, in malicious falsehood the wrongdoer knew or was reckless to the untruth of his declaration and calculated to harm the claimant.

In turn, Cane analyses tort law around the diverse types of wrong conduct, protected interests and sanctions. Accordingly, he examines the individual causes of action which shield the economic interests from certain conduct through particular remedies. For him, tort law clings to the correlative relationship between victim and tortfeasor. Still, rather than comparing the rights and duties as such (as Weinrib does) Cane contrasts the position of the parties. Tort law comprises a social and ethical institution which imputes personal responsibility for conduct by striking a complex balance between responsibility and freedom as well as between litigants’ interests. It safeguards claimants’ rights but values wrongdoers’ liberty to act. This liberty, therefore, operates as a defence and justification defining the scope of liability.

Alternatively, tort law can be structured around the kinds of rights (legitimate interests) invaded or the defendant’s fault or intention. Thus, Stevens defines tort law as the wrongdoer’s secondary obligation to rectify the violation of the victim’s primary right. Birks had earlier argued that civil wrongs (torts) consisted of the defendant’s breach of a legal duty owed to the claimant. He said that torts trigger a secondary (remedial) obligation whose content is determined by the law as a matter of policy responding to external factors. Therefore, although compensation for damage is often tort law’s paramount aim, remedial tort law can serve other purposes: deterrence, restitution, punishment and vindication of rights. For Birks neither harm nor blameworthiness is essential to tortious liability. Trespass is actionable whenever the defendant invades the claimant’s protected interest despite the victim being unharmed. Likewise, the law can impose strict liability, as happens with trespass. Furthermore, the objective standard of care has been said to conceal strict liability. For example, Coleman argues that fault liability actually excludes fault: the wrongdoer’s lack of culpability is not a defence, whereas the law focuses on the fault in the “doing”, that is, the breach of the objective duty of care. Conversely, for Fletcher the failure to meet the standard of reasonable care is a social judgment which entails culpability. Nonetheless, as Waddams emphasises, to incur liability for the economic harm caused to another person the defendant must act intentionally and wrongfully, namely, violating the victim’s legitimate interest. Indeed courts usually infer from the defendant’s wrongful conduct the claimant’s legitimate

89 Birks (1995) passim. Likewise, Descheemaeker [2009] IIff defines wrong as the violation of a right by the breach of a correlative duty without requiring harm.
90 Williams (1951) 160.
92 Fletcher (1993) 1665, 1672.
interest, for example, to run a business. Moreover, Stevens notes that the leading economic-tort cases denied liability because the damage did not arise from the infringement of any right of the victim: *damnum sine iniuria*. Similarly, Benson argues that inducers are liable under *Lumley* for interfering with claimants’ (quasi-proprietary) contractual rights, exercisable against anyone who attempts to invade them without their owners’ consent. As Koziol indicates, liability for intentionally caused economic loss hinges on wrongfulness, understood as the infringement of claimants’ rights. Therefore, under the rights-based model liability for economic harm requires the defendant’s fault or intention and the violation of the claimant’s right.

Without necessarily defending Hohfeld’s theory of rights, I think it illuminates some difficulties the rights-based paradigm may encounter. This is particularly so in the economic torts, which provided Hohfeld himself with useful material for discussion. For Hohfeld, commercial rivals had a liberty (“privilege”) to compete rather than a “right-claim” imposing a correlative a duty upon third parties not to interfere with such right. Hohfeld perceived that judges often and mistakenly inferred a claim-right from a liberty, as he thought Lord Lindley had done when stating in *Quinn* that:

‘[The claimant]…was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and…did not infringe the rights of other people. This liberty involved the liberty to deal with other persons…This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing’.  

Thus, the liberty to undertake a business imposes no duty at all upon third parties, although policy and justice could require that a claim-right is recognised in order to protect that liberty. Yet, as Simmonds explains, Lord Lindley was educated in the Kantian tradition, so he correctly understood that rights rendered a conduct permissible (as the expression of a liberty) and inviolable (imposing a duty not to interfere with it upon others, its infringement being wrongful). Conversely, for Hohfeld a liberty (permissibility) lacked any correlative duty whatsoever (inviolability), unlike a claim-right. What matters, as Simmonds suggests, is that in *Quinn* Lord Lindley strove for protecting the economic freedom on policy and justice principles, thereby conferring a claim-right upon the claimant and finding that the defendants had infringed their correlative duty not to invade such right. *Quinn* concerned a conflict between the liberties of claimant and defendant which had to be balanced considering their substance. Comparably, Deakin and Randall postulate that the leading economic-tort cases rightly decided that the business interests must be safeguarded from certain types of illegitimate interference. Although from a Hohfeldian perspective there is arguably no “right” to engage in a business, there are other ways of defining rights. Therefore, English courts shield the liberty to compete but only from conduct which falls within a given economic tort.

Another radical interpretation, currently defended by Descheemaeker, argues for a consolidated law of wrongs, which are defined as the breach of a duty correlative to a right and comprise common-law wrongs (torts), equitable wrongs and statutory wrongs. He claims that a coherent synthesis is essential to achieve legal certainty and justice. The traditional study of torts around the causes of action is chaotic. Likewise, the rights-based model can neither explain the tort of negligence which has invaded zones formerly occupied by specific torts, nor easily identify the distinct interests protected by one or more torts. Consequently, the law of wrongs should rest on the tripartite division between negligence, intention and strict liability. The coexistence of fault-rooted and rights-based approaches has determined inconsistent decisions and policies on the same fact-situations. To avoid this Descheemaeker proposes adopting the fault-based model while using the rights-based scheme only as an ancillary criterion.  

---

3. Observations

To implement a single explanation for so many different torts is a daunting enterprise, even if the endeavour is reduced to the economic torts. If any principle can be drawn from the foregoing it is one that denies liability beyond the established torts. The economic torts by and large involve wrongful acts as settled in *Allen*, the great exception and contradiction being the entirely intentional tort of simple conspiracy instituted in *Quinn*. Nonetheless, as will be seen in Chapter III, *Allen and Quinn* involved labour conflicts and were mainly influenced by political factors rather than by a technical choice between a casuistic approach (fragmented torts including wrongful means) and a principle of liability for intentionally caused harm.

Trade competitors can in principle harm one another without risking tortious liability: they exercise the freedom to compete which involves no duty incumbent upon their rivals not to interfere with such liberty. This damage does not arise from any tort because neither a legal duty is broken nor a right violated: 'one supermarket may set out to capture the business of another and ruin the latter's owners, but if there is no duty not to compete – or not to compete in the chosen mode or with the chosen purpose – there can be no legal wrong'.106 As suggested elsewhere,107 merely suffering damage is insufficient to ascribe liability if the harm stems from the exercise of the wrongdoer's freedom to act or to abstain from acting. The absence of a right not to sustain economic loss leads to denying any principle of liability for negligently or intentionally caused pure pecuniary harm, that is, unrelated to the infringement of victims' personal or proprietary right.108 Commercial rivals are not and should not be accountable for injuring each other out of competing. The liberty to compete justifies the infliction of harm unless intentionally and wrongfully committed.

I endorse Descheemaeker's view that a "right" is narrower than an "interest": it is that part of an interest which the law protects from interference through an action, thus recognising a right not to be injured by particular wrongful acts.109 The intentional element is an important qualification to the general rejection of liability for carelessly caused economic loss. Yet, wrongfulness signals the violation by the defendant of her duty not to invade the victim's correlative right. This obviously presupposes that victims possess a claim-right to safeguard their liberty to compete, as the landmark economic-tort decisions did. Thus, inducing the breach of contract entails liability as the defendant encroaches upon the claimant's contractual right. The inducer's freedom to compete (to offer better dealings to contract-breakers) yields to the promisee's contractual right. However, the concept of wrongfulness extends beyond the breach of common-law duties, including the infringement of duties established by statute, such as the competition laws the violation of which embodies antitrust conduct that roots the competition torts. Consequently, tortious liability hinges on wrongfulness partly because entrepreneurs have the liberty (not the claim-right) to carry out economic activities and compete. Hence Coleman argues that the harm experienced by trade opponents driven out of the market is justified despite affecting their legitimate interests (not rights); unless the damage flows from wrongful behaviour, for instance, unfair practices.110 Put differently, I understand that if competitors had an authentically "Hohfeldian" right to trade the sole interference with it would trigger strict liability. This seems to occur with passing-off which invades the claimant's proprietary right to goodwill and entails outcome-based strict liability (regardless of the defendant's fault/intention), although the conduct is deliberate. That apart, the competition torts too cause outcome-based strict liability for reasons concerning their statutory origin, yet they are grounded on antitrust conduct which is also deliberate. Conversely, absolute strict liability (that is, for barely harming competitors) would make commercial life impossible. Business adversaries have a legitimate interest in defeating one another. This is protected through the economic torts which comprise wrongful means (except for simple conspiracy and malicious falsehood) and certain intent. Tort disputes between competitors revolve about weighing their conflicting liberties. Rivals lack any right not to be harmed.

The rights-based model does not work in all the economic torts, some of which trigger liability despite the claimant lacking a right distinguishable from her

---

108 See below n.171 and accompanying text.
liberty to compete. Thus, for Stevens himself the three-party unlawful-interference tort is troublesome, given the absence of a right to trade. Likewise, Neyers has said that this tort instantiates damnum sine injuria: the claimant can recover damages for conduct that infringed no right whatsoever of hers, only a third party’s right. This tort cannot rest on the infringement of the claimant’s “right to trade” which (following Hohfeld) does not exist. In my view the torts of unlawful means conspiracy and intimidation pose equivalent problem: they entail liability despite not violating any “right”. Although the notion of right is debatable and in practice courts have shielded competition freedom against unlawful interference as a matter of justice and policy, in torts other than Lomley and passing-off (which protect contractual and proprietary rights, respectively) liability hinges on wrongful conduct rather than on the infringement of vested rights. A position contingent on the tort involved seems inevitable, rigid paradigms becoming untenable. It is not necessary to force the concept of right but realise that courts prioritise the claimant’s interest in business over the defendant’s liberty to compete inasmuch as the defendant’s conduct matches with a known economic tort.

Despite these problems, Stevens maintains that tort law is in disarray: courts use a rights-based model or a loss-based criterion (liability for intentionally or negligently caused harm) depending on the tort under consideration. He advocates a unitary rights-based approach, thereby helping courts to circumvent the policy issues entangled by the loss-based paradigm, particularly when determining whether the harm was justified. Nonetheless, however salutary the adoption of an exclusive rights-based scheme for the purpose of systematising tort law, I think it is unrealistic to remove the too-well established differences between the named torts, let alone to suggest that courts could or should stop evaluating the policy inquiries which have always nurtured case-law. An inflexible conception can start as a normative proposition about how tort law should be read but end up misstating the actual law. I thus agree with Cane in this: the rights-model does not depict the current panorama of tort law; it can hardly be deemed the best explanation of tort law as compared with the loss-model which has never been a true alternative; nor is it reasonable to decide tort cases without contemplating policy and consequentialist rationales.

Finally, Descheemaeker’s thesis persuasively shows that a clear taxonomy helps to accomplish legal coherence, certainty and fairness. Yet, it seems uncertain that the conventional understanding of tort law around the diverse causes of action, as a legal area distinct from equity, can be replaced with a merged law of wrongs. What Descheemaeker’s thesis concretely suggests as regards the economic torts, I think, is that the latter should be deemed rooted in a clear intention. However, as Descheemaeker acknowledges, in English law intention is equivocal: it can mean deliberate conduct or intended consequences. This ambiguity is manifest in the economic torts, thereby complicating any effort of systematisation. Likewise, Descheemaeker excludes breaches of contract and crimes from the concept of wrong. Even so, I doubt that wrongfulness could not include them. If this were the case the long-settled Lomley-tort would be called into question. Furthermore, Descheemaeker suggests that all the wrongs should be aligned one another regardless of their origin. Still, I consider it contentious that the common-law economic torts and the statutory competition torts can be studied as a single category ignoring their diverse sources, rationales and ingredients. The economic torts are invented by case-law basically to repair and prevent pecuniary damage flowing from unfair or even anticompetitive practices. They contain an intentional element which varies according to the tort at issue and generally require wrongful means. The competition torts are established by statute as the key form of private enforcement of competition law. They mainly serve to compensate for harm arising from the infringement of the relevant statutes and give rise to outcome-based strict liability for deliberate antitrust conduct, namely, regardless of the defendant’s intention to harm or fault. Nonetheless, I will show that both categories unveil the modest function that courts assign to tort law in the control of commercial competition.

---


116 Ibid 22-23, 33-34. See below n.486.
II. Tort law's roles

Tort theories, whether descriptive (the sociological inquiry of which goals tort law in fact serves) or prescriptive (the philosophical question about the aims that tort law should perform),\(^\text{117}\) identify principal and ancillary tasks. From an orthodox position, torts form a mechanism of personal redress establishing standards of right and wrong conduct.\(^\text{118}\) As indicated, tort law is chiefly concerned with providing compensation for wrongful harm grounded on corrective justice.\(^\text{119}\)

Accordingly, I disagree with Law and Economics’ submission that tort law does not or should not repair individual harm, this being better covered through insurance, but does or should serve social goals, like increasing safety.\(^\text{120}\) Tort law fulfils an essential compensatory mission although it can in addition serve social purposes such as deterrence. In particular, tort law helps to deter and punish wrongful conduct, vindicate rights and even make restitution of illicit gains. Compensation, Birk's said, is the typical, neither the sole nor the necessary target of torts.\(^\text{121}\)

Moreover, tort law is concerned both with the past, hence resolving disputes through certain remedies, and with prescribing future conduct.\(^\text{122}\)

I. Reparation

Tort law fundamentally compensates victims as if they had not been injured.\(^\text{123}\) This can be compared with expectation damages for breach of contract which leave claimants as though agreements had been performed.\(^\text{124}\) Torts are protective; contracts, productive.\(^\text{125}\) Tortious liability safeguards the “reliance interest”, undoing wrongs; contractual liability protects the “expectation interest”, replacing performance.\(^\text{126}\) But corrective justice underpins both liabilities.\(^\text{127}\) Likewise, tort-victims are fully compensated (save for contributory negligence) because tort law is to protect victims instead of punishing wrongdoers. So, liability relates to the victim’s harm unlike to the tortfeasor’s blame.\(^\text{128}\)

2. Prevention, retribution and restitution

Beever claims that private law is all about corrective justice, whereas deterrence and punishment are monopolised by criminal law.\(^\text{129}\) I agree that retribution is primarily a social concern and torts do not substitute crimes. I too am convinced that corrective justice offers a formidable understanding of private law. Yet, as numerous cases and jurists have stressed,\(^\text{130}\) tort law also performs preventive, retributive, distributive, restitutionary and extra-compensatory roles. As Cane asserts, tort law vindicates certain rights despite victims being unharmed, thereby indicating the high value the law attributes to such interests; compensation simultaneously serves preventive and retributive goals; and disgorgement damages punish reprehensible conduct.\(^\text{131}\)

Concretely, punitive (exemplary) damages can help to discourage and castigate the commission and repetition of wrongs, thus repressing intentionally inflicted harm and supplementing corrective justice; dissuade tortfeasors from deliberately making illicit profits; and reinforce private-law rights. Furthermore, since exemplary damages form a sort of private retribution\(^\text{132}\) there is no need for extending the criminal procedural safeguards applicable to the accused. As Zipursky indicates, the absence of such defences in civil procedure precludes from

\(^{117}\) Williams (1951) 138.

\(^{118}\) Goldberg (2003) passim.


\(^{120}\) Birk's (1995) 37; On vindication in passing-off: see below n.808 and accompanying text.

\(^{121}\) Cane (1997) 5.


\(^{124}\) Weir (1976) 5.

\(^{125}\) Fuller/Perdue (1936-7) passim; Whitaker (1996) 208.


\(^{127}\) Cane (1997) 104-105, 111.


\(^{129}\) Cane (1997) 116ff.

\(^{130}\) Cane (1997) 116ff.

\(^{131}\) E.g., Zipursky, they can be insured; Lancashire CC v. Municipal Mutual Insurance Ltd. [1997] Q.B. 897, CA.
awarding exemplary damages to punish egregious acts on behalf of the state but does not prevent disciplining the wilful injuring of individual victims.\footnote{Zipursky (2005) passim.}

Moreover, punitive damages need not undermine corrective justice if they are granted, as English courts have done, cautiously and occasionally. Hence Weinrib saluted \textit{Rookes} for confining exemplary damages to neutralise the wrongdoer’s unjust enrichment.\footnote{Weinrib (1995) 114, 134-135.} Likewise, the fact that punitive damages are awarded for reasonable amounts in specific cases\footnote{Cassell ([1972] A.C. 1027) imposed punitive damages for knowingly and recklessly publishing defamatory information, so affecting the claimant. See: Harris/Campbell/Haison (2005) 591ff.} questions certain criticisms, perhaps pertinent to American law, \textit{inter alia}, that punitive damages can unjustly enrich already fully compensated victims, exacerbate vindictiveness,\footnote{Burrows (2007) 1677-8.} or discourage meritorious behaviour, and thereby undermining punitive goals.\footnote{Schwartz (1982) passim.} By the same token it seems unnecessary to implement special solutions, like exemplary damages being collected by the state or assigned to appropriate beneficiaries.\footnote{Cane (2006) 74, 302; Daakin/Johnston/Markesinis (2007) 949ff.} Yet, as some authors indicate, the simultaneous realisation of so often contradictory rationales as compensation, deterrence and retribution can be impracticable. The concrete facts force a choice between these targets.\footnote{Chapman/Trebilcock (1989) passim.} But determining the appropriate measure of punitive damages is also hard. As Cooter demonstrated, while too small awards do not deter abnormally risky (or socially costly) practices, excessively high amounts may discourage efficient activities, especially if they are already burdened with strict liability.\footnote{Cooter (1982) \textit{passim}. See also: Epstein (2008) 854.}

Formerly, English courts awarded exemplary damages to punish outrageous conduct. However, in Rookes Lord Devlin restricted them to three categories, the second of which being the most pertinent to the economic torts: where the defendant calculates to profit from his conduct.\footnote{Rookes (1964) A.C. 1129, 1221, 1226-27. The first category comprises exemplary damages awarded against oppressive or unconstitutional action taken by servants, e.g., wrongful arrest (\textit{Holden v. Chief Constable of Lancashire} [1987] Q.B. 380, CA), malicious prosecution (\textit{Thompson v. Commissioner of Police of the Metropolis} [1987] Q.B. 499, CA) and misfeasance of public office (\textit{Ruddock v. Chief Constable of Leicestershire} [2002] 2 A.C. 122, HL - \textit{"Ruddock"); Fairgrieve (2007) 356. The third category includes punitive damages authorised by statute, a prominent (foreign) illustration being treble-damages: victims injured in their business or property by misfeasance in trust conduct can recover the triple in damages plus litigation costs and reasonable lawyers' fees (s.4, §85, Clayton Act 1914). The punitive component is two-thirds of the award: Posner leading authority on exemplary damages, \textit{subjecting them to important restraints: compensation must be inadequate to deter and punish wrongful misconduct; the claimant must be an indistinguishable tort-victim, thus preventing windfalls; and the awards must not exceed the amount of criminal penalties and should be commensurate with litigants' resources. Neither procedural constraints nor an accurate calculation of profits by defendants are demanded but tortfeasors must have compared the risk of injuring claimants with the chance of escaping liability.}\footnote{Rookes (1964) A.C. 1129, 1227-28, Lord Devlin.}


prevention are the exclusive targets of punitive damages.\textsuperscript{131} But if the law prioritises punishment the awards must correspond to the reprehensibility of the conduct unlike the magnitude of the harm or the defendant's means: retribution is not achieved if exemplary damages are simply additional costs/taxes.\textsuperscript{132} Consequently, on both sides of the Atlantic victims must clearly state whether they seek punitive damages or extra-compensation,\textsuperscript{133} the latter not being presumed from a vague allegation of the former.\textsuperscript{134} Precision is necessary because exemplary damages entail unique legal effects. Hence the landmark Philip Morris USA v. Williams case,\textsuperscript{135} which declared it unconstitutional for juries to calculate punitive damages pursuant to the harm caused to non-litigants (thus preserving the criminal safeguards),\textsuperscript{136} is irrelevant to extra-compensation.\textsuperscript{137}

Lord Devin’s second category seems entirely germane to the economic and competition torts for they embody conduct aimed at or calculated to unjustly enriching the wrongdoer at the victim’s expense. As Cane says, this conduct is unambiguously intentional. The defendant’s culpability is fundamental for this category of exemplary damages to perform the punitive and restitutory goals.\textsuperscript{138} Thus, unlawful interference with business requires the agent’s intention to harm the claimant as an end or, what typically involves self-enrichment, as a means to another end.\textsuperscript{139} Further, punitive damages can be awarded even if the defendant does not obtain illicit gains: restitution is a subsidiary function of exemplary damages,\textsuperscript{140} their award really depending on the defendant’s attempt (successful or not) to profit.\textsuperscript{141} However, English courts may be too cautious to accept this suggestion. They reject exemplary damages to safeguard non bis in idem where defendants were already imprisoned for fraud\textsuperscript{142} or penalised for anticompetitive conduct.\textsuperscript{143} In Devenish, the EC Commission had fined the defendants’ cartel. Although this antitrust conduct was knowingly and intentionally targeted at illicit self-enrichment, Lewison J denied punitive damages. First, the penalty imposed (though commuted to zero as the defendants had been whistle-blowers under the leniency program) sufficiently deterred and punished the cartel. Secondly, punitive damages could discourage offenders from denouncing serious anticompetitive acts. Thirdly, exemplary damages posed the risk of multiple claims (the cartel had an impact on the EC market) let alone the difficulty to assess them and to limit them in order to avoid double jeopardy.\textsuperscript{144}

Some authors,\textsuperscript{145} approving Lewison J’s arguments, criticise the Court of Appeal’s denial\textsuperscript{146} of gained-based damages claimed to deprive the defendants of their illicit profits. They argue that the disgorgement of unlawful gains serves the public interest in strengthening private enforcement of competition law, prevents the unjust enrichment characteristic of anticompetitive behaviour which often surpasses the victim’s harm, and avoids the complex calculation of compensatory damages. The latter are inadequate if the claimant can transfer to her customers the overcharge imposed by the defendant.\textsuperscript{147} After Devenish, it is concluded,\textsuperscript{148} restitution will probably have to be pursued directly through an action for unjust enrichment.\textsuperscript{149}

3. Observations

I agree with the critics of Devenish that account of illicit profits should be allowed when claimed through the competition torts, given the nature and aims of antitrust

\textsuperscript{132} Ellis (1982) passim; Galanter/Laban (1993) passim.
\textsuperscript{133} Calabresi (2005) passim.
\textsuperscript{134} Devenish Nutrition v. Sanofi-Aventis [2008] 2 All E.R. 249, Ch.D. ("Devenish"), at [70-74], Lewison J.
\textsuperscript{135} 549 U.S. 346 (2007).
\textsuperscript{136} The U.S. Supreme Court ruled differently in BMW of North America, Inc. v. Gore 517 U.S. 559 (1996), generating vehement criticism on grounds similar to those underpinning Philip Morris: Colby (2003) passim.
\textsuperscript{137} Selbok (2007) passim; Colby (2008) passim.
\textsuperscript{139} OGB [2008] 1 A.C. 1, at [60-62], Lord Hoffman.
\textsuperscript{140} They are ‘a very blunt instrument of disgorgement’: Cane (1997) 115.
\textsuperscript{141} For example, article 1371 of the Avant-Projet de Réforme du Droit des Obligations (Art 1101 à 1386 du Code Civil) et du Droit de la Prescription (Art 2234 à 2281 du Code Civil) 22.9.2005 (under Pierre Catala’s direction, “Catala’s proposals”), introduces punitive damages for ‘manifestly deliberate fault’ and ‘fault with a view to gain’ (emphasis added), which is patent in unfair practices: Rowan (2008) 193, (2009) 329-330, 336.
\textsuperscript{142} Archer v. Brown [1985] Q.B. 401, Q.B.D.
\textsuperscript{143} Devenish (2008) 2 All E.R. 349.
\textsuperscript{144} Ibid at [43]-[46], Lewison J. See: Whish (2008) 303.
\textsuperscript{145} Odudu/Virgo (2009) passim; Sheehan (2009) passim.
\textsuperscript{146} Devenish (2009) 3 All E.R. 27.
\textsuperscript{147} In Attorney-General v. Blake [2001] 1 A.C. 268, HL, 284-285, Lord Nicholls subjected the (exceptional) award of restitutionary damages for breach of contract to the inadequacy of compensatory damages and to the claimant’s legitimate interest in preventing the defendant’s unjust enrichment. Whether gained-based can be awarded beyond breach of contract remains unclear: Rowan (2008) 138ff.
\textsuperscript{148} Odudu/Virgo (2009) passim.
\textsuperscript{149} As recognised in Kleinwort Benson Ltd. v. Birmingham CC [1997] Q.B. 380, CA ("Kleinwort").
conduct. Yet, I too regard the second category of exemplary damages as entirely pertinent to the economic torts which form a vehicle for intentionally sought unjust enrichment. I acknowledge that English courts associate exemplary damages with criminal punishment: *Rookes* prohibited awarding them for sums exceeding the amount of penalties while double jeopardy was an important concern in *Devenish*. Although the moderate way in which English case-law awards punitive damages is coherent with tort law’s main reparatory purpose, exemplary damages can be used to deprive tortfeasors of unlawful profits as a private sanction distinct from criminal punishment or from fines for antitrust practices. As some indicate, punitive damages can be an effective decentralised mechanism threatening the pocket (not the liberty) of economically powerful wrongdoers who have not been sufficiently punished by public law.\(^{170}\)

The second category of exemplary damages should not be dismissed merely because the defendant was criminally punished. They are neither a criminal sanction nor repress a criminal offence. Reversing the defendant’s unjust enrichment (if this happened) or deterring and punishing malicious behaviour targeted at making illicit profits must also be distinguished from the other categories of exemplary damages involving torts which can really entail the risk of duplication of sanctions.

III. Policy of the law towards economic loss

This section explores the policy and technical grounds by which English courts deny in principle tortious liability for carelessly inflicted pure economic loss (the “exclusionary rule”), except for very specific situations within the tort of negligence and, mainly, the intentional economic torts.

Among other reasons it is the fear deeply entrenched in courts’ mentality for the disastrous, yet unproven, social and economic consequences which might arise from such a general fault-liability rule. Victims are likewise supposed to safeguard their own interests in contract without evading privity through tort actions.

For others, economic loss is before the law less valuable than physical damage or should not at any rate be repaired since it generates social welfare regardless of affecting individual victims. Moreover, accidentally caused financial harm is an expected-by-product of legitimate competition. This justifies restricting liability through intention and wrongful means, which are mostly incorporated into the economic torts.

1. Defining economic harm

Whereas “consequential loss” derives from the claimant’s own physical (personal or proprietary) injury, “relational (indirect) harm” flows from the physical damage suffered by a person other than the claimant. Pure economic loss is a kind of relational harm usually comprising loss of (actual or potential) profits: clientele, market-share and business.\(^{171}\) Although political interests may favour compensation for individual damage following public harm,\(^{172}\) case-law often dismisses reparation of relational economic loss.\(^{173}\)

2. Rationales for the exclusionary rule

The exclusionary rule is influenced by policy, institutional, social and cultural factors leading to contrasting results across the common-law jurisdictions. The reasons buttressing this response vary with the facts and can contradict one another. For instance, there is no evident relation between the ripple effects potentially ensuing from liability and the concern for preserving the contract-tort divide.\(^{174}\)

---

\(^{170}\) Galanter/Luban (1993) passim.


\(^{172}\) Thus, in *Re Exxon Valdez* (see, e.g., 270 F.3d 1215 (2001)) fishermen, landowners and natives were awarded environmental damages against a corporation owning oil tanker that ran aground, causing oil spill. See: Goldberg: (1991) 250-251, 275; (1994) passim.


2.1 Floodgates argument

The most recurrent justification for the exclusionary rule is the judicial fear for the detrimental economic impact, and endless litigation, which liability for negligently caused financial harm would produce.\textsuperscript{175} In \textit{Ultramarines Corporation v. Touche}\textsuperscript{176} Judge Cardozo warned about the risk of liability indeterminate in amount, time and class of potential victims,\textsuperscript{177} a famous ruling quoted by English courts when deciding the same sort of problem.\textsuperscript{178} Previously, in \textit{Palgraff v. Long Island Railroad Company},\textsuperscript{179} Cardozo had held that negligence revolved around the factual issue of foreseeability and the duty of care to be solved before the normative questions on causation and width of liability. However, in \textit{Ultramarines} Cardozo limited foresight to avoid imposing indeterminate liability in novel cases which Congress and regulators could better handle.\textsuperscript{180}

\textit{Ultramarines} has traditionally been considered as rooted in policy and pragmatic reasons.\textsuperscript{181} It prevented an extensive liability that posed uncertainty and discouraged productive economic activities.\textsuperscript{182} Financial damage, some argue,\textsuperscript{183} derives from interconnected relations which generate chain reactions, thereby potentially spreading more frequently and easily than physical harm. Then, others stress,\textsuperscript{184} the need for reducing the number of prospective claimants to direct victims suffering consequential (not relational) losses. Hence indirect purchasers are not normally allowed to bring antitrust tort suits.\textsuperscript{185} Moreover, liability can be a disproportionate reaction against those who caused pure economic loss incapable of weighing the costs and benefits of their acts. Thus, in \textit{Ultramarines} the defendants knew that the balance-sheets they had prepared as auditors were to be delivered to shareholders and investors but ignored their identity and the transactions in which the information was to be employed.\textsuperscript{186}

Nevertheless, the risk of indeterminate liability must not be overstated. A similar danger emanates from physical harm as litigation on mass and toxic torts shows.\textsuperscript{187} Victims of economic losses are often recognisable and the high administrative costs of litigation considerably reduce the volume of negligence cases.\textsuperscript{188} Indeed the floodgates argument lacks empirical support and may prompt judicial incompetence.\textsuperscript{189} That too many victims can sue is unacceptable as justification. An exaggerated fear for widespread liability should not sacrifice individual victims' interests.\textsuperscript{190} In my view the fact that courts severely restrict liability through a mental element more stringent than mere negligence and unlawful means demonstrates the vitality of floodgates argument. Through the economic torts courts can counteract the risk of limitless liability and litigation attributed to fault liability for pecuniary harm.

2.2 Contractual remedies

A powerful reason against tortious liability is that economic losses can better be distributed and prevented through contract.\textsuperscript{191} Jurists recommend using contractual remedies to neutralise the immoderate growth of English tort liability, as compared to French (and Chilean) contract law which has expanded by virtue of the \textit{non-cumulative} principle.\textsuperscript{192} It is said that tort lawsuits can undermine contractual relations\textsuperscript{193} or promote the objectionable attitude of blaming others before assuming one's own adversities.\textsuperscript{194} Yet, Lord Goff treated tortious liability as the default rule, somewhat circumventing privity of contract.\textsuperscript{195} Subsequently he held a solicitor

\textsuperscript{175} Epstein (2008) 1242. \\
\textsuperscript{176} 235 NY 170 (1931, "Ultramarines"). \\
\textsuperscript{177} Ibid, 179. \\
\textsuperscript{178} Heffely Byrne [1964] A.C. 465, 537, Lord Pearce; Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605, HL ("Caparo"), 621, Lord Bridge. \\
\textsuperscript{179} 248 N.Y. 339 (1928). \\
\textsuperscript{180} Kaufman (1998) 296ff, 307ff. \\
\textsuperscript{181} Bussani/Palmer (2003) passim. Cf (asserting that \textit{Ultramarines} was decided on legal principle alone, as the defendant owed the claimants no duty whatsoever): Beever (2007) 234ff; Bessin (2009) 837. \\
\textsuperscript{182} Rubin (1985) passim; Deakin/Johnston/Markesinis (2007) 159. \\
\textsuperscript{183} Aylah (1967) 270; Perlman (1982) 72. \\
\textsuperscript{184} Hizzio (1982) passim. \\
\textsuperscript{185} Epstein (2008) 1266. \\
\textsuperscript{186} Bernstein (1998b) 115. \\
\textsuperscript{187} James (1972) passim; Bernstein (1998b) 126ff. \\
\textsuperscript{188} Bussani/Palmer/Parisi (2003) 124ff; Gergen (2006) 749-750, 770-771. \\
\textsuperscript{189} Prosser (1939) 877; Banakas (1996) 22ff; Bussani/Palmer (2003) 18-19; Deakin/Johnston/Markesinis (2007) 159, 168. \\
\textsuperscript{190} Stapleton (1998) 66; Barker (2008) 184. \\
\textsuperscript{192} Markesinis (1987) passim; Whitaker (1995) passim; Bussani/Palmer (2003) 15. \\
\textsuperscript{193} Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145, HL ("Henderson"), 196; Lord Goff. \\
\textsuperscript{194} Banakas (1996) 8. \\
liable for carelessly performing his services towards his client (a testator), thereby affecting the claimants (disappointed beneficiaries). This finding, his Lordship asserted, was the only way of doing justice to them, although neither the defendant had assumed responsibility to the claimants nor the latter relied on his services.196 Conversely, Whittaker suggests confining tort liability to particular islands and regulating the effects of certain contracts whose parties have remained silent.197 In the same vein, Weir lamented that Hedley Byrne, the leading case affirming liability for negligent misstatements provided by banks, had allowed the claimant to transfer its risk to a stranger instead of protecting it by contract.198 For Weir, Hedley Byrne indirectly clashed with Cattle v. Stockton Waterworks Co,199 the effect of which is the denial of liability for carelessly interfering with another's contract. No less eloquently, Schwartz reproached that J'Aire Corp. v. Gregory200 preferred fault liability for contract interference rather than using the theory of contracts made to third parties' benefit.201

As will be seen,202 a strong argument for contractual remedies is raised to refuse or delimit tort liability for interference with contract or business. English courts confine liability to inducing breach of contract and for intentionally causing economic loss to another person's trade by wrongful means. Tort law does not replace contractual remedies but fills their gaps.

2.3 Efficiency

Law and Economics deflects the exclusionary rule from several flanks.203 Liability is said to entail more social costs than benefits. Pure economic loss is deemed merely private (as it generates social gains) and spread amongst countless victims (each of whom sustains a relatively small damage easily transferable to

consumers); thereby preventing defendants from calculating how much invest in precaution.

However, Schwartz argued, courts often redress individual harm on corrective justice without assessing social costs. Moreover, individual losses often involve social costs, such as the diminution in the level of services that the claimant's customers experience after the defendant expelled the claimant from the market.204 For Espstein the absence of liability can prompt victims to overprotect through contract and wrongdoers to sub-invest in precaution.205 And Barker perceives discrimination in favour of physical harm and against pure economic loss: physical harm is recoverable despite entailing the same wealth-transfer effect than pure economic loss, which is not.206

Although I disagree that tort law only fulfils goals outside the tortfeasor-victim relationship, Law and Economics provides useful criteria to identify irrational conduct like that embodied in the economic and competition torts. As will be seen,207 predatory pricing is a clear illustration of this. It involves a business who stops profiting and starts selling at a loss, normally uncovering the agent's intention to annihilate identifiable competitors or to prevent future rivals from entering the market. Hence the Competition Appeal Tribunal ("CAT") has asserted that 'the longer the prices of a dominant undertaking remain below total costs the easier it is likely...to infer [the] intent to eliminate competition'.208

2.4 The alleged lower rank of financial interests

Weir founded the exclusionary rule on the supposedly inferior hierarchy of pure economic interests compared to corporeal property, suggesting that people (unlike artificial persons) have deeper affection for tangible goods than money. Therefore, the law protects corporeal property but not financial interests against negligent interference. This preference for physical harm is consistent with the social scale of human values and with the fact that trespass, the predecessor of the tort of negligence, exclusively safeguarded physical rights (personal and proprietary).

198 Weir (1963) passim.
199 (1875) LR 10 Q.B. 453, Q.B.D. ("Cattle"); the defendant negligently allowed its pipes to leak, thereby increasing the claimant's cost under a contract with a third party to construct a tunnel.
200 24 Cal.3d 799 (1979, "J'Aire"). See below n.603 and accompanying text.
202 Below Chapter III, section III.3.2, pp.112ff.
207 Below nn.102ff and accompanying text.
argument. Only subsequently the type of damage was highlighted as the ultimate criterion against liability. Although conceptualism never attempted to limit liability, and was in fact abandoned, it endured as precedent and was justified in policy. But as Weir points out, ‘the policy will continue to be expressed in terms of duty and/or remoteness’. Thus, the nature and hierarchy of pure financial interests coincidentally aid to underpin the exclusionary rule albeit they are not decisive: by and large Western legal systems allow the recovery of intentionally inflicted pure economic damage through specific torts or a general rule. For Gordley, the exclusionary rule punishes victims for negligently exposing themselves to harm, though this rationale is concealed in the floodgates argument or, as in France, in formal criteria, as remoteness of damage. Perhaps, as (Anita) Bernstein contends, the exclusionary rule keeps tort law understandable and accessible for the public: pure financial interests are too abstract to be protected by rules designed to regulate involuntary transactions.

In brief, pure pecuniary interests are important but in practice less protected than tangible proprietary interests. Financial interests cannot generally be redressed through the tort of negligence but through the economic torts which make more difficult the enforcement of liability. The true reason for this is, I believe, that courts implicitly endeavour to balance victims’ right to compensation for pure economic harm against wrongdoers’ liberty to compete. So, pure pecuniary damage is rarely compensated not for anything in its nature but because it often arises from competitive activities, thereby being justified. Interestingly, the technical reason behind Cattle was that the claimant’s harm had been too remote an effect of the defendant’s act, which is entirely equivalent to the common ground that French (and Chilean) courts employ to refuse compensation

Trespass is actionable per se, despite the victim being unharmed: it mainly vindicates rights rather than compensating for damage. Actually, however, economic interests can be more valuable (at least objectively and regardless of their sentimental price) than corporeal assets. Indeed property damage is a kind of economic loss. Moreover, Weir himself admits that tangible and incorporeal goods are currently given similar value. Furthermore, the purportedly lower status of the financial interests may only signify that the resources to compensate for economic loss are insufficient. Yet, without empirical evidence this is mere speculation: at least in France the scarcity of capital is no impediment to recover pecuniary harm. As some have noted, English and German laws have privileged tangible assets over economic interests, contractual rights and mere expectations. In Germany financial interests are excluded from the list of protected rights and can only be remedied if intentionally or recklessly injured through conduct contra bonos mores. Conversely, since the 1789 Revolution French courts allow compensation for all kinds of harm, including pure economic loss, although it is rejected where it is indirect or uncertain.

The predominant nineteenth-century individualism, symbolised in the Cattle decision, drove English courts into denying compensation for claimants’ relational economic harm. For (Robby) Bernstein and Gordley, the real-rights/personal-rights conceptualist dichotomy, which likewise influenced courts to refuse proprietary protection to contract rights and mere expectations, is a historical accident. Indeed, as Atiyah claimed, Cattle did not hinge on the nature of the harm but on its remoteness (lack of causation) and the floodgates

220 Atiyah (1967) 269.
224 They are not mentioned in §823 BGB: (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or other right of another person is liable to make compensation to the other party for the damage arising from this. (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault”. See below n.881.
225 §826 BGB: ‘A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage’.
for economic loss. It is noteworthy that Stevens acknowledges that the English rights-based model and the French loss-based system usually reach similar results, excluding this type of liability for lack of causation.226

Finally, English law clearly prioritises proprietary interests over contractual rights and the latter over business interests. It protects proprietary interests against their invasion or unauthorised exploitation through strict-liability torts where the defendant’s intention or fault is immaterial. These include trespass, which protects tangible property and is per se actionable (the victim’s damage is irrelevant), and passing-off, which protects intangible property and demands proof of likely (not actual) harm. In both tort law mainly vindicates the claimant’s rights and gives them priority over third parties’ freedom of action. Hence the imposition of strict liability and also the granting of injunction as prime remedy. Conversely, non-proprietary interests are protected through intention-based liability and the main remedy is compensation for harm, injunctions being granted insofar as damages are not adequate redress. Contractual rights are safeguarded through Lamley which requires the defendant’s intention to cause the breach of another’s contract. Business interests are shielded, inter alia, through the unlawful-interference tort which presupposes the more stringent defendant’s intention to harm the claimant. Ultimately, as Owen implies, a rule of strict liability for the violation of recognised rights reflects the prevalence of victims’ personal security from harm over tortfeasors’ freedom of action.227 Similarly, Cane shows that the paramount importance the law attributes to proprietary interests over contractual rights is manifest in strict liability and the granting of injunctions as the chief remedy. Tort law serves to affirm victims’ rights, so limiting wrongdoers’ liberty to act.228

3. Pockets of negligence liability

English courts avoid undermining economic activity. Consequently, only occasionally do they award compensation for carelessly caused pure economic loss. A major exception concerns damage arisen from negligent misstatements
given by banks (Hedley Byrne) or auditors (Caparo) in the offering of advice in financial matters, thereby injuring claimants who entered into unprofitable business. However, the nature of damage was merely implicit in Hedley Byrne and only later case-law noticed it.229 Particularly, Hedley Byrne offered an alternative to liability for fraudulent misstatement. Under deceit the defendant makes a false representation intending that the claimant should act on it and knowing that the statement is untrue, without believing in its reality or being recklessly indifferent to its veracity or falsity.230 Significantly, Hedley Byrne allowed liability for negligent misstatements. By contrast, since Cattle carelessly interfering with another’s contract has remained lawful conduct.231

Currently, liability for negligent misstatement is enforced in different contexts which are difficult to incorporate into coherent rules.232 Courts can impose liability where defendants voluntarily assumed responsibility vis-à-vis claimants who reasonably relied on the advice or information rendered by the former,233 whether the parties are in a special contract-like relationship234 or the defendant promised to discharge a certain obligation on which the claimant (third party) trusted.235 Courts can also impose a duty of care upon the defendant provided that it is “fair, just and reasonable” and the claimant’s harm is foreseen and proximate.236

Nonetheless, the tort of deceit (alongside other intentional torts such as inducing breach of contract) has the advantage of conferring upon victims the possibility of recovering all the actual damage, including consequential losses, directly derived from the fraudulent misstatement,237 whilst defendants cannot plead contributory negligence.238 In turn, negligent tortfeasors only answer for the

228 Cane (1997) 84ff, 139ff.

4. Debate on policy arguments

Several jurists deny pure economic loss the status of compensable damage because it does not violate any right of victims, thus amounting to what they call “nonfeasance”. They underpin liability in the breach of corrective justice due to the infringement by the wrongdoer of the victim’s right or legally protected interest (“misfeasance”). Then, freedom of action is limited by another’s rights whose violation (wrongful conduct) triggers tort liability.\footnote{Weinfurth (1995) 134, 161-162; Benson (1995) 444, 455, (2009) passim; Honori (1995) 77ff; Ripstein (2002) 655-657, 685; Stevens (2007) 221ff; 42; Beever (2008) passim.}

As Benson indicates, the rationale underlying the exclusionary rule is neither policy (“foolsgates”) nor the nature of pure economic loss (as compared with physical harm) but \textit{damnnum absque iniuria}: since the defendant does not encroach upon any victim’s right against him, he owes no duty of care to the victim. Benson exemplifies his rights-based approach arguing that pecuniary harm caused between trade competitors is commonly unrecoverable for it arising from the infringement of rights that claimants have towards third parties other than defendants, except for specific situations subsumed under the economic torts, such as \textit{Lumley}. However, \textit{Lumley} presupposes a mental element and the invasion of the claimant’s contractual right that produces an effect equivalent to real rights.\footnote{Benson (2009) 86ff.} As Pollock\footnote{Pollock (1887) 129-130.} and Birks\footnote{Birks (1995) 38.} have said, beyond the economic torts harming rivals by competing with them is \textit{damnun sine iniuria}.

Accordingly, supporters of a rights-based model focus on corrective justice, disapproving of policy arguments. The latter, as Bell suggests, signal a kind of justification whereby judges can assess the merits and effects of opposing substantive grounds creatively and consistently with traditions, precedents and current rules.\footnote{E.g., Spartan Steel [1973] Q.B. 27, 36, Lord Denning MR.} For courts\footnote{Cane (2008) passim, Douglas (2008) passim, Witting (2008) passim.} and authors\footnote{Hepple (1997) passim.} policy reasoning is a central justification for the exclusionary rule, whereas the rights-based scheme fails to explain tort law in its entirety and corrective-justice theories manipulate instead of describing the real case-law. Corrective justice alone cannot solve conflicts between individuals. Although a rights-based paradigm can justify strict-liability torts, both the defendant’s conduct and policy considerations are fundamental to negligence. Indeed Hepple championed a policy principle to developing a coherent law of negligence.\footnote{Bell (1983) 22.} As Bell implies, policy argumentation has an overall impact which renders it essential to tort litigation.\footnote{Stapleton (1991) 294ff; (1998), (2002) passim.} Stapleton concentrates on identifying and evaluating the policy grounds underpinning the conventional rationales (for instance, indeterminate liability or the respect for the contractual allocation of risks). The goal is to determine whether such “slogans” were valid in the concrete circumstances: was the defendant exercising its liberty to compete? Was the claimant self-protected through contract or did he belong to an identifiable class of victims? Stapleton rejects both the superficial factual analogies forming clusters of liability for negligently caused pure economic loss and American highly sophisticated tort-doctrines which neither describe real cases nor predict further developments.\footnote{Holborn (1999) 197.} Yet, it must be noted that since U.S. corporations could insure against fault liability this area has mainly lied in policy and economic considerations advanced by renowned judges and jurists, as Holmes, Pound, Hand and Posner.\footnote{Bell (1983) 22.}
English courts make the policy grounds explicit through imprecise formula, for example, "fair, just and reasonable", excluding the recovery of pure economic loss for pragmatic as well as systematic reasons, like the respect for the tort-contract divide. However, policy is also pivotal in both French and Chilean law, as carelessly caused economic harm, albeit it is concealed behind the concepts of fault, causation and damage. Policy is an indeterminate concept which has an undeniable influence on the exclusionary rule. Likewise, policy covers the more specific consequential and technical grounds supporting the exclusionary rule.

5. Economic loss flowing from legitimate competition

That pure economic harm is a foreseeable effect of legitimately exploiting self-interest in competition is a sound reason to discard liability, certainly if that damage is only carelessly caused. At worst, from a Hohfeldian angle, the liberty to compete imposes no duty at all on third parties not to interfere with that freedom. At best, some argue, competitors can only expect their rivals will refrain from intentionally invading their businesses.

However, as has been asserted elsewhere, the prospect of recovering pure economic loss is further limited by English law. It does not suffice that the defendant intentionally injures her competitor for the latter to be compensated but must have done so acting in a wrongful manner. This is reflected in the economic torts, beyond which intentionally inflicted financial damage is justified in the liberty to compete.

IV. Approaching the economic torts

The main exception to the exclusionary rule is the economic torts which require some form of intention and (save for simple conspiracy and malicious falsehood)

wrongful means. Intention and wrongfulness significantly vary in content between these torts, the organisation of which is thereby complicated.

English law denies a general principle of liability for intentionally inflicted economic loss such as the prima facie tort or the abuse of rights in its more robust variant. English law, Cane says, also demands that economic harm is wrongfully occasioned. Intention is, unlike negligence, a logical device for restricting liability congruently with competitive freedom, as rivals seldom act solely or primarily to hurt one another. Yet, intention cannot on its own limit liability. Competitors foresee and often aim at expelling their opponents from the market for profit-making purposes. Further, tort law is principally concerned with protecting victims’ rights through compensation rather than punishing injurers; hence it cannot exclusively concentrate on the mental element but must also find a mechanism for balancing claimants’ interests against defendants’ freedom to compete. The technique is to require wrongful means (illegal conduct, including torts and crimes) and admit justifications (mainly wrongdoers’ competitive freedom and self-interest) which negate liability. As others have indicated, courts rely on what Parliament and the common law define as unfair or unlawful competition. Then, intention, wrongfulness and justifications aid to restrain economic-tort liability in harmony with judicial pro-competition policy. I will now explore more fully intention and wrongfulness from moral and legal stances.

1. Harming competitors: a moral-philosophical outline

Before examining the intention from a juristic viewpoint I will consider what business-ethics and philosophy permit and object to regarding commercial competitors injuring each other. This is advisable for, as will be apparent, courts approach the intention requisite to the economic torts in a form that mirrors the moral distinction between intended and unintended consequences.

Adam Smith claimed that in a capitalist society firms can make profits so long as they comply with the law, the limit being at abusive conduct. Mutual cooperation, he argued, is egoistic: social welfare results from the “invisible
The DDE distinguishes the effects intended as ends or as means to other goals (for instance, self-enrichment), from merely foreseen, unintended and inevitable consequences. Moral blameworthiness and responsibility are imputed to intended results only so far as they flow from an agent’s choice, that choice providing reasons for acting. Bentham himself distinguished intended consequences, which give motives for acting (corresponding to the civilian notion of dolus), from foreseen likely outcomes, dubbed “oblique intention”, which neither offer reasons for acting nor matter to achieve one’s target. Anscombe demonstrated that an effect is intended if it contributes to the agent’s purpose. Harm is deemed a by-product if it ensues from the good effect of one’s action or independently of it, so it is sought neither intrinsically nor instrumentally. Side-effects are therefore not necessary to accomplish a particular aim. The problem is to separate side-effects from results pursued as means to other ends. Hart treated as intended those effects which are causally closer to the defendant’s act. Quinn defines as intended those effects sought directly, deliberately and opportunistically, defendants utilising victims as instruments to achieve their goals, as opposed to incidental or unintended victims.

These explanations clarify the conceptual distinction between the immoral act of intentionally harming others (with malice or self-interest) and the ethically admissible injuring of others as a foreseeable side-effect of a lawful activity. Yet, they fall short of being workable. As Moore warns, the claimant must prove that the wrongdoer’s intention squared with the mental element prohibited by the law. Likewise, as Cavanaugh says, the law must offer practical ways of showing intention.

2. Law’s perception of harm caused between commercial rivals

Moral philosophers acknowledge that business adversaries usually foresee contenders’ injury as an inevitable by-product of their conduct. Moreover, the law generally justifies the intentional infliction of harm in the exercise of the liberty to compete and the advancement of one’s own economic expectations unless sought at another’s expense. Furthermore, it is a regular opinion among Anglo-American judges that legitimate competition involves a struggle for superiority to increase customers and trade, leaving winners and losers. Thus, the successful rival ‘must not be turned upon when he wins’.

Holmes J thought that competitors necessarily harm one another, thereby proposing to limit liability by requiring unlawful means. He declared that the law often permits deliberately caused harm although justifications rest on policy and social advantage, such as the freedom to compete, and are usually hidden behind formal arguments. Subsequently, Holmes J implied that injuring rivals was a foreseeable side-effect of competing, as distinguished from the harm inflicted “wilfully”, that is, as an end or as a means to other end. For his part, Lord Reid declared that intentionally causing economic loss was a common trade practice justified in the advancement of self-interest, while Goff LJ affirmed: “the philosophy of the market place presumes that it is lawful to gain profit by causing

263 Aquinas, Summa Theologica, II-II, Qs.64, art.7.
264 Bentham ([1781/1996] Ch.VIII, §6, 86 & Ch.IX, §17, 94. Modern criminal law, however, confines “oblique intention” to side-effects virtually certain to occur: Williams (1987) 420ff; see below section 3.1, pp.38ff.
265 Anscombe (1965) passim.
266 Boyle (1980) passim.
267 Hart (2008) 120.
273 U.S. v. Aluminium Co. of America 148 F.2d 416 (1945), 430, Hand J.
others economic loss. Finally, modern jurists consider intentionally harming opponents as endemic to competition, except when it is the agent’s exclusive (malicious) purpose.

Antitrust law itself starts with the premise that free competition inexorably affects particular rivals. This legal branch basically safeguards the competition process. Hence the CAT remarked that article 82 EC and Chapter II (Prohibition) of the Competition Act 1998 prohibit “exploitative abuses”, namely, prejudicial to consumers, unlike those detrimental to identifiable competitors (“exclusionary abuses”). Competitors defeat their rivals and, as a result, secure monopolistic positions which accrue to consumers’ benefit. Therefore, the abuse of market power is punished because of its inimical effect on consumers, competitors and the marketplace at large. Yet, it seems to me that the sanction of unfair and antitrust conduct somehow reflects the Kantian lesson that one must never treat others as means but always as ends-in-themselves. So it is held that the legitimate cutting of prices becomes abusive if targeted at eliminating competitors.

3. Distinguishing intended consequences from side-effects in practice

Neither criminal nor tort law necessarily mirrors the division between intended outcomes and side-effects drawn by the DDE.

3.1 Crime

English criminal law treats as equally intended the results aimed at by defendants (“direct intention”) and those side-effects foreseen as virtually certain to happen despite being undesired. Williams referred to the latter as “oblique intention”. Thus, the legal response clashes with the moral-philosophical idea that side-effects are unforeseen, unintended and unnecessary to achieve one’s purpose. As Hart explained, criminal law equates side-effects to intended consequences in order to convict the accused. Moreover, criminal law often aligns recklessness with intention, as both imply an agent choosing his action and controlling its outcome:

‘The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also’.

Recklessness and intention demonstrate extreme indifference to others. Hence they are practically similar vis-à-vis certain offences. Thus, criminal intent is wider than the philosophical notion of intention, because it includes the consequences intended as ends (“direct intention”), as means to other ends (necessary for the attainment of ultimate goals) and the side-effects virtually certain to follow (“oblique intention”). Pragmatic reasons justify avoiding this fine line as regards serious offences. Criminal law illuminates how hard it is to discriminate between mental states. Much of the evidentiary trouble is tackled by inferring mens rea from actus reus and circumstance. Traditionally, effects were sometimes presumed to be intended by reason of their being foreseen as “likely” or “natural” consequences of wrongful acts. Yet, modern law requires a higher degree of foresight for a result to be deemed intended: the defendant must have foreseen it as almost certain to happen. Nonetheless, to differentiate intended (as means) results, oblique intention and recklessness entails quite a

283 P v. Woodlin (1999) 1 A.C. 92, HL, 93; Lord Steyn, CE: Kaveny (2004) passim (arguing that foresight cannot be deemed “intentional” but a sufficiently high degree of foresight of occasioning the victim’s death is equated to actually intending this effect, ergo constituting murder).
284 He noted that oblique intention contains a higher degree of certainty about the probability of the undesired foreseen effect than that in recklessness (which does not meet the intention required for murder but that for manslaughter): Williams (1987) 423, 438.
286 Hart (2008) 120FF.
289 White (1961); Williams (1962); Brady (1983); Cane (2000a) passim.
292 In R v. Moloney [1985] A.C. 905, HL, Lord Bridge required a probability ‘little short of overwhelming’ and a ‘moral certainty’ (ibid, 925-926). So, Lord Bridge indirectly backed oblique intention but confusingly used the words ‘natural consequences’ (ibid, 929); Williams (1987) 432.
conundrum: ‘once we depart from absolute certainty there is a question of degree and an uncertain boundary between intention and recklessness’.

Moreover, it is debated whether foreseeing as virtually certain a wrongful effect is true intention or mere evidence from which intention can be inferred. Some reject the concept of “oblique intention”: intention cannot be deduced from foresight. For others, a given result can be considered as intended if the agent would have treated his act as a failure had he not achieved that outcome. This discards the possibility of enhancing criminal intent to include side-effects. Yet, as Williams argued, the incorporation of oblique intention into the mental state required for serious crimes is a sound, policy-based way of circumventing subtle distinctions.

3.2 Tort

Intention and recklessness, the core mental states in crime and tort, concern the effects of conduct rather than conduct as such. As Kant, Bentham and Austin contended, the law focuses on acts and intentions, prescribes external behaviour and imposes rights and duties, while motives are examined by morals. Intention concerns what agents pursue, choose or aim; motives give reasons for acting. Thus, criminal liability hinges on the intention with which acts are perpetrated, although motives help to construe past conduct: nobody acts without a reason. Similarly, the intention in the economic torts relates to consequences; motives provide justifications, such as freedom to compete.

As Cane asserts, motive and intention often coincide, so they can be confused. Yet, tort law does not reflect morals completely: ‘people are not necessarily condemned for doing the right thing for the wrong reason’.

As Williams argued, bad motives do not render legitimate conduct wrongful and good motives do not justify tortious acts. Although Lord Esher MR reasoned that the defendant’s bad motive rendered conduct wrongful, and Finnis comparatively claimed that an act is lawful if and only if both its means and ends are licit, English law rejects the idea that intentionally caused economic harm is tortious unless justified (the prima facie tort). Except for conspiracy to injure and malicious falsehood, economic losses are compensable if intentionally and unlawfully caused.

In tort, intention consists of foreseeing and desiring a certain effect as the immediate or ultimate purpose. The harm caused to another person as a (necessary) means to accomplish a further aim is equally intended; the inescapable side-effects of activities generally are not. Recklessness is the awareness that an act will cause an undesired though avoidable result, combined with the agent persevering and producing it. It encompasses knowledge/belief of high risk-creating and conduct close to gross negligence, which in continental systems is equated to intention: magna culpa dolus est. Moreover, tort law often treats intention and recklessness alike: deliberately harming others and completely disregarding victims are censured with equal vigour as both are the agent’s choice. In contrast, simple awareness that damage is likely to happen somewhere or sometime is not an intention to cause that damage. Indeed the intentional torts involve planned conduct in a matrix of economic relationships whereby wrongdoers use victims to achieve their goals. Conversely, negligence typically concerns spontaneous interactions between strangers.

Yet, establishing the boundary between intention, recklessness and foreseeable side-effects is complex and prone to arbitrariness. First, to understand, classify and assess the legal impact of the states of mind is a daunting task. Secondly, the characterisation of mental states involves sophisticated policy, economic, ethical and technical dilemmas. The law may wish to enforce certain

---

293 ibid 99ff.
297 Allen (1924) 180; Freeman (2001) 49.
298 Austin (1932) 111; Salmond (1937) 527; Anscombe (1963) 18ff.
299 Austin (1932) 111; Salmond (1937) 527; Markessinou/Unberath (2002) 84.
303 Williams (1951) 144.
312 Jung/Levine (1980) passim.
moral values reflected in “desire-states” (intention/recklessness) but their administrative costs may favour cheaper “belief-states” (knowledge). So problematic drawing workable distinctions between intention, recklessness and gross negligence can be that American courts usually identify the broad categories of intention and negligence; the middle zone remains obscure. Thirdly, although intention must be proved as any other fact, to uncover it is very hard: the thought of man is not triable, for the devil himself knoweth not the thought of man. Fourthly, the fact that the overt acts are often the same further complicates the separation between intentionally/recklessly inflicted harm and injury flowing as a side-effect of legitimate conduct.

One way of tackling this crucial evidentiary issue is found in Law and Economics which offers both criteria to define negligent conduct and a valid explanation for awarding extra-compensatory and/or punitive damages for intentionally or recklessly occasioned harm, particularly that stemming from the economic torts. As Landes and Posner show, malicious and reckless wrongdoers incur negative and negligible costs, respectively, to avoid causing harm. Malice is presumed from the irrational act of expending considerably more in injuring the victim than in preventing this from happening: the defendant practically goes into debt as to harm the claimant. However, as recently held in England, the intention to hurt another is also clearly demonstrated by a rational attempt to profit at another’s expense, this conduct matching Lord Devlin’s second category of exemplary damages.

Now, do the economic torts reflect more faithfully the moral division between intended consequences and side-effects? In OBG Lord Hoffmann defined the intention required in Lonley and in the three-party unlawful-interference tort as the result pursued as an end or as a means to another end (usually self-enrichment), that is, the breach of the claimant’s contract or the claimant’s harm, respectively. Furthermore, Lord Hoffmann understood Woolf LJ’s statement in Lonrho plc v. Fayed as implying that the harm occasioned as a means to other goal was equally intended. Thus, side-effects appear excluded from the mental element in these prominent economic torts. Still, there are several contentious issues. First, Carty complains that the intention required for the unlawful-interference tort is too wide. Since it suffices that the claimant is injured as a result of the defendant advancing his economic interest, the mental element can easily be enlarged to cases where claimants are harmed as a merely foreseen and unavoidable consequence of defendants’ conduct. The effect would resemble the principle of liability for foreseen, unintended damage suffered as the inevitable effect of unlawful, intentional, positive acts established in the Australian decision in Beaudesert Shire v. Smith. This case elicited acid condemnation, particularly for embodying a strict-liability tort in circumstances where the invention of strict liability is Parliament’s province.

Hence Beaudesert was replaced with the requirement of unlawful acts directed against the claimant and moreover, in England, rejected to prevent the undue extension of liability for breach of statutory duty. Conversely, Neyers suggests that it is not obvious why merely foreseeing that harm will ensue cannot form the mental element required in the unlawful-interference tort.

Secondly, it can be maintained that recklessness satisfies the mental element of the unlawful-interference tort. Although recklessness comprises the awareness of a risk of causing harm coupled with the indifference as to whether it follows or not, tort law generally equates recklessness to intend: both involve

---


314 [The state of a man’s mind is as much a fact as the state of his digestion]: Edgington v. Fittersarince (1885) L.R. 29 Ch.D. 459, CA, 483, Bowen LJ, deciding this famous case on deceit.

315 V.B. 17 Edw.JV, 1 Brian CJ.

316 Ancombe (1963) 44-45.

317 Harm is deemed carelessly caused if its magnitude, multiplied by its probability, exceeds the costs of preventing it: U.S. v. Carroll Towing 195 F.2d 169 2d Cir (1947), 173, Hand J. Yet, this is undermining from the irrational act of expending considerably more in injuring the victim than in preventing this from happening: the defendant practically goes into debt as to harm the claimant. However, as recently held in England, the intention to hurt another is also clearly demonstrated by a rational attempt to profit at another’s expense, this conduct matching Lord Devlin’s second category of exemplary damages.

318 See below n.706 and accompanying text.


deliberation. The factual proximity of recklessness to intention is plain in the tort of misfeasance in public office, case-law equating reckless indifference as to the victim’s harm to targeted malice. Some even argue that recklessness and intention are essentially identical, just that recklessness is proved by evidence whereas intention by inference. In OBG, Lord Nicholls held that recklessness sufficed as the mental element in the unlawful-interference tort, blurring the line between recklessly caused harm and intentionally caused injury as a means to profit at the claimant’s cost. Even so, it is unclear why he discarded reckless indifference in the Lamley-tort.

In my opinion it is indisputable that merely foreseen harm falls short of the mental element required in torts which essentially exclude negligence as a ground of liability. Hence OBG overruled the criticised Millar v. Bassey judgment which had supported liability for intentionally breaking one’s contract foreseeing that the contractor would break its agreement with the claimants although the defendant neither intended to harm them nor used unlawful means.

4. The impact of intention upon the economic torts

Normal competitive behaviour, I think, does not target identifiable rivals but foresees harm caused to them as a collateral effect of legitimate business struggle. Hence it is justified. Conversely, the intentional infliction of financial harm, as an end or as a means to another end, is ethically unacceptable and socially inefficient, thereby justifying the imposition of liability.

The economic torts restrain liability through some forms of intention. As many contend, the justification for a mental element lies in that free competition inevitably harms known adversaries, attracting their customers by legitimate methods. However, English law has always denied a general principle of intention-based liability, selecting specific torts incrementally developed from the action on the case. As Moore argues, the law tolerates wrongdoers targeting victims on consequentialist grounds, thus departing from the DDE. Likewise, I think that the intentionally doing of economic harm is only exceptionally sanctioned as it often involves legitimate competition producing widespread social benefit. Still, as Fleming implies, business competition would become inoperative if rivals were liable for the losses caused simply because they could predict them. I thus regard as significant that liability for economic harm inflicted between trade competitors is restrained through a certain mental element, therefore excluding simple fault and absolute strict liability.

First, as some suggest, the requirement of a given intention as opposed to mere negligence diminishes the impact of the floodgates argument. Secondly, although negligence and strict liability can be founded on corrective justice, neither is a good candidate for regulating economic damage in trade. Corrective justice is engaged where a tortfeasor deliberately appropriates the victim’s goods for his convenience. It commands him to restore the pre-existing equality between individuals by transferring wrongdoers’ gains to victims. And it typically explains intention/fault-based liabilities: defendants answer for choosing to profit at victims’ expense or behaving with less prudence than required. Conversely, strict liability seems to contradict corrective justice, unless it arises from abnormally dangerous activities. For Weinrib, strict liability denies the equality between individuals: it treats victims as passive sufferers with the absolute right not to be harmed, thereby punishing the taking of claimants’ property, albeit such entitlement is not shown; and it blames defendants merely for acting, as they have not violated any duty owed to victims. Although Epstein champions a general theory of strict liability rooted in corrective justice, Weinrib highlights its illogical implication: insofar as defendants must consider the damage they cause...
to victims as though it was their own, defendants would end up responding even for involuntary acts or would never be liable. 347 Epstein argues that defendants should be strictly liable for the losses inflicted upon others whenever they would have had to bear the damage had they injured themselves. Yet, as Perry asserts, that individuals can harm one another is one thing; that a person injures himself is another thing. For Perry, strict liability offers no clear solution, as both defendant and victim produce the harm. 348

In my view although strict liability can be based on corrective justice and helps to vindicate proprietary rights, commercial competition would be hindered if trade contenders were liable for barely harming one another. Liability must be restrained through intention, whether it comprises deliberate conduct (like passing-off and the competition torts, which trigger outcome-based strict liability, thus relieving claimants from proving the defendant’s intention) or intended effects. As recently confirmed: ‘The position of [the defendant] was that he wished to defend his publication against the damage it might suffer on account of having lost the exclusive. But that...is precisely the position of every competitor who steps over the line and uses unlawful means. The injury which he inflicted on [the claimant] in order to achieve the end of keeping up his sales was simply the other side of the same coin...Lord Sumner made this point pungently in Sorrell...The injury...was the means of attaining [the] desired end and not merely a foreseeable consequence of having done so.’ 350

5. The importance of unlawfulness

The real difficulty in distinguishing unintended side-effects from desired results justifies restricting liability through wrongful means. Thus, Lord Nicholls declared that English law promotes and defends business competition despite the fact that rivals intentionally harm each other unless they use unlawful means. 351 Likewise, American authors propose limiting liability for interfering with another’s prospective economic advantages both through intention and unlawful means, the latter including antitrust conduct. 352

For others, deliberately injuring competitors is not per se unlawful but inherent to the functioning of the market, even if this conduct deserves moral stricture. 353 Wrongfulness is a formal criterion that restricts liability within appropriate bounds, thereby preventing the judiciary from interfering with Parliament’s control over competition. 354 As Carty suggests, wrongfulness expresses an abstentionist judicial attitude, whereas the prima facie tort symbolises an interventionist one. 355 Courts can strike a balance between litigants’ conflicting interests relying on the conduct prohibited by statute, including competition laws. 356 The width of judicial power to repress misbehaviour depends on the scope of unlawfulness.

For Carty a single definition of wrongfulness can bring consistency to the economic torts, aiding courts in evaluating carefully the policy and common sense problems connected with unlawfulness and justifications. 357 She suggests that unlawful means conspiracy, intimidation and wrongful interference with another’s business are incorporated into the tort of causing economic loss by unlawful means. As Heydon and Buckley argued, what defines an economic tort should not depend on the infringement of statutes completely unrelated to it. 358 Hence, Carty says, unlawful means must be restricted to legal and civil wrongs, namely: torts (including statutory crimes independently actionable as breach of statutory duty); 359 breaches of contracts; and threats to commit one or the other. For her, a broad notion of wrongful means, such as ‘any act the defendant is not at liberty to commit’, 360 including agreements in restraint of trade, breach of confidence and crimes despite not being autonomously actionable as torts, undermines the

---

349 ‘How any definite line is to be drawn between acts, whose real purpose is to advance the defendants’ interests, and acts, whose real purpose is to injure the plaintiff in his trade, is a thing which I feel at present beyond my power. When the whole object of the defendants’ action is to which I feel at present beyond my power. When the whole object of the defendants’ action is’ [1925] A.C. 700, 742, Lord Sumner.
350 OBG [2008] 1 A.C. 1, at [134], Lord Hoffmann.
351 Ibid., at [142]-[145].
360 Torquay Hotel Co. Ltd v. Cousins [1969] 2 Ch. 106, CA (“Torquay”), 139, Lord Denning MR.

See below n.418 and accompanying text.
cautiousness with which courts must approach competition when deciding tort cases.

Nevertheless, as shown in the next chapter, the unlawfulness criterion settled in the landmark Allen decision was altogether excluded from conspiracy to injure in Quinn, arguably for political reasons relating to the tense relationship between employers and trade unions. Moreover, the recent key OBG and Total cases adopted divergent views on the extent of wrongfulness and justifications with regard to unlawful-interference tort and unlawful means conspiracy. These divergences have a technical explanation but bring more disorder to the already confused economic torts. As stressed in the following two chapters, the intentional and wrongfulness ingredients present appreciable dissimilarities between the economic torts, rendering the whole area bizarre. Accordingly, as many argue, the piecemeal feature of these torts makes their rationalisation impracticable. 361

6. Observations

However morally reprehensible it might be to harm others as an end or as a means to another end, English tort law rejects a principle of liability for carelessly or intentionally caused economic harm such as the neminem laedere tenet in force in France and Chile. It equally denies strict liability for the mere infliction of such damage. It only represses misbehaviour that generally encompasses wrongful means and certain intention. However, passing-off (analogously to the statutory competition torts) involves deliberate conduct although brings about strict liability for results. Moreover, simple conspiracy and malicious falsehood are purely based on intention, thus clearly deviating from the remaining economic torts which presuppose wrongful means, although the range of this element varies greatly from tort to tort. Consequently, the systematisation of the economic torts around an all-comprehensive standard is daunting, if not a waste of time. Nor does it seem feasible to align the economic torts with the competition torts because of their different sources and underlying rationales.

Howarth proposes to absorb the intentional torts into the tort of negligence. He highlights the erratic dimension of intention which fluctuates widely with the tort involved. He emphasises the dearth of moral and economic reasons to deny compensation for negligently caused pure economic loss. In his view courts can control this species of liability through the prudent assessment of the costs and benefits derived from competition. The law does not represent morals but prohibits defendants from causing victims unjustified harm, whether carelessly or deliberately occasioned. Wrongfulness is the conclusive touchstone of tortious liability. Then, it would seem discriminatory refusing compensation for negligently inflicted pure pecuniary damage. 362

Yet, there are moral and practical reasons to reject negligence as an overall standard of liability for economic loss save mainly for the economic torts. First, these torts encompass a certain intention which is morally and legally more obnoxious than negligence. The law takes for granted that accidentally beating rivals is an inevitable side-effect of competition, socially justified in the benefits conveyed to consumers. Conversely, deliberately targeting adversaries as the ultimate or immediate purpose of the defendant’s conduct discloses excessive conduct, whether antitrust or unfair. Secondly, proving a mental element like intention is harder than showing negligence, thereby reducing the prospect of liability. Intention better satisfies the pervasive judicial concern about an expansive liability, encapsulated in the floodgates argument. Negligence liability can seriously undermine competition freedom. Thirdly, although the common law accepts the strict-liability passing-off tort as chief remedy against unfair competition, which is easier to prove than negligence, as I have noted and will elaborate in Chapter IV, passing-off mainly vindicates victims’ proprietary interest in goodwill before compensating for harm. Nonetheless, passing-off is rooted in deliberate conduct and, therefore, cannot be committed carelessly. Still, I acknowledge that acting exclusively or chiefly to harm another person is sufficiently inefficient and irrational conduct to support the entire edifice of liability. Hence rather than prohibiting all kind of intentionally inflicted damage the law limits the spectrum of liability through the economic torts which presuppose a certain intention and unlawful means, the exceptions being simple conspiracy and malicious falsehood.


V. Conclusions

This chapter has shown the strained relation between the constant academic effort to arrange the heterogeneous torts through a generic principle, affirming or denying liability, and the actual case-law which just recognises specific causes of action.

As demonstrated and as will be examined further in Chapters III and IV, the disjointed structure of torts in general permeates the economic torts in particular, their intentionality and wrongfulness components notoriously shifting between each other. The purely intention-rooted simple conspiracy and malicious falsehood cohabit with the outcome-based strict-liability passing-off, while the remaining economic torts require a certain intention and unlawful means whose meaning and ambit greatly differ across these torts. Likewise, although the most recent, leading case-law, confirms the economic torts providing a limited redress against financial losses between commercial competitors, there is disagreement about the exact extent of the role that the economic torts should perform. Furthermore, the diverse origins of the economic torts and the competition torts (case-law and statutes, respectively) render them independent categories which fulfill different functions and cannot be understood through a common theory. Yet, as will be seen in Chapter V, since courts ultimately decide cases involving both sets of torts, one can expect that they will enforce tortious liability with their customary prudence to avoid intruding into what is deemed Parliament’s province: the main regulation of business competition. Two implications emerge from the foregoing. First, today it seems implausible to systematize the economic torts through a consolidated framework. Moreover, unlawfulness is no less problematic than the intentional element. Secondly, as far as commercial competitors are concerned, English law acknowledges neither an absolute duty not to harm others (strict liability) nor a duty not to injure others negligently or intentionally, but just a discrete duty not to damage others intentionally (except for passing-off) and wrongfully (save for simple conspiracy and malignant falsehood) reflected in the specific economic torts, beyond which the infliction of pecuniary damage is justified in the freedom to compete.

I have also asserted that English law provides diverse remedies hinging on the economic tort implicated. Injunctions form the principal measure against unfair practices and are commonly associated with passing-off. However, compensation for harm is a paramount goal of the economic torts. Interestingly, Lord Devlin’s second category of exemplary damages can be employed for punitive, deterrent and restitutionary purposes in the economic torts through which the wrongdoer aims at profiting at the victim’s expense. To divest tortfeasors of the unjust enrichment intentionally pursued is a private-law sanction distinct from criminal punishment.

I have contended that policy arguments are broadly against compensation for carelessly inflicted pure economic loss, in addition to the more detailed formal and consequentialist reasons which support that answer. Likewise, the economic torts are coherent with the exclusionary rule. They reduce the prospect of recovering financial losses between business competitors and, as a result, mitigate the judicial fear against expanding tortious liability and litigation. The economic torts also imply that tort law should not substitute but supplement statutory and contractual remedies. Thus, tortious liability is confined to extreme situations. As Law and Economics reasonably suggests, intentionally or recklessly injuring rivals as an end or as a means to another end reveals irrational, often anticompetitive, conduct worth repressing through the economic torts. Then, negligently interfering with another’s contract does not trigger liability unlike inducing (intentionally) the breach of another’s contract. Furthermore, an important reason why English law rejects compensation for carelessly occasioned pure financial interests rests in this kind of harm usually being a side-effect of legitimate competition, hence justified. Nonetheless, the law clearly discriminates against pure economic interests, prioritising the protection of physical assets. The law considers that people create special affections towards tangible goods and awards compensation (even as non-pecuniary harm) when are negligently damaged. Still, for commercial competitors, particularly legal persons rather than natural persons, pure financial interests are typically more precious than tangible property. Yet, tort law accords the strongest protection to corporeal property through strict liability torts such as trespass and, more importantly in this thesis, passing-off. Conversely, the other economic interests are safeguarded through intention-based liability. Accordingly, contractual rights are shielded against defendants who knowingly and intentionally procure the breach of another’s contract, thereby injuring the claimant’s business (Lumley). In turn, business or
trade interests at large are protected through the three-party unlawful-interference tort where the defendant intends to harm the claimant and actually harms her by using wrongful means against another person independently actionable by the latter. Additionally, I showed that English courts can also deny negligence-based liability for pure pecuniary harm on formal reasons just as French and Chilean courts traditionally refuse liability: treating that damage as too remote a consequence of the defendant’s act rather than requiring a mental element.

Deciding a leading case on deceit, Lord Steyn affirmed: ‘The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality’. However, I think that tort law overlaps with morals in a finite zone. It authorizes the infliction of harm (even intentionally) as an expected, inevitable side-effect of promoting competitive self-interest. It does not punish the immoral conduct of exploiting, injuring or ruining competitors as an end or as a means to another end (normally self-enrichment) to its fullest extent. Instead of enshrining an intention-based liability rule, which might mirror the DDE, the common law selects and sanctions particularly abusive conduct through the economic torts. Liability requires intention and generally wrongfulness, which is essential to restrain liability, given the great difficulty in distinguishing intended from unintended harm. Unlawfulness is coherent with the nature of the law of civil wrongs as compared with French and Chilean law in which, as will be seen, wrongfulness is concealed behind fault, damage and causation.


CHAPTER III
BASIC ASPECTS OF THE ECONOMIC TORTS

This chapter evaluates the key features of the English modern economic torts as the main redress against pure economic loss occasioned between business competitors. As indicated in Chapter II, I will now demonstrate that English law rejects a principle of liability for intentionally caused economic harm without justification (the prima facie tort and the abuse of rights) but safeguards pecuniary interests through specific rules in particular problem-situations. I will submit that it is currently implausible to amalgamate the economic torts into a single rule of liability for deliberately and wrongfully inflicted financial damage. First, intention and wrongfulness greatly contrast between the economic torts. Moreover, simple conspiracy is entirely rooted in intention. Secondly, the economic torts affect two markedly different sectors of competition, namely business and labour, eliciting quite divergent judicial reactions. Courts have restricted industrial competition through the torts of simple conspiracy, inducing breach of contract and intimidation, yet this movement has been continuously neutralised by statutory immunities. Conversely, courts customarily avoid intervening in commercial competition, thereby limiting economic-tort liability. Indeed, labour competition implies a tense relationship between the judicial and legislative powers, making this context highly contingent on politics. Hence this thesis rests on the premise that both areas should remain separate. Thirdly, to merge the economic torts into one principle is complicated even if the study focuses solely on business because English law protects the economic interests unequally. This is reflected in the diverse components of the economic torts and the corresponding liability rules, as the extreme simple conspiracy (intention-based liability) and passing-off (outcome-based strict liability) strikingly exemplify. The economic torts illustrate tort law’s complexity, which is evident in the various interests protected, types of misconduct recognised and remedies available. Although these inconsistencies might indicate the convenience of an all-inclusive canon, I will submit that English courts have adequately addressed the problem of harm between commercial adversaries by weighing the claimants’ economic interests against the
wrongdoers’ freedom to compete, without missing a tidy taxonomy or a general criterion.

Section I analyses the modern leading authorities which instituted the economic torts and determined the English courts’ approach to the financial loss caused between the participants in commercial and labour battle, covering the recent landmark case-law which recapitulated central aspects of these torts. It evaluates the effects of these decisions in terms of policy and principle, as mirrored in the intentionality and unlawfulness elements. Section II scrutinises the reasons for remediing economic damage through specific torts instead of a general principle based on intention and/or wrongful means. It assesses the impact of this method upon legal consistency and certainty. Section III discusses exclusively inducing breach of contract and unlawful-interference torts. These prominent economic torts have provoked profuse academic debate and litigation in Anglo-American jurisdictions, thereby justifying separate treatment. Section IV outlines the main conclusions. Passing-off and malicious falsehood are tackled in Chapter IV, for they specifically combat unfair competition, thus forming a sub-area within the economic torts.

1. Central case-law

This section explains the cardinal modern decisions on the economic torts and assesses their essential consequences for policy and principle. This case-law includes Pickles, a property-rights dispute, since it moulded the refusal of a principle of liability for intentionally inflicted economic harm.

1. Facts-situations

1.1 Mogul

Through a concerted practice (cartel) and predatory pricing the defendants had retained the trade of tea from China to Europe, therefore driving the claimant out of the market. The claimant sued the defendants for conspiracy to injure.

The suit was rejected at all instances. From a technical standpoint the defendants had neither employed unlawful means nor intended to ruin the claimant. Conversely, they lawfully defeated the claimant advancing their own business interests. Thus, the Court of Appeal held that the claimant’s economic harm was simply incidental to legitimate competition. The defendants had acted without “malice in law”, that is, lacking the intention to commit a wrongful act, as separate from “malice in the ordinary sense” (ill-will). Impermissible commercial conduct presupposed unlawful means such as fraud, intimidation and intentionally procuring the infringement of another’s rights, none of which had been used in the instant case. Nor had the defendants acted with the predominant intention to injure the claimant.

From a policy perspective, Fry LJ stated that courts should neither control the normal development of trade nor define unfair competition. Expelling rivals from the market was part of competing. Free competition involved cooperation between businesses. Hence agreements in restraint of trade were not illegal (criminal) but merely void and unenforceable. Lord Esher MR dissented: the defendants had deeply lowered freights, making trade unprofitable for the claimant. This evinced malice which rendered the defendants’ act tortious.

Their Lordships unanimously upheld the Court of Appeal’s majority decision. Competing is to pursue commercial targets, inexorably but unintentionally damaging contenders. The defendants had legitimately prevented social waste without encroaching on the claimant’s right to compete.

1.2 Pickles

The claimant sought an injunction to prohibit the defendant from diverting underground water which would otherwise have percolated and flowed into the

368 Ibid, 615-619, Bowen LJ.
369 Ibid, 626-630, Fry LJ.
370 Ibid, 608-610.
claimant’s catchments. The claimant alleged that the defendant had intentionally forced it to purchase his water rights. Their Lordships found that the defendant had not intended to injure the claimant but exercised his property right by lawfully pressing the claimant to buy the right to the flow of water to which it lacked entitlement. The exercise of property rights was deemed lawful however malicious, mercenary or philanthropic the underlying motive. Motives do not render lawful an otherwise tortious act. So, since the defendant’s malice was unproven, Lord Halsbury’s *dictum* that “motive is irrelevant to legality” did not represent the actual facts.

1.3 Allen

Flood and Taylor (the claimants), shipwrights employed daily by a ship-repairers firm to restore a ship’s woodwork, had done ironwork on ships in another yard. As this practice was prohibited by the ironworkers’ union some of its members who laboured on that ship’s ironwork refused to continue working on it. They called Allen (the union’s delegate) who informed the employer’s manager that their men would depart unless the claimants were dismissed that day and not engaged again. The claimants were immediately discharged and subsequently sued Allen (together with the union’s chairman and the union’s general secretary who, however, were eventually released from suit) for maliciously inducing the employer to sack them and refuse to hire them again. Kennedy *et al.* and the Court of Appeal, applying *Temperton v. Russell*, held the defendant liable for inducing breach of contract regardless of the absence of any breach: Allen’s intention to harm the claimants in their livelihood made Allen’s conduct unlawful.

In an unusual procedure, Lord Halsbury summoned ten judges of the Queen’s Bench to answer whether, assuming that the facts were certain, the defendant was liable. Three Law Lords, following the advice of eight of the lower judges, found for the claimants: Allen had maliciously and wrongfully threatened the employer to terminate the labour contracts with the claimants and to refrain from entering into future agreements with them, thereby invading the claimants’ right to work free from interference. Since the defendant lacked an absolute right his motive (that is, to discipline the claimants for past conduct) rendered his conduct tortious.

The remaining six Law Lords, however, dismissed the action. First, the defendant had not used wrongful means but informed the employer of the possible scenario that would follow if the claimants were not discharged. Secondly, *Pickles* had decided that a bad motive did not make unlawful an otherwise lawful act. Indeed, the defendant had not acted with an improper motive but taken a practical measure in self-defence, precluding the repetition of what the ironworkers deemed an unacceptable interference with their specialty. Thirdly, the *Lamley*-tort presupposed a breach of contract. The claimants lacked any right to have their employment contracts renewed: these agreements were terminable at-will, so the claimants had lawfully been sacked. For the same reason the ironworkers could have been called to strike without risking any liability. Fourthly, contrary to the erroneous decision in *Temperton, Lamley* did not encompass conduct that prevented prospective covenants from being concluded. Lastly, interference is inseparable from competition as *Mogul* had illustrated with respect to business battle and which was comparably pertinent to industrial struggle. Although the defendants had sought to profit at the claimant’s expense, they could not be declared liable in the absence of wrongful means.

1.4 Quinn

Leathem (a butcher employing non-union members) sued Quinn (a union official) for wrongful interference with his business and for conspiracy. The Union ordered

---

377 Ibid, 394.
381 [1893] 1 Q.B. 715, CA (“*Temperton*”).
382 [1895] 2 Q.B. 21, 38-42, Lord Esher MR.
its members to assist one another in finding jobs with preference to non-unionists. The union refused Leathem’s offer to pay all its demands against Leathem’s employees if the latter were admitted. Leathem was warned that his dealings with Munce (a butcher and long-term customer of Leathem’s products) would be stopped unless he desisted in hiring non-unionists. The union told Munce that it would instruct his employees (union-members) to leave their work if Munce persisted in buying from Leathem. Munce ceased trade with Leathem accordingly.

Their Lordships considered tortious a combination of several persons aimed at injuring the claimant’s business by inducing his customers and employees to break their contracts and not to deal with and work for the claimant. Allen was distinguished as it comprised unthreatening individual conduct. Conspiracy to injure constituted an autonomous tort, based on the defendants’ pure or predominant intention to harm the claimant without requiring unlawful means. The defendants had abused their right to compete by collaboratively preventing Leathem’s customers and employees from exercising their rights. Conversely, in Mogul the defendants had advanced legitimate interests without infringing their rivals’ rights.

1.5 Rookes

The defendants (union members), irritated at the claimant (draughtsman) for having left the union after a dispute, and in pursuance of draughtsmen’s full membership, threatened the claimant’s employer (who too was employer of two of the defendants) to go on strike in breach of their employment contracts unless the claimant was dismissed. The claimant’s employer, yielding to the threat, lawfully discharged the claimant. The latter sued the defendants for the harm following the unlawful threat. While the Court of Appeal held that the tort of intimidation only included threats of violence, for their Lordships intimidation was outside the legislative immunity and encompassed the defendant’s threat to break a contract with a third party unless the latter did or abstained from doing an act (even lawful) detrimental to the claimant, targeting and actually injuring the latter. The claimant could not sue for breach of a contract alien to him but could recover damages in intimidation against those who had threatened to break the contract. Conversely, threatening to do lawful acts is not tortious except when it amounts to simple conspiracy.

1.6 OBG

In Mainstream Properties v. Young, the first of the OBG trilogy, two employees of the claimant (a property company), breaking their employment contracts, redirected a development opportunity to a parallel company of theirs. The defendant financed the transaction knowing the contractual obligations of the employees, though honestly believing the negotiation did not entail their breach. The Law Lords dismissed the Lumley-tort: the defendant had acted in good faith neither intending (or being recklessly indifferent) to cause the breach of contract, nor avoiding investigating whether the transaction involved said breach.

In OBG v. Allan, the defendants, invalidly appointed as receivers under a floating charge, and acting in good faith, took control of the claimant’s assets, thereby causing losses to the claimant. Their Lordships rejected the action for unlawful interference with the claimant’s business: the defendant had neither used wrongful means nor intended to harm the claimant.

In Douglas v. Hello!, Michael Douglas and Catherine Zeta-Jones granted OK! the exclusive right to publish pictures of their wedding, prohibiting all other photography. Hello! subsequently published pictures in the UK knowing they had clandestinely been taken by an unauthorised photographer. OK! sued Hello!, among others, for unlawful interference with its business, the House of Lords setting aside the claim. Although Hello! had intended to harm and had injured OK!, it did not interfere by independently unlawful means with the Douglasses’ liberty to deal with OK! and to perform the obligations under their contract. Nor did Hello!, unlike the paparazzo, invade the Douglasses’ equitable right to confidentiality.

1.7 Total

Through an intricate "carousel" fraud, the defendant (a Spanish company) supposedly imported into the UK mobile phones, which subsequently were sold from that company to a UK firm and, eventually, exported back to the defendant, the operation occurring during a single day. One of the vendors in the series recovered input VAT from the claimant (the Revenue and Customs Commissioners) showing proper invoice documentation, its buyer vanishing without paying the claimant the proportional sum of VAT. As the defendant was not a UK VAT-registered company, the claimant failed to recover overpaid credits through the statutory procedures. Hence it sued the defendant for unlawful means conspiracy and damages. Their Lordships allowed the action, holding that the common-law offence of cheating the public revenue constituted wrongful means in this type of conspiracy although that offence was not independently actionable.

2. Implications

The aforementioned cases settled the courts' position towards tort liability for harm inflicted between competitors in labour and business markets. I will now argue that the economic torts form an irregular area of the law lacking a unifying criterion, mostly due to political forces which shaped a negative judicial attitude to workers and trade unions. I will also highlight the disagreement about the extent of wrongfulness, which increases the disorder and uncertainty within the economic torts. I will, however, submit that the common law has invariably been reluctant to regulate trade competition, circumscribing tort liability to extreme situations where claimants are seen to fully deserve to be called victims and to be compensated.

2.1 Against the prima facie tort and the abuse of rights: the wrongfulness standard

For many years, courts have debated whether the intentional infliction of economic harm should be tortious or whether it additionally requires unlawful means. The former contention, the prima facie tort doctrine, is classically supported in Keeble v. Hickeringill, where the defendant was held liable for intentionally discharging guns near the claimant's decoy pond, frightening away the wildfowl. Holt CJ upheld a principle of liability for maliciously injuring another in his trade, except when the damage flowed from legitimate competition. This justification can be traced back to the Gloucester Schoolmasters case which declared that it is not tortious for the defendant to attract the claimant's pupils by setting up a rival school, thereby injuring the claimant.

Conversely, Tarleton v. M'Cawley epitomises the unlawfulness criterion: the defendant was found liable for harming the claimant in his business by threatening his customers through physical violence (firing at them). Allen approved Tarleton and construed Keeble, Lumley and Temperton as though they had involved wrongful conduct. OBG endorsed this reading. Moreover, the great cases of Mogul, Pickles and Allen denied a general rule of liability for intentionally caused economic damage, such as the prima facie tort, the abuse of rights, neminem laedere (as in article 1382 of the French Civil Code) or liability for intentional and immoral conduct (as in §826 BGB). This position, ratified in Rookes, was subsequently treated with some hesitation until being reinstated in OBG. In Mogul, Bowen LJ maintained that deliberately caused economic harm without justification was actionable:

"Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse."
This statement has been treated as one of the pillars of the American prima facie tort doctrine. However, this interpretation does not represent English law. Bowen LJ himself restricted liability to damage occasioned to the claimant’s property or trade through unlawful means:

‘No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it.’

Their Lordships affirmed this ruling. Mogul became one of the bastions of the wrongfulness ingredient. Likewise, in OBG Lord Nicholls quoted Bowen LJ precisely to illustrate that intentionally interfering with another’s business is not tortious without unlawful means.

While Mogul required wrongful means to impute liability upon businesses acting in concert and harming their competitors, Pickles and Allen demanded unlawful acts overtly infringing the claimant’s rights as a condition for holding liable those who acted individually and injured rivals. Scholars of different generations maintain that Pickles and Allen ousted an intention-based liability for economic damage. To infer deliberately pecuniary harm is within fair competition unless it involves wrongful means. In Allen, the claimants lacked any right to have their labour contracts renewed. The defendant exercised fair competition, so he was not liable regardless of his malicious purpose. Others argue that the wrongfulness yardstick provided more objectivity and certainty than a generic intentional tort. For Gutteridge, the abuse of rights undermined freedom of action and brought confusion to the then expansive tort of nuisance.

Carleton Allen, a resolute supporter of the prima facie tort, lamented that Pickles and Allen segregated law from morals: ‘[i]n practical life nobody is more detested or detestable than the person who is for ever standing on his rights...His frame of mind...is that of Shylock’. However, this author admitted that moral analysis may not fit with the procedurally constructed law of torts.

Rookes ratified the method established in Allen, resolving that the three-party intimidation tort comprises threats to do unlawful acts. Whereas in Allen the defendant’s threat to strike had been lawful (the contracts were terminable at-will), the threat at issue in Rookes was wrongful (the defendants were bound not to strike). To suggest, as Pollock and Salmond did, that Quinn was an intimidation case which encompassed lawful threats was deemed a ‘leading heresy’ because intimidation involves wrongful means as opposed to simple conspiracy. The leading heresy, I think, essentially corresponds to the prima facie tort, a theory again rejected in Rookes. Moreover, Weir infers from Rookes a principle of liability for intentionally caused economic damage by unlawful (impermissible) means widely understood: all those which the defendant is not at liberty to use.

J.T. Stratford & Son Ltd. v. Lindley confirmed that wrongful coercion is essential to intimidation, although it held the defendants liable for the unlawful-interference tort: they had induced third parties’ employees to break their labour contracts, putting the third parties in breach of commercial agreements with the claimant who thereby suffered actual and prospective economic losses.

Notwithstanding, the defendant’s intention, requisite to economic-tort liability, may serve to prove the tort of nuisance, ergo solving the conflicts between neighbours holding equal rights to use and enjoy their properties. Conversely, in Pickles-type situations the defendant exercises an absolute right whereas the claimant has no right at all. As held in Christie v. Davey and in Hollywood Silver Fox Farm Ltd. v. Emmett, the unreasonable use of land

---

402 Forkosch (1957) passim. See below n.518.
405 [2008] 1 A.C. 1, at [142-143].
407 Weir (1964) 226; Hoffmann (1965) 118.
408 Freund (1897) 451ff; Wilgus (1902) 52ff.
410 Gutteridge (1933) passim.
tantamount to nuisance may be presumed from the fact that the defendant maliciously and unnecessarily annoyed the claimant's amenity.\(^{423}\)

In contrast, French courts handle disputes between neighbours through the abuse of rights:\(^{424}\) one is liable for intentionally harming others regardless of exercising a property right. Liability for invading another's property requires excessive disturbance rather than fault.\(^{425}\) However, although the abuse of rights apparently solves novel situations with more flexibility than nuisance,\(^{426}\) English and French laws often achieve equivalent results in this specific problem-area but deploying different techniques.\(^{427}\) Nonetheless, beyond conflicts between neighbours English law rejects liability for deliberately injuring others in the occasion of exercising a right.

2.2 Politics compromising legal coherence and consistency

By 1889 whether several businesses could legally promote their commercial interests by acting collectively and injuring their rivals was dubious. The Conspiracy and Protection of Property Act 1875 granted immunity to conspiracy without declaring it lawful.\(^{428}\) Meural (1892) clarified that the agreements in restraint of trade were void, not criminal, and businesses' combinations triggered tort liability only if these involved unlawful means.

What remained unclear was whether courts would apply the same rules to workers and trade unions advancing their own interests. In the American landmark case of Vegelahn (1896), the majority held the defendants liable for wrongfully preventing third parties from working for their employer rather than promoting trade unions' goals.\(^{429}\) However, in a solid dissent, Holmes J suggested that the intentional infliction of harm and combinations of businesses or workers were part of legitimate competition unless they involved unlawful means.\(^{430}\) His


\(^{424}\) Cf. Gamban (1995) passim (arguing that neighbours' conflicts are resolved by planning-regulation instead of the abuse of rights).

\(^{425}\) Civ(3), 4.2.1971, JCP, 1971, I.16781, n.R.Lindon (allowing owners to use their assets as they like without affecting neighbours' property beyond normal inconveniences); Whittaker (2008a) 374.


\(^{427}\) Markesinis (1977) 80.

\(^{428}\) 44 N.E. 1077, 1077-78; Allen J.


unsuccessful attempt to give workers and unions the same treatment entrepreneurs received, subjecting both to unlawful means conspiracy, was duly appraised.\(^{430}\) Thus, Holmes J was prepared to renounce to the prima facie tort and accept wrongfulness as the ultimate criterion of liability for economic harm arising from concerted actions of businesses and workers alike.

The majority judgment in Vegelahn is comparable to the English courts' bias against workers and trade unions. Case-law has limited severely labour competition through tort liabilities. Strikes constituted a criminal offence until the Trade Union Act 1871 and the Conspiracy and Protection of Property Act 1875 decriminalised all but violent labour actions and legalised workers' combinations in contemplation or furtherance of trade disputes. At the turn of the century, industrial conflicts increased and courts restored the situation preceding those immunities: strike-organisers were again held liable for inducing the breach of employment contracts and workers' combinations for simple conspiracy (Quinn).

Courts granted injunctions to stop strikes and awarded damages against trade unions even though the latter lack legal personality.\(^{431}\) Simple conspiracy became the instrument of judicial interventionism. In Quinn and Taff, Lord Halsbury formed the panel of judges he liked to use conspiracy against labour and in favour of capital, his prestige resulting seriously compromised.\(^{432}\) However, the statutory immunities have intermittently reversed these developments. A new government passed the Trade Disputes Act 1906, which allowed strike-organisers to act in contemplation or furtherance of trade disputes without engaging liability for conspiracy or inducing breach of contract. Over the next fifty years judicial caution prevailed. In Crofter, the House of Lords permitted trade unions to justify their activities in the promotion of self-interest, that is, in order to improve labour and collective-bargaining conditions.\(^{434}\) Nonetheless, in Rookes their Lordships found in the three-party intimidation tort comprising the threat to strike a new way of repressing trade unions. This tort was not protected by the Trade Disputes Act 1906, unlike conspiracy to injure and the Lumley-tort. The claimant could not plead Lumley because the employer had legally terminated his labour

\(^{426}\) (1996) 10 HLR 301.

\(^{427}\) Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426, HL ("Taff").


\(^{429}\) 1942 A.C. 435.

\(^{430}\) Heydon (1978) 18ff.
contract. Subsequently, Parliament promulgated the Trade Disputes Act 1965, which entitled trade unions to threaten to call for strikes in advancement of industrial disputes. Later case-law curtailed these immunities once again but further legislation limited them, litigation diminishing accordingly. This history shows an ongoing interplay between the restriction of labour competition through the judicial enhancement of tort liability and the statutory neutralisation of the latter. This tension might end if workers had the right to strike. As Kahn-Freund argued, the ‘judicial legislation’ embodied in the invention and extension of the economic torts against trade unions and strikers determines the kind of economic pressure courts consider as justified in the promotion of self-interest. Parliament reacts, establishing exceptions to these liabilities (immunities and privileges), then narrowly construed by courts. Without a proclaimed right to strike this interpretative task is ‘apt to become a labyrinth’.

I will suggest that both the wrongfulness criterion established in Allen and the intention-based simple conspiracy tort settled in Quinn reflected the prevailing political climate. Freund noted that in Allen the claimants, unable to prove conspiracy, had alleged an ambiguous notion of malice that disguised the political issues. For example, was there a right not to be interfered with in one’s work? Likewise, could trade unions cause harm out of exercising the liberty to compete? Allen resolved this political impasse through formal language and reasoning incomprehensible to the public. Thereafter, trade unions could interfere with labour relationships by strike. Consequently, as Terry highlighted, Allen justified the intentional infliction of economic harm in the freedom to compete in labour, mirroring what Mogul had settled with respect to business. Similarly, for modern scholars, the dismissal of the prima facie tort responded to a political rather than a technical reason. Until 1910 the Appellate Committee of the House of Lords constituted a political body performing quasi-legislative roles in labour law. Thus, Allen satisfied a social need before Parliament reacted.

Comparably, who is today Lord Hoffmann, treated Allen as settling a political dilemma on consequentialist bases. Instead of doing justice to the claimant, Allen strengthened the politically weak trade unions, given the legislator’s passivity. Pressed by pro-unionists, their Lordships authorised collective action to promote workers’ self-interest just as Mogul had for enterprises. Thirteen out of twenty-one judges, led by the conservative Lord Esher MR and Lord Halsbury, imposed intention-based liability, against all evidence and precedents, whereas a liberal majority of six Law Lords endorsed the wrongfulness yardstick. Probably, as Stevens argued, the majority reacted against Lord Halsbury’s blatant effort to uphold the Court of Appeal’s ruling by summoning lower judges. Conversely, Petro holds Allen to be purely politics because it rejected the only possible juridical solution, the prima facie tort, overlooking the fact that the defendant had not merely “informed” the claimants’ employer what would have happened had the claimants continued working, but also threatened the employer’s manager with calling their workers to leave their jobs unless the claimants were dismissed. Yet, it seems to me that perhaps not even the prima facie tort would have modified Allen’s result: the majority of their Lordships would have rejected the lawsuit either because the defendant did not intend to harm the claimants or because he acted within fair competition. The impact of politics upon the case was unavoidable. As has been implied, Allen could have accepted the prima facie tort but did not, thus remaining a well-established precedent.

In turn, the imposition of intention-based liability for simple conspiracy (Quinn) also responded to the political animosity towards workers and trade unions. Some criticise that Quinn made liable those who had indeed furthered self-interest without targeting the claimant; Quinn ‘might well have been regarded as one [case] in which ordinary measures had been taken to promote the union’s interests by excluding non-union labour’. Quinn, Cane argues, sacrificed the defendants’ liberty to compete in order to protect the claimant’s interest not to be intentionally interfered with in her business.

437 Davies/Freedland (1983) 327.
442 Stevens (1979) 90ff.
444 Heaton/Buckley (1996) 37, 344ff.
2.3 Problems with conspiracy

Simple conspiracy, I will suggest, is anomalous in two senses. First, it clashes with the unlawfulness rule, symbolising the prima facie tort and the most prominent class of abuse of rights. Indeed Lord Lindley grounded Quinn on the prima facie tort. 455 So, as modern jurists assert, when several persons act collectively with the motivation primarily to harm and actually injure a third party, this is per se abusive and tortious. 456 Nevertheless, Quinn is ‘too well-established to be discarded,’ 457 hence challenging the unlawfulness test. 458

Secondly, as Lord Lindley postulated, the law assumes as an ‘undeniable truth’ that several people operating in concert can inflict more damage than one person acting alone. 459 Likewise, in Total the Law Lords asserted that conspiracy was more pernicious than individual misbehaviour. 460 Yet, this is an unconvincing argument. A single firm functioning individually can cause much greater harm to the market than several small enterprises acting in concert: ‘[T]o suggest...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.’ 462

The conventional explanation conceals, I think, the true reason behind simple conspiracy: anti-unionist judicial policy. If “numbers” were really critical, simple conspiracy would also be deployed against traders’ combinations instead of unlawful means conspiracy. In sum, simple conspiracy makes the economic torts incoherent, although this is understandable from historical and political perspectives that accompany the casuistically built tort law.

Nonetheless, simple conspiracy has scarcely been employed. This tort is difficult to show and easy to circumvent. Proving the defendants’ prevalent intention to damage is complicated, particularly because it is commonly indistinguishable from the intention of advancing economic self-interest. 463 Acting in concert exclusively or principally to harm rivals is unusual. Likewise, conspirators can often justify their conduct in pursuit of legitimate self-interest, for example the enforcement of anti-racist policies. 464 Additionally, each conspirator can act for a different reason. 465 Only exceptionally have the

456 Heaton (1986) passim.
458 Chalmers-Hunt (1903): Charlesworth (1920) passim.
459 MacCormick (1978) 40. See also: Cartly (1988) 277; Polden (2009) 195 (‘no one was more adept and unscrupulous in escaping the chains of precedents than Halsbury himself...most outrageously in Quinn’).
460 Quinn [1901] A.C. 495, 506.
461 Only since the Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234 their Lordships can overrule their own precedents, though they more often distinguish them: Bell (2007) 39.
467 Total [2008] 1 A.C. 1174, at [56], Lord Scott.
469 Lonhro [1901] A.C. 173, 189, Lord Diplock. Likewise, for Holmes J, the proposition that collective action rendered an otherwise lawful act wrongful was ‘plainly untrue, both on authority and principle’: Vegelahn 44 N.E. 1077, 1081.
470 Snow (1956) 395F; Davies/Freedland (1983) 311-312.
472 Hughes (1952) 212.
torts) at the suit of the third party had she been injured. Wrongful means include physical force or threats (as in Tarleton); common-law or statutory crimes and breach of statutory duty provided that they are independently actionable; fraud and misrepresentation; breach of contract; inducing breach of contract; and the three-party intimidation tort (Rookes), in which the defendant too uses wrongful means (that is, the threat to break a contract; but not the actual breach) against a third party with the intention to harm and actually injuring the claimant.\textsuperscript{474}

In turn, Lord Nicholls, strongly dissenting, included within unlawfulness all sorts of acts that the defendant commits against a third party so as to injure the claimant and which the defendant is prohibited from doing, whether torts, crimes, breaches of contract or equitable obligations.\textsuperscript{475} Total applied this broad definition by rooting the wrongful means conspiracy in the non-independently actionable common-law crime of cheating the public revenue. Following Sales and Stiltz,\textsuperscript{476} their Lordships considered that Lomh\textsuperscript{477} had not required for this tort independently actionable wrongful means but established that it does not demand the conspirators’ preponderant intention to injure the claimant, as contrasted with simple conspiracy.\textsuperscript{478} As a result of wrongfulness being widely defined, the Law Lords declared unlawful means conspiracy to be an autonomous tort rather than entailing secondary liability.\textsuperscript{479} Sales had argued that conspirators assist in the commission of an actionable wrong by another person.\textsuperscript{480} Likewise, Cooper proposed that ‘if a person participates by assistance, inducement or conspiracy in the actionable civil wrong of another with actual knowledge of that wrong, he is liable jointly and equally with the person who committed the wrong’.\textsuperscript{481} However, in rejecting this principle of accessory or secondary liability,

2.4 Incongruence within wrongfulness

The span of wrongfulness varies between the economic torts, thereby preventing any systematisation. This also reflects the diverse roles that the economic torts are ascribed in the regulation of competition.

Consistently with his former opinion as legal writer,\textsuperscript{482} in \textit{OBG} Lord Hoffmann, delivering the majority judgment, defined wrongfulness tightly. On this view, the unlawful-interference tort presupposes that the defendant, intending to harm the claimant as an end or as a means to another end, uses wrongful means against a third party, affecting her freedom to deal with the claimant, who is thereby damaged. Thus, the illicitness of the defendant’s conduct is directly connected with the harm caused to the claimant in her business interests. The wrongful means, Lord Hoffmann added, must be independently actionable (as

\textsuperscript{466} [2008] 1 A.C. 1174, at [228-230], Lord Neuberger.
\textsuperscript{468} Sales (1990) passim.
\textsuperscript{470} Total (2008) 1 A.C. 1174.
\textsuperscript{471} Matthews/Mergor/O’Cinneide (2009) 881-882.
\textsuperscript{473} Hoffmann (1965) 124ff.
\textsuperscript{475} Sales (1990) 50ff; Sales/Stiltz (1999) passim.
\textsuperscript{477} \textit{OBG} (2008) 1 A.C. 1, at [162].
\textsuperscript{478} Sales (1990) passim.
\textsuperscript{480} Sales (1990) passim.
\textsuperscript{481} Cooper (1996) passim. Cooper (ibid, 44) criticises Sales for contradictorily treating unlawful means conspiracy both as secondary liability and as a separate tort.
Total did not require independently wrongful means in unlawful means conspiracy as compared with the unlawful-interference tort (OBG).\textsuperscript{482}

Thus, the successive endeavours of rationalisation\textsuperscript{483} have not dispelled the incoherence within the economic torts, given their dissimilar mental and wrongfulness requirements. The disparity between the slim and extended approaches to wrongful means upheld in OBG and Total respectively precipitated Carty’s strong criticism.\textsuperscript{484} Some scholars note that a restrictive concept makes it doubtful whether wrongs less serious than crime, such as breach of contract, should count as wrongful means in the torts of intimidation, unlawful-interference and wrongful means conspiracy.\textsuperscript{485} It is observed that unlawfulness ought not to hang on the civil actionability of the means exercised by the defendant against the victim but on the seriousness of the wrong: crimes and breaches of statutes should unquestionably be deemed wrongful means by reason of their greater social repercussion than torts.\textsuperscript{486} Additionally, as Deakin and Randall demonstrate, the inconsistency between the economic torts is aggravated by the fact that the threat to break a contract forming the three-party intimidation tort need not be independently actionable (Rookes), thus departing from the three-party unlawful-interference tort. The respect for precedent sacrifices the doctrinal coherence sought in OBG.\textsuperscript{487} As O’Sullivan implies, Lord Hoffmann adopted a strict notion of wrongfulness to achieve consistency across the economic torts.\textsuperscript{488} However, the judges who decided Total manifested that the wide concept of wrongfulness they chose jeopardised the desired systematisation within the economic torts: ‘the temptation of elegance’ (consistency\textsuperscript{489}) was unattainable between so dissimilar torts as three-party unlawful-interference and two-party wrongful means conspiracy.

\textsuperscript{482} Cooper ([1996] 48) had suggested exactly the opposite. As to whether Lamley involves secondary liability: see below n.697 and accompanying text.

\textsuperscript{483} Weir (1964); Heydon (1978); Carty (2001) passim.

\textsuperscript{484} Carty (2008) passim.


\textsuperscript{486} Matthews/Morgan/O’Cinneide (2009) 890, 932-933. Conversely, if crimes and breaches of contract were not wrongs (as Descheemaeker says (2009) 22-23, 33-34), unlawfulness would be divested of much of its content: see above n.116 and accompanying text.

\textsuperscript{487} Deakin Randall (2008) 546ff.

\textsuperscript{488} O’Sullivan (2007) passim.

\textsuperscript{489} Total (2008) 1 A.C. 1174; at [90]-[95]; Lord Walker. See: Dugdale/Jones (2007) 170-171.


\textsuperscript{491} Total (2008) 1 A.C. 1174: at [123]; Lord Mance; at [224], Lord Neuberger.

Now, the conflicting conceptions of wrongfulness display divergent ideas about the mission that the unlawful-interference tort particularly, and the economic torts generally, should fulfil. Lord Hoffmann’s thin notion discloses a conservative policy according to which the delimitation of competition is Parliament’s task, the unlawful-interference tort simply helping ‘to enforce basic standards of civilised behaviour in economic competition’.\textsuperscript{492} Conversely, Lord Nicholls’ view represents a liberal approach whereby this tort serves ‘to curb clearly excessive conduct...for intentional economic harm caused by unacceptable means’.\textsuperscript{493}

2.5 “Two-party intimidation”: interfacing contract and tort

In Rookes the three-party intimidation tort was based on the defendant’s threat to break a contract with a third party who, yielding to the menace, acted in detriment to the claimant. The Court of Appeal had rejected the action considering that it undermined privity of contract: if a person cannot sue for the breach of a contract to which she is not a party, she cannot either allege the threat to break that contract even as intimidation.\textsuperscript{494} Their Lordships disagreed: privity of contract is endangered only if a third party is allowed to sue for the breach of a contract to which she is not a party. Conversely, in the instant case the claimant brought her own tort lawsuit for the damage arising from the threat to break a contract used by the defendants against a third party.\textsuperscript{495} Furthermore, the tort of intimidation presupposes that the third party consents to the threat. If she resists the threat and the defendant breaks the contract, the third party would be the exclusive victim and could sue the defendant for breach of contract; but there would be no tort of intimidation at all.\textsuperscript{496}

Lord Hoffmann, both as legal writer and judge, saluted the three-party intimidation tort settled in Rookes.\textsuperscript{497} Yet, in OBG Lord Hoffmann left

\textsuperscript{482} OBG [2008] 1 A.C. 1, at [56], Lord Hoffmann.


\textsuperscript{485} [1964] A.C. 1129, 1168, Lord Reid.


unanswered the question whether there is a “two-party” intimidation tort in which
the defendant (promisor) threatens the claimant (promisee) with breaking their
contractual relationship.498 For Weir, not only the threat to break one’s own
contract with the claimant forms the two-party intimidation tort (if the remaining
conditions are met) but also the deliberate breach of contract. If the careless
breach of contract can trigger tortious liability in negligence, he argues, the more
reprehensible deliberate breach should a fortiori entail liability in intimidation.499
Nonetheless, as Hoffmann noted, the claimant can avail herself of contractual
remedies which render the “two-party intimidation tort” superfluous. For
example, the promisee can regard the contract whose breach is threatened by the
promisor as repudiated or wait until the latter breaks it, suing him for damages.
Tort redress is justified where the claimant lacks contractual protection as against
the defendant, just as happens in the three-party intimidation and unlawful-
interference torts.500 Moreover, through the “two-party intimidation tort”
promisors could evade contractual rules, such as the limitation of compensation to
foreseeable losses and the denial of exemplary damages for (even intentional)
breach of contract.501

The reluctance to accept “two-party intimidation” discloses the narrow
mission that the common law assigns to the economic torts. This resembles, I
think, the non-cumul principle valid in France and Chile.502

2.6 Consistent judicial approach to commercial competition

Although Pollock and Holmes championed the prima facie tort theory, they in fact
valued wrongfulness, as settled in Mogul, as an adequate instrument to protect
commercial competition on legal, policy and practical grounds. That a group of
traders acted collectively, intending to harm and actually injuring their opponents,
did not render them liable in the absence of wrongful means. The unlawfulness
test allowed courts to balance the defendants’ economic freedom against the
claimants’ interests. Motives just aided to prove or negate justifications once

498 OBG [2008] 1 A.C. 1, at [61].
500 Hoffmann (1965) 127-128.
502 See n.1092, n.1131 and accompanying text.

liability had been ascertained.503 Correspondingly, Wyman said that the harm
arising from commercial competition was justified in public policy: competition
produced more social gains than costs.504 Moreover, as Weir explains, Mogul not
only ousted the prima facie tort (and cognate principles as the abuse of rights and
liability for conduct against good commercial morals) but epitomises the judicial
vision of trade competition: a harmful albeit socially beneficial activity mainly
regulated by statute. Consequently, the relations between courts and legislature
have not been strained.505 Thus, courts award compensation for economic losses
following unlawful and excessive misconduct, ignoring ambiguous parameters,
such as malice, which fetter competition. Additionally, the agreements securing
monopolistic positions are lawful however inimical to adversaries, unless
prohibited or implemented by illicit means.

Carty claims that the economic torts are in chaos due to the contradictory
judicial policies affecting them. Courts adopt an interventionist stance towards
labour competition through the expansion of intention-based liabilities which are
constantly counteracted by legislative immunities, whereas case-law is unwilling
to control commercial competition, thereby limiting liabilities to abusive or unfair
misconduct, particularly through wrongful means. Carty proposes approaching
both sectors of competition cautiously, Parliament retaining the mainstream
regulation. She saluted OBG for bringing more certainty and coherence to the
economic torts through a slim concept of wrongfulness and the eradication of the
“tort of mere interference with another’s contract” without causing breach or
involving unlawful means.506 Hence Carty lamented the revival of judicial
interventionism of competition evident in Total.507 Nonetheless, I will stress that
the function that courts acknowledge to the economic torts specifically in business
competition remains limited. Although no all-inclusive concept of unlawfulness

503 Pollock: (1889a/b), (1890), (1892) passim; Holmes (1894) 3ff; Holmes’ letter 21.10.1895:
504 Wyman (1902) 445.
570, 609, Lord Diplock. The background lies in these dicta: [It is a] violation of legal right...to
interfere with contractual relations recognised by law if there be no sufficient justification for the
interference’, Quinlin [1901] A.C. 495, 510-511; Lord Macnaghten: [The] principle which
underlies [Lumley] reaches all wrongful acts done intentionally to damage a particular individual
organises this area, the common law has consistently refrained from intervening in commercial competition and delimiting lawful and unlawful competition.508

This is a conservative and abstentionist judicial policy. Carty and other leading scholars confirm that the economic torts play a residual role vis-à-vis trade competition. Courts are reluctant to tackle antitrust practices that are commissioned to criminal and competition laws.509 The economic torts, Deakin and Randall argue, supplement antitrust law and help to protect property, contract and competition itself against abusive conduct aimed at affecting the economic interests in business and in labour generally.510 Courts take an interventionist attitude where labour competition or criminal activity is at stake. This partially explains, I think, the use of the tort of simple conspiracy and the enhancement of the concept of wrongfulness in relation to unlawful means conspiracy and three-party intimidation. Quinn and Rookes involved industrial conflicts when anti-unionist movements prevailed. Total concerned conspirators defrauding tax authorities.

However, where entrepreneurs are implicated such as in the magazine market (OBG), tort liability is managed with moderation. Therefore, the social, economic and political trends influence the judicial attitudes and techniques through which diverse problem-situations are handled.

II. Rejecting an overall principle

This section examines the theoretical attempts to structure the economic torts around a single criterion grounded in intention or wrongfulness and the reasons why courts dismiss them. Yet, case-law often resolves disputes concerning business contenders fairly, by weighing their conflicting interests.

1. Liability for intentionally caused economic harm

1.1 The prima facie tort theory

In Tuttle v. Buck,511 a rich banker was held tortiously liable for installing a barbershop, using his personal influence to attract the claimant (barber)'s clients merely to ruin the latter. The defendant, the court concluded, established a rival business solely to drive the claimant out of the market and intended to retire once he achieved this aim. This conduct was defined as unfair competition, quite apart from diverting a competitor's customers by offering better or cheaper products. Although Epstein argues that the defendant legitimately defeated the claimant,512 Tuttle is conventionally deemed the most legendary illustration of the prima facie tort, namely, liability for intentionally inflicted economic damage without justification, and also the epitome of malicious unfair competition uncovering antitrust conduct.513 Moreover, the defendant's intention to harm the claimant is inherent to predatory pricing, the primary form of the abuse of dominant position.514 In fact, Tuttle shows that such intention can be inferred from anticompetitive conduct, that is, from the defendant's attempt to retire from the market after securing a monopoly at the claimant's expense.515

Although the prima facie tort emerged from the unsystematic evolution of the action on the case,516 its modern inception is attributed to Pollock,517 Bowen LJ518 and Holmes.519 Pollock proposed a generic intentional tort as counterpart of negligence, an idea subsequently endorsed by Holmes. Yet, Pollock (and other authors) admitted that the prima facie tort clashed with English case-law.520 Furthermore, Pollock applauded unlawfulness as an efficient mode of preventing massive and speculative litigation. Allen, he opined, reasonably weighed the

511 107 Minn. 145 (1909, "Tuttle").
513 Holmes: (1881) 144; (1894) passim; Shapiro (1983) passim; Keeton (1984) 1014.
514 See below nn.1021ff and accompanying text.
515 Perlman (1982) 95ff.
517 Pollock: (1887) 129, (1890) passim.
518 Mogul (1889) L.R. 23 Q.B.D. 598, 613. But see above n.402 and accompanying text.
519 Holmes (1894) passim.
the public justifies the acts lawful into strangers. 530

Persuade right. The rights. The rights. The rights. The rights.

acknowledges defendant's right to persuade strangers into doing lawful acts against the claimants' right not to be invaded in their work. Wrongfulness was pivotal to enforcing liability consistently with economic freedom. Motives, like malice, served to rebut justifications exclusively. Pollock and Holmes criticised the structure of Allen but valued the outcome. Thus, they advocated the prima facie tort for systematisation purposes, although they praised the pragmatic advantages associated with unlawfulness as ultimate criterion of liability, whereas motives just mattered to justify wrongful conduct.

Holmes focused on the policy choices affecting liability for intentionally inflicted harm and its justifications. For him, tort liability flowed from the breach of duties grounded on public policy, that is, preventing tortfeasors from causing harm at all (strict liability), foreseeable damage (negligence) or highly probable harm (intention-based liability). Holmes treated motives as external standards of likelihood of harm without involving moral blameworthiness. But later he redefined motives as subjective factors which may justify the intentionally and wrongfully inflicted harm. Moreover, in Vegelahn (1896), Holmes proposed that workers' combinations were subject to unlawful means conspiracy in the same way as businesses (Mogul), thereby rejecting the prima facie tort that he had championed and would subsequently endorse. In Aikens (1904), he reasoned that the defendants' motives do not determine liability ('what a man is bound to foresee') but help to justify deliberately caused damage. Thus, liability is triggered by intentionally inflicted injury but can be negated by motive-based justifications, especially self-interest.

Pollock, habitually cited by contemporaneous British judges and lawyers against the then conventional prohibition from quoting living jurists, was not a prophet in his land. Conversely, Holmes applied the prima facie tort in America. Likewise, Ames firmly supported a rule of liability for intentionally occasioned damage unless justified in paramount public policy reasons or in the exercise of absolute rights. The American Law Institute too acknowledges the theory that the defendant's motive can serve as justification for deliberately inflicted harm. Still, the prima facie tort theory is only recognised by the courts of Missouri, New Mexico and New York and in lieu of the nominate torts.

1.2 The French abuse-of-rights doctrine

This theory is a judicial reaction against the individualistic ethos of the 1789 Revolution, reflected in the prime importance of property and liberty to contract alongside the form and style of the Code Napoléon.

During the nineteenth century principally non-French jurists, such as Zacharie, commenting on the French Civil Code, postulated that unlawfulness formed an element of liability independent of fault, an idea later defended by Planio and Savatier. Subsequently, wrongfulness was overlooked: a person could be tortiously liable for causing harm through the abusive exercise of a given right, such as to compete. Gutteridge disapproved of the very possibility of upholding liability where the defendant had not acted wrongfully but injured the claimant who lacked any right whatsoever. For Sacco, the abuse-of-rights doctrine leads to arbitrary results: liability can be asserted although the harm follows legitimate activities or denied even though the defendant acted wrongfully. Yet, I agree with the abuse of rights enhances the impact of wrongfulness by restricting the justification for harm.

In France (and in Chile) the abuse of rights, contractual or not, triggers the duty to compensate in tort for all consequential losses. It is abusive conduct to exercise a right abnormally, negligently, against its economic-social purpose or

530 Ames (1905) 412ff.
531 E.g., 870 RST 1979.
532 Article 4 of the 1789 Declaration of the Rights of Man and the Citizen.
535 Gutteridge (1933) 43.
537 Salmond (1937) 510; Whittaker (2008a) 366.
538 Soc, 11.6.1953, D.1953.661: the groundless termination of a mandate is culpable and tortious.
without any serious interest.\textsuperscript{539} Yet, the case \textit{par excellence} is to inflict harm maliciously.\textsuperscript{540} So, the landlord abuses his right to reject the tenant's petition to make transformations to the property if he acts in bad faith or intends to injure the tenant.\textsuperscript{541} It is also abusive to bring lawsuits acting with bad faith, malice or gross negligence\textsuperscript{542} and to exercise the right to strike using deplorable methods, for instance, repeated strikes, or pursuing irrelevant goals, for example, political ones. French courts can grant injunctions, award damages in tort or deprive the act of its legal effects, such as holding contracts abusively and unilaterally terminated as remaining binding agreements.\textsuperscript{543}

More engaging, I think, is the similarity between the prima facie tort and the abuse of rights,\textsuperscript{544} remarked by Anglo-American jurists.\textsuperscript{545} Josserand too was aware about the denial of the abuse of rights by Guttridge and Walton, among others, but neither mentioned relevant case-law (like \textit{Pickles}) nor associated the abuse of rights with the prima facie tort.\textsuperscript{546} Following modern jurists,\textsuperscript{547} I submit that the prima facie tort mirrors the strongest case of abuse of rights.

The prima facie tort is narrower than the abuse of rights and also than the French unfair competition law, judicially created from the delict rules. In addition, the rarity of situations where harm is maliciously inflicted and the intricate proof of malice confine the prima facie tort to the abuse of the liberty to compete. The problem is that damage is often a tangential effect of promoting lawful self-interest in trade competition.

\textsuperscript{542} Civ(2), 11.11.1973, Gaz.Pal.1973 II.710. Likewise: Civ(2), 21.4.1982, Gaz.Pal.1983 II.591, n.F.Chabas (finding abusive the former husband's refusal, inspired by pure malice, to give the ex-wife the "jewel"). Cf Chabas: it is subjective rights, not mere faculties, which can be abused.
\textsuperscript{543} Whittaker (2008a) 374.
\textsuperscript{544} And §226 BGB: "The exercise of a right is not permitted if its only possible purpose consists in causing damage to another." See below n.1253.
\textsuperscript{545} Ames (1905) passim; Walton (1908) passim; Allen (1924) 165, 178; (1952) 52 Colum.L.Rev. 503.
\textsuperscript{546} Josserand (1939) 310ff. This author was quoted in Chile by Alessandri (1943) 256 who argued that Anglo-American laws denied the abuse of rights given their "individicial character".
is. Conversely, wrongfulness could be used against legitimate competition, thereby compelling defendants to justify their lawful activities. 557

Others applaud this theory’s ability to enhance or restrict liability for intentionally caused economic loss on policy, rather than formal reasons, especially as regards industrial disputes. 558 For Petro, wrongfulness is a rigid technique that treats the defendant’s conduct as lawful or unlawful in the abstract. In contrast, the prima facie tort, which he considers as elegant and effective as the abuse of rights, enables courts to ground liability on the facts and to assess the defendant’s motives and the means used. So, Petro argues, intentionally inflicted harm, such as driving rivals out of the market, is not tortious where it is a side-effect of achieving a superior goal, for example, to gain market-share through fair practices. Here the invisible hand produces both social welfare and private benefit to successful particular competitors. The expulsion of rivals can trigger liability if it is the sole defendant’s aim and leaves no social advantage but instead results in private losers. 559

2. Liability for intentionally and wrongfully caused pecuniary loss

*Mogul, Pickles, Allen and Rookes* are the bastions of wrongfulness as the limit of economic-tort liability. Hence Weir postulates a principle of liability for intentionally caused pecuniary harm by wrongful means, including all those which defendants are not at liberty to use. This standard, Weir argues, offers the predictability that businesses expect, as reprehensible conduct is defined within the law. Conversely, the prima facie tort is rooted in immoral conduct, ergo hinging on justifications which generate uncertainty and exacerbate litigation. 560 Sales and Stilitz also support liability for intentionally inflicted economic harm, both as an end or as a means to another end, by wrongful means broadly conceived, that is, including non-independently actionable wrongs, unless justified by policy reasons. The torts of deceit, malicious falsehood, intimidation and unlawful-interference entail primary liability. Wrongful means conspiracy involves secondary liability since it requires an independently actionable tort, while simple conspiracy is anomalous. 561 Yet, whereas *OBG* confirmed Sales and Stilitz’s notion of intention, *562 Total* treated unlawful means conspiracy as an independent tort 563 rather than as an instance of secondary liability. 564

Carty argues for limiting the economic torts mainly through the wrongfulness criterion, thus courts refraining from controlling labour and commercial competition beyond particularly extreme conduct. 565 Analogously, Cane observes that trade contenders harm one another as an inevitable and foreseeable effect of legitimate struggle, so negligence liability would undermine competition freedom. Instead courts constrit liability through specific intention-based or recklessness-based torts, wrongful means (save for simple conspiracy) and justifications, including self-interest. For Cane, the fact that competitors often intend to harm each other, although this is seldom their unique or main purpose, manifests the importance of wrongfulness. 566 Epstein values wrongfulness as a restraining device because competitors intrinsically intend to injure each other. Liability, he argues, is triggered if the defendant damaged the claimant by encroaching upon a right of the latter. Justifications, and the factors negating them (for instance, bad motive), must be discussed at a later stage. Thus, Epstein says, Bowen LJ rightly decided *Mogul* although by an incorrect route: he initially thought the defendants liable for intentionally harming the claimant, but eventually accepted a justification. Bowen LJ should have directly dismissed the action for lack of wrongful means. 567

Epstein’s impressions of *Mogul* in terms of its method and outcome seem to me entirely analogous to Holmes’ and Pollock’s observations about *Allen’s* structure and result. 568 This shows that the contrasting techniques represented by the prima facie tort and wrongfulness need not produce divergent consequences.

557 Heydon (1978) *passim.*
562 [2008] 1 A.C. 1: at [62], Lord Hoffman; at [166], Lord Nicholls.
564 See above n.479 and accompanying text.
568 See above n.522 and accompanying text.
3. The common law’s position

Notwithstanding the academic efforts to amalgamate economic-tort liability around the intentional and unlawfulness elements, English courts deny any general principle outside particular torts. The scope of wrongfulness varies greatly between three-party unlawful-interference and unlawful means conspiracy (and three-party intimidation). Moreover, wrongfulness is excluded from the polemical though settled tort of simple conspiracy. Likewise, case-law rejects a principle of liability for intentionally caused economic harm. Here I only can offer a condensed account of some of the reasons for this response.

First, as emphasised in Chapter II and as Weir noted, courts have traditionally chosen acts over motives to avoid involving themselves in the evidentiary problems typically associated with intention-based liabilities. Courts prefer unlawfulness. Secondly, as Weir asserts, since the common law frames rights narrowly from the outset further qualifications become redundant. Indeed, the piecemeal structure of the English torts obstructs the identification of the social goals underpinning different rights. Conversely, in France the exercise of a right in a manner contrary to its social aims constitutes abusive conduct. Thirdly, Salmond suggested that systems with rigid case-law and statutes required the abuse-of-rights doctrine in order to apply the law progressively, whereas in England courts routinely distinguish precedents and check their validity when tackling new circumstances. Yet, as Taggart asserts, English courts are bound to legal formalism, principles and precedents. Thus, Pickles, the paradigm of individualism, remained unchanged regardless of the twentieth-century dominant collectivism.

Fourthly, Allen shows how politically committed judges imposed a laissez-faire approach rooted in property and free competition, thereby restricting liability to extreme misconduct. What matters is whether harm ensues from wrongful rather than immoral acts. OBG confirmed that courts look with disfavour on the uncertainties ascribed to a generic intentional tort and rely instead on what statutes define as unfair or wrongful. In rejecting an intention-based liability, Lee implies, OBG prevented courts from deciding on justifications and distinguishing between subtle motives dissociated from the more objective issue of unlawfulness. Likewise, leading American jurists propose abandoning the ambiguous criteria, such as “improper motive”, which characterise the prima facie tort, and grounding liability (for example, for interference with contract or business) on illegal means which infringe the claimant’s proprietary or contractual rights.

4. Observations

English law excludes any general principle of liability for economic losses caused between commercial competitors whether founded on carelessness, intention and/or wrongfulness. Negligence is discarded because trade rivals owe each other no duty of care and harm is a predictable and unavoidable side-effect of legitimate struggle. English law exclusively recognises specific economic torts which require a certain form of intention and, generally, wrongful means. However, this is not a coherent area partly because both elements change considerably from tort to tort. Intention may relate to the consequences of the act, such as the claimant’s harm or the breach of another’s contract, or to the conduct itself, as is the case with passing-off. Wrongfulness is excluded from simple conspiracy and where it is required it varies in extent. In other words, it is narrowly defined in the three-party unlawful-interference tort, while widely understood in unlawful means conspiracy and three-party intimidation. Furthermore, whether misconduct of more minor importance than crime and torts, including breaches of contract, should count as wrongful means is also debatable.

From a policy perspective, the economic torts are anarchic because of the contradictory goals that courts seek depending on the type of opponents embroiled in conflict. Political pressures render these torts incoherent in their real operation when labour and business markets are compared. Courts have conventionally abstained from supplanting Parliament in the ordinance of business competition,

---

575 This mirrors the judicial fear of the uncertainty following intention-based liability under juries’ control: Howe (1963) 184ff.
576 Calatai/Weir: (1964) 221ff, 237ff; (1965) 780-781.
571 Salmond (1937) 32ff.
573 Stoner (1910) passim; Fridman (1958) 490, 496.
577 See §§766-768 RST.
judicial ability to weigh the litigants’ conflicting interests. Legal consistency, fairness and certainty cling to such assessment.

As some indicate, wrongfulness too forces courts to balance the tortfeasor’s conduct against the victim’s interests. Bagshaw argues that wrongfulness is just a clearer description of the same conduct that the prima facie tort treats as intolerable. In my view both approaches imply the evaluation of the interests in dispute. Stone wrote that ‘exegesis on the single formula without attention to the interests concretely pressing in various kinds of situation does not yield adequate development’. By “single formula” he implied the prima facie tort, the predominant intention to injure or wrongful means. Stone missed a deeper analysis of the clashing interests in the great cases of Mogul, Allen, Quinn, Sorrell, Crofter and Rooke. However, I remain unconvinced that the courts failed to do such assessment. Moreover, whatever the route followed, courts will be forced to weigh clashing interests. Thus, it is possible to speculate that Allen might have been decided as it was even if the prima facie tort would have been endorsed, rejecting the action because the defendant’s intention to harm was unproven or through the reasoning that the injury caused to the claimants was justified in the advancement of the defendant’s self-interest in competition.

III. Interference with contractual and business interests

This section is devoted to analysing the principal features of inducing breach of contract and unlawful-interference torts. These torts protect contractual rights and business interests generally. Yet, the law recognises the superiority of the former over the latter. In principle, establishing the Lumley-tort seems easier than showing the unlawful-interference tort, and justifying the former appears harder than escaping liability from the latter. Both torts require intention and wrongfulness but in different measures. Although there is agreement that these ingredients are useful devices to limit liability consistently with the liberty to compete, there is a vivid debate about the content of each component and whether business interests at large, including contractual rights, ought to be safeguarded

---

from third parties’ interference through a single tort. Here, I will also demonstrate the circumscribed role performed by Lumley, thus essentially supplementing contractual remedies vis-à-vis certain types of covenants.

1. Origin

The Lumley-tort emanated from the medieval actio quod servitium amissit within the compulsory work system introduced by the Ordinance of Labours to counteract the enormous reduction of workforce following the Black Death. Until this Act, masters could not sue the departing servants: employment agreements were terminable at-will. Under the Act, the actio could be brought against those who enticed servants, wives or daughters to leave their masters, husbands or fathers. Servants’ work was deemed masters’ property. The actio protected the labour relationships pivotal of the feudal hierarchy endangered by the Great Plague, just as the Lumley-tort preserves the contractual stability essential to the modern market economy.

Lumley extended the protection to independent contractors. In the case, Gye, the defendant (Covent Garden’s manager), induced the prima donna Irmanna Wagner to break her contract with Lumley, the claimant (Her Majesty’s Theatre’s manager), by performing for Gye instead. The diva was bound under a contract for personal services to sing exclusively for Lumley for three months in London and not to sing for anyone else without Lumley’s written consent. Gye, who knew of such agreement, was found liable for intentionally causing Wagner to break her contract with Lumley, thereby injuring the latter. Nevertheless, Coleridge J dissented holding the opera star to be the sole person responsible for breaking her contract with Lumley.

Lumley has continuously expanded. Brett LJ (subsequently Lord Esher MR) applied it in Bowen v. Hall588 on the ground that the defendant had intended to harm and actually injured the claimant by persuading a worker with certain knowledge to break his contract for exclusive services with the claimant. What rendered the conduct wrongful, the judge said, was the defendant’s bad motive, defined as the intention to harm the claimant or to profit at his expense.590 Lord Coleridge, as his father (Sir John Coleridge) had done in Lumley, dissented: motives did not underpin liability but served to rebut the defence of justification against specific torts like defamation.591 In Temperton, Lord Esher MR stretched Lumley to encompass all sorts of agreements and conduct preventing prospective contracts from being concluded. 592 Allen, however, rooted Lumley in the breach of contract. 593

Nonetheless, Lord Macnaghten and Lord Lindley gave speeches594 which influenced subsequent courts to misconceiving Lumley. Thus, in G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.,595 the first claimants (motorcar manufacturers) contracted with the second claimants (tyre manufacturers) to use the latter’s tyres whenever the former’s cars were exhibited. At a major exposition the defendant (the second claimants’ competitor) replaced the tyres of the first claimants’ vehicles with its own. The defendant was found liable for preventing a contract from being performed without causing its breach, an act treated as a subspecies of Lumley. Furthermore, Torquay596 and Merkur597 held that interfering with another’s contract without employing wrongful means is tortious.

These decisions were criticised for creating confusing categories through an inadequate analysis of precedents, including D.C. Thomson & Co. v.

---

589 Ibid, 338.
590 Ibid, 343-344.
592 E.g., [1898] A.C. 1, 121, Lord Herschell.
593 Pollock (1893), Carpenter (1928) parasim; Harper (1953) 879.
594 Quinn [1901] A.C. 495, at 510-511 and at 535, respectively. See above n.506.
595 [1926] 4 T.L.R. 376, CA ("G.W.K."); 377, Lord Hewart CJ.
596 [1969] 2 Ch. 106, 138, Lord Denning MR.
Deakin. 599 This case had distinguished Lamley from indirect inducement (like temporarily depriving the claimant of his workers, thus preventing him from performing his obligations to a third party) and from directly procuring the breach of another’s contract by wrongful means targeting the claimant, which was later incorporated into the unlawful-interference tort. Torquay and Merkur overlooked the radical contrast between Lamley, which demands breach of contract, and the unlawful-interference tort, which requires independently wrongful means. 600 OBG confirmed that the conduct preventing contractual performance, as in G.W.K. and Thomson, is actionable insofar as the defendant uses unlawful means. 601 Lamley, Lord Hoffmann declared, entails accessory liability contingent upon the claimant’s contract being broken by the promisor, whilst the defendant is primarily liable for preventing performance or otherwise causing economic harm to the claimant by using unlawful means against a third party, which must be independently actionable by the latter had she been injured. 602

3. Keeping liability within reasonable bounds

In America, Lamley has reached disproportionate breadth. Some courts uphold liability for negligently interfering with unenforceable or terminable at-will agreements, as in J.Aire. 603 Unstable contracts, it is argued, bind their parties until being terminated. Likewise, prudent persons should avoid any unreasonable risk of invading another’s contracts. 604 In these cases, liability is imputed upon the defendant without requiring breach of contract or, as in Texaco, 605 for merely frustrating the claimant’s potential agreement to merge with a third party after the defendant offered the latter a better deal. 606

These developments prompted tough academic criticism. Perturbing financial expectations or unstable contracts are characteristic of legitimate

competition. 607 Indeed most Anglo-American courts and jurists define contractual relations as worth protecting and restrict tort liabilities through intention and wrongfulness. Sayre suggested confining Lamley to situations in which the defendant attempts to appropriate the same subject-matter of the claimant’s contract. Inducement, he said, is not tortious if the defendant’s liberty to compete outweighs the claimant’s contractual right and the social interest in contractual stability. 608 Similarly, Bagshaw proposes restricting Lamley to rivals struggling for identical performance. 609

3.1 Limiting the liberty to interfere with competitors’ interests

It is agreed that intentionally interfering with another’s contract without causing its breach or with another’s prospective commercial advantage without using unlawful means (for instance, antitrust conduct, including the abuse of a dominant position) is intrinsic to business competition and infringes no contractual rights or trade interests of the claimant. 610

Conversely, if courts impose liability relying on the prima facie tort, competition would be chilled and opponents forced to justify perfectly fair practices. 611 Thus, in Alyeska Pipeline Service Company v. Aurora Air Service Inc. 612 the defendant was declared liable for intentionally interfering with the claimant’s subcontract which had rightly been terminated by the contractor after its own agreement with the defendant was legitimately terminated by the latter. This finding elicited Weir’s and Dobbs’ harsh objection for weakening competition. 613 Likewise, Myers stressed the absurdity of imposing liability for persuading contracting parties to exercise their right to terminate unsteady agreements or break annulable contracts, such as anticompetitive negative covenants, which, in any case, cannot be enforced against contract-breakers. Contracts in restraint of trade are invalid and unenforceable, unless reasonable in

599 [1952] Ch. 646, CA (“Thomson”).
603 73 Cal.3d 799 1979. See above n.300 and accompanying text.
606 See above n.145 and accompanying text.

608 Sayre (1923) 660ff, 702-703.
the interests of the parties and the public. Obviously, existent or void agreements cannot be broken. Conversely, Myers argued, Lumley’s contractual right legitimately prevailed over Gye’s liberty to compete because the exclusivity clause in the Lumley-Wagner agreement was limited in time and territory, therefore valid.

In my view, Lumley-type situations reflect the law’s preference for contract rights over competition freedom. This limits justifications to the advancement of moral principles or the exercise of contractual or proprietary interests, at least equal to the claimant’s. Thus, in Edwin Hill and Partners v. First National Finance Corporation Plc, the defendants had acquired security rights necessary to finance a landowner’s project knowing of the contract between the borrower and the claimants. This agreement was broken following the exercise of such rights. Smith LJ dismissed Lumley so as not to discourage the financing of development projects and to avoid landowners restricting the use of property. Yet, O’Dair thought that the suit failed because the claimants knew that their contract hinged on the landowner obtaining a loan from the defendants whose securities had priority.

3.2 Confining Lumley

For Woodward, the public interest in preserving contractual relationships as such is a cogent reason for punishing parties for inducing breach of contract. He salutes that Alyeska sanctioned bad faith evident in the fact that the defendant had retaliated against the claimant. Similarly, Chan and Simester argue that Lumley safeguards the “special relationship” that every contract contains. Promisors bind themselves to fulfil, treating their undertakings as special. Promisers acquire a preference over these obligations. Inducers impair such reason-generating promises.

Nevertheless, I think it excessive to use the Lumley-tort to prevent non-performance under every circumstance. To avoid the unneeded expansion of this tort, Waddams suggests the strict observance of the very conditions present in Lumley and Lumley v. Wagner: a contract for personal services conferring upon the promisee a quasi-property right to performance which overcomes the promisor’s freedom to break and pay damages in lieu; an exclusivity clause restricting, for certain time and in certain area, the promisor’s liberty to compete or to work for the promisee’s rivals; the inducement to break the contract; and the adequacy of injunctions (as opposed to compensation) to prevent the contract from being broken and the inducer from unjustly enriching himself at the claimant’s expense.

In practice Lumley fills contractual gaps, particularly helping to shield agreements concerning unique goods or services in respect of which compensation is inappropriate and specific performance unavailable. Lumley gives proprietary protection to the rights that promises have under specific-information contracts, non-competition covenants and long-term business or employment relationships. Promises can assign their rights to higher-value users (inducers) and participate in the gains that contract-breakers obtain from inducers. Lumley can supplement contractual remedies where defaulting promisors are insolvent or promisees want to preserve contracts. In these cases, tort is not being offered as the primary solution to contractual imperfections. If compensation for harm arising from bad-faith breaches or termination of contracts is insufficient, courts should enhance good-faith implied covenants before

---

617 E.g., preventing the contract-breaker from prostituting herself by forcing the claimant to raise her salary: Brimelow v. Cosson [1924] 1 Ch.302, Ch.D.; Lever (1961) 64.
622 This idea in: Raz (1982) passim.
624 (1852) 42 E.R. 687, Q.B.
625 Remarkably, Hohfeld ([1917] 719) explained the concept of “negative” contractual right with an example that resembled Lumley: ‘If K, a distinguished opera singer, contracts with J that the former will not for the next three months sing at any rival opera house, J has a negative right in personam against K; and the latter is under a correlative negative duty’.
626 The absence of non-competition clauses may mean that the promisee did not value his investment in staff enough to insert those covenants, thus Lumley would be unjustified: Perlman (1982) 113-114.
629 BeVier (1990) passim.
630 Partlett (1991) 775, 834.
awarding tort compensatory or punitive damages. Nor does the promisor’s insolvency authorise making third parties tortiously liable if promisees can self-protect through contractual mechanisms. Still, courts do enforce tort liabilities for interference with contract or business, thus demonstrating that contractual remedies are not a complete answer to the problems that may arise.

In England, unlike France or Chile, breach of contract is essentially remedied through compensation for expectation damages. Specific performance is subordinated to the inadequacy of damages which are normally deemed suitable for obtaining a replacement for the unfulfilled obligation at the marketplace. Specific performance is rejected where monitoring compliance is difficult, in employment contracts or personal-services agreements. Courts are loath to endanger individual freedom and assume that contracting parties bargain to secure certain economic expectations whether through performance or compensation. However, damages are typically regarded as insufficient to enforce post-employment or post-services non-competition covenants. Prohibitory injunctions can be issued if neither involve specific performance nor compel defendants to perform or remain idle. Yet, promisees are usually prohibited from working for promisees’ competitors, and are hence obliged to perform or remain redundant. Nor need promisees prove they would suffer more damage if promisors performed for rivals instead of remaining unemployed. Wagner was enjoined from violating the exclusivity clause with Lumley: the injunction did not entail specific performance. This illustrates the reluctance of courts to force the fulfilment of positive obligations and their readiness to forestall breaches of lawful negative covenants, particularly to prevent competitors from reaping without sowing through the granting of injunctions: Wagner is not compelled to sing for Lumley though restrained from performing for Gye. Likewise, Lauterpacht noted, case-law refuses to enforce contracts inconsistent with previous agreements. Gye was not awarded damages by reason of Wagner having broken their agreement. On the contrary, Wagner was forbidden to perform for Gye in order to protect Lumley’s pre-existing contract. A contract to break a previous covenant is illegal and unenforceable, the parties being tortiously liable to the promisee under the first agreement.

Nonetheless, contract rules question tortious liability for inducing breach of contract. Breach of contract is not per se culpable, so the remedies neither deter nor punish non-performance. Deliberate and careless breaches are treated alike, punitive damages are excluded, and promisors can break their contracts paying for expectation damages: specific performance is exceptional. Save for professional services, liability for breach of contract is strict simply because promisors voluntarily bound themselves to perform: It is axiomatic that, in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfill his obligation, and certainly no defence to plead that he had done his best. These features lead Posner into arguing that contractual liability embodies a sort of insurance against non-compliance which supports the efficient-breach. Yet, the Lumley-tort can help to punish particularly reprehensible breaches and attend restitutionary purposes. The fact that specific performance is exceptional implies that not every breach of contract is deemed wrongful, although it confirms that Lumley has a limited role, which is to punish serious breaches that are not sanctioned in contract. These are typically bad-faith breaches whereby defaulting promisors and inducers unjustly appropriate promisees’ performance without paying in return.

631 Chatorium (1986) passim.
635 Co-operative [1998] A.C. 1, 11-12, Lord Hoffmann.
637 Johnson v. Shrewsbury and Birmingham Railway Company (1853) 43 E.R. 358, Ch.
638 De Francesco v. Barnum (1890) L.R. 45 Ch.D. 430, 438, Fry LJ.
640 Doherty v. Allman (1877-78) 3 App.Cas. 709, HL.
643 (1852) 42 E.R. 687, Q.B.
645 Lauterpacht (1936) passim.
4. Challenging Lumley

4.1 Causation problem

Coleridge J refused to hold Gye liable as the breach of Lumley’s contract had been caused by Wagner. It is thus disconcerting that promisees can recover loss of profits from inducers despite the fact that such losses derive from contract-breakers’ free consent not to perform. As held in OBG, liability under Lumley is secondary to defaulting promisors’ breach of contract. Hence Howarth argues that contracting parties should assume their own vulnerability to the risk of non-performance using contractual remedies rather than transferring responsibility to third parties. It is also affirmed that defaulting promisors are denied personal autonomy if others answer for the breaches they freely commit.

However, following Erle J I consider that the Lumley-tort performs the circumscribed albeit critical mission of sanctioning knowing and deliberate interferences with promisees’ contractual rights. As Cane and Bagshaw argue, contracting parties take the risk of breach, not that strangers will attack their agreement. Lumley indirectly helps to enforce contracts by preventing third parties from intentionally procuring their breach. Contractual rights have a quasi-proprietary effect. Third parties must respect these rights whenever they actually or constructively know of them. Moreover, OBG justified Lumley in that contractual rights are ‘a species of property’. Lumley reacts against the appropriation of contract rights without owners’ consent. The freedom to attract prospective contractors prevails if competitors ignore that a contender already owns the right to performance against such contractors. Ultimately, Lumley safeguards contractual security upon which market economy rests.

4.2 Efficient-breach

It is worth wondering why inducers should be held liable if promisors can choose to break and pay compensatory damages. Law and Economics generally sees the Lumley-tort as inimical to third parties’ offering of better deals to promisors and to the “efficient-breach of contract”, famously phrased as follows: “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it and nothing else.” Payment of expectation losses releases contract-breakers from liability and promisees from their obligations (or entitles promisees to restitution if their duties are already performed).

Moreover, if expectation damages fairly correspond to performance, promises are no worse-off whilst promisors and inducers are better-off. As Posner and Shavell suggest, by giving contract-breakers the choice to pay damages in lieu of performing contract law departs from morality, filling the gaps left by contracting parties unable to regulate all the likely eventualities. Promisors are entitled to break contracts even intentionally, which occurs whenever performing is more expensive than paying damages. Contracts prosper because the law authorises or promotes efficient-breach.

Perlman proposed eliminating Lumley and conserving liability for interference with another’s contract or business by wrongful means, particularly antitrust conduct, unless victims shielded their own anticompetitive practices.

Howarth criticises Lumley for forcing debtors to perform unprofitable contracts.

---


654 Holmes: (1881) 301, (1897) 462.


and imposing high enforcement costs, likely to exceed expectation damages. Moreover, it dissuades parties from concluding productive bargains, carefully self-protecting, settling disputes and competing. Lumley, which is a well-established precedent, should be confined to specific fact-situations such as those concerned in Lumley itself and justifications ought to be enhanced.668

Nonetheless, the argument that Lumley undermines efficient-breach needs to be supported by empirical evidence.669 Further, efficient-breach can be more expensive than Lumley, particularly in contracts regarding unique goods/services.670 Expectation damages can exceed the re-negotiation costs incurred by inducers, defaulting promisors and promisees. That is, whereas inducers purchase directly from promisees the right to performance, the efficient-breach compels inducers to bargain with promisors (who own performance) and claimants (to whom performance is owed).671 Efficient-breach can also be more costly than specific performance, injunctions, punitive damages or account of profits.672

The substantive objection against the efficient-breach is that it renders the performance of binding contracts uncertain.673 Contractual performance is a paramount value. As Whittaker suggests, the fact that expectation losses seek to situate promisees as if promisors had fulfilled their obligations reveals the law’s aspiration (or perhaps priority) that agreements are honoured.674 Thus, the breach of contract is deemed unlawful regardless of the payment for expectation damages.675 For Fried, the breach of contract is morally wrong: it betrays the promisor’s commitment to fulfil and the promisee’s trust.676 Eisenberg, advocating fault-based liability for breach of contract, argues that moral and legal contracts oblige promisors to take future action unless performance is seriously harmful to promisors, such as if performance is extremely costly.677 Therefore, I think, efficient-breach should not be an excuse for defaulting. Yet, contract law does not reflect that ethical expectation. It promotes the reverse: specific performance is subsidiary; compensation is limited to foreseeable harm even for deliberate breaches; and exemplary damages are outlawed. Hence Shiffrin asserts that American contract law should not encourage breach of contract by allowing expectation damages but treat as legally binding the moral obligation to fulfil, for instance, through the award of punitive damages for intentional breaches.678

Conversely, civilian systems as the French (or the Chilean) contain principles and remedies which, at least theoretically, mirror the morality of performing and the immorality of breaking contracts. As Scalise shows,679 the efficient-breach encounters several hurdles in France, including the pacta sunt servanda and good faith tenets; the recognition of specific performance as the prime remedy for breach;680 and the extension of liability for deliberate breach of contract to unforeseeable harm. The latter discourages the efficient-breach which, inspired by the desire for self-profiting, is necessarily deliberate. Nonetheless, compensation for damages is the ordinary remedy awarded by courts, or paid through out-of-court settlements, and case-law accepts economic criteria, although disregarded.

Even so, the fact that French courts declare third parties liable for interfering with another’s contract in bad faith, without demanding a more stringent mental element (as opposed to English law and §826 BGB), also pre-empts the efficient-breach. As Whittaker says, inducing breach of contract is a wrongful and intentional act worth sanctioning.681 This fact, I think, does not disappear just because contract-breakers can pay for expectation losses without performing. Even where specific performance is the chief remedy, a Lumley-type rule can strengthen contracts.

674 Whittaker (2009b) 17.
681 Whittaker (2008b) 118.
5. Ingredients

5.1 Lumley-tort

Negligently interfering with another's contract is a foreseeable side-effect of competing, not a tort.\(^{682}\) Inducing breach of contract is intentional. Yet, \textit{Lumley} does not incarnate the \textit{prima facie} tort.\(^{683}\) Inducers do not intend to harm promisees but seek to cause promisors to break their contracts with promisees.\(^{684}\)

If the intention to harm was required, claimants' contractual rights might be under-protected. As Bagshaw suggests, inducers could easily eschew liability showing self-interest in competition. Moreover, the intention to harm is often much harder to prove than the intention to procure the breach.\(^{685}\) Likewise, inducers must know of the contracts the breach of which they pursue\(^{686}\) or recklessly disregard the means of knowing such contracts, 'like the man who turns a blind eye'.\(^{687}\) As held in misfeasance of public office, intention can be presumed from bad faith or recklessness.\(^{688}\)

\textit{OBG} ratified that inducers must know of the contract, or be recklessly indifferent to its existence (gross negligence being insufficient), and intend to procure the breach as an end or as a means to another end.\(^{689}\) In \textit{Mainstream Properties v. Young}, Arden LJ dismissed the \textit{Lumley}-action as the defendant was not shown to have intended to injure the claimants. Arden LJ discarded recklessness, reasonable foresight of damage and harm inflicted as an inevitable or probable consequence of the defendant's act as possible mental elements.\(^{690}\)

Yet, for Lord Hoffmann the defendant's intention to harm the claimant as an end made it too easy for defendants to escape liability by pleading to have sought self-

\(^{684}\) Pollock (1893) passim; \textit{Holmes} (1894) 2, 10ff; \textit{South Water} [1905] A.C. 239, 246, Lord Macnaghten.
\(^{688}\) \textit{Dean} (1967) passim.
\(^{690}\) \textit{OBG} [2008] 1 A.C. 1: at [60]-[135].

5.2 Unlawful-interference tort

Lord Watson neatly separated inducing breach of contract from causing economic loss to the claimant by using unlawful means against a third party.\(^{691}\) This distinction, which had been blurred particularly in \textit{Torquay} and \textit{Merkur}, was reinstated in \textit{OBG}: the inducer is "secondarily" liable for the promisor's breach of contract, a result intended by the former as an end or as a means to another end, typically self-enrichment. The unlawful-interference tort entails the primary liability of the defendant who intends to injure the claimant in her economic interests as an end or as a means. The defendant uses unlawful means against a third party which must be independently actionable by the latter had she suffered harm, thereby impairing the third party from dealing with the claimant, who is consequently injured. Merely foreseeing that the claimant will be affected is insufficient, although reckless indifference is apparently equated to the intention to harm as a necessary means to achieve self-interest or other ultimate goal.\(^{692}\)

Thus, Lord Hoffmann apparently favoured Cooper's argument that the inducer is

\(^{691}\) \textit{OBG} [2008] 1 A.C. 1: at [60]-[135].
\(^{692}\) Ibid, at [191]. Lord Nicholls.
\(^{694}\) \textit{Oliphant} (1999) 321.
\(^{695}\) \textit{Allen} (1898) A.C. 1, 96.
\(^{696}\) \textit{OBG} [2008] 1 A.C. 1: at [38]-[49]-[51]-[62]. Lord Hoffmann; at [166-167], Lord Nicholls.
secondarily liable by influencing the contract-breaker's decision not to perform, whereas the defendant is primarily liable for unlawful-interference.\textsuperscript{697} However, OBG required the inducer's intention to procure the breach rather than mere knowledge as Cooper had proposed. Moreover, English tort law, as opposed to criminal law, does not adhere to a principle of accessory liability.\textsuperscript{698} Tort law only admits joint tortfeasance, that is, the commission of the same wrong act by two or more persons in concert,\textsuperscript{699} and the \textit{Lumley}-tort, which is separate from the breach of contract, each of which with its own rules on liability, measure of damages, remoteness and justifications.\textsuperscript{700}

The intention reflects the causal relationship between the defendant's act and its effect (that is, the breach of contract or the claimant's damage)\textsuperscript{701} and the kind of protected interest: \textit{Lumley} protects the promisee's exclusive right to the peremptory status of the promisor's performance, whereas the unlawful-interference tort shields the claimant's right to performance from being unlawfully prevented.\textsuperscript{702} Chapter II showed that the intention normally concerns the consequences of certain conduct. Accordingly, inducers must intend to procure the breach because this is what they want and do, whereas promisees are harmed by contract-breakers. Conversely, the defendant must intend to injure the claimant in her economic expectations by using wrongful means against a third party: this is his goal and deed. Likewise, the kind of intention mirrors the legal hierarchy of the relevant interest. The difficulty to prove intention, requisite to the unlawful-interference tort, is a legal threshold to protect the claimants' business interests over the defendants' liberty to compete. The intention in \textit{Lumley}, probably less complex to establish than the former, uncovers the \textit{prima facie} priority of contractual rights over business interests.

Deakin and Randall emphasise that the diverse types of intention illustrate the superiority of contractual rights over trade interests generally. In order to make a consistent legal body of the economic torts, they propose treating the economic interests (contractual or not) alike, by incorporating \textit{Lumley} into the unlawful-interference tort. Accordingly, the mental element is defined as targeting and interfering with the claimant's business, as an end or as a means to another end. It suffices that the defendant seeks to profit at the claimant's expense.\textsuperscript{703} However, this attempt to organise the disordered economic torts clashes with what many scholars had eagerly awaited: \textit{OBG} settled: the dissolution of the 'unnatural union' between \textit{Lumley} and unlawful-interference tort.\textsuperscript{704} Further, if the economic interests in trade were given the same treatment to that accorded to contractual rights, the next logical step would be to equalise the protection of all kinds of economic interests, even proprietary interests. I do not think it possible, at least in the near future, that courts will place property, contract and competition freedom in the same rank. Each of these interests entails different relationships, conditions for liability and remedies. The proprietary interest in goodwill is principally safeguarded through the strict-liability passing-off tort and the availability of injunctions. Contractual rights are protected through \textit{Lumley} against outsiders who persuade promoters to break their contracts with promisees. The preservation of economic interests in business at large involves a comparison between rivals' freedoms to compete. Moreover, the inclusion of \textit{Lumley} into the unlawful-interference tort might obstruct the imposition of liability on inducers, since the claimant would be required to show the defendant's intention to harm her rather than the arguably less troublesome intention to procure the breach. This very practical consideration convinced Lord Hoffmann that \textit{Lumley} requires the inducer's intention to cause the breach.

Although in \textit{OBG} the damage sought by the defendant as a means to another end meets the intentional element in the unlawful-interference tort,\textsuperscript{705} Carty implies that the intention should be confined to the harm aimed at the claimant. She offers, I understand, a solution to avoid the diffuse line between intended consequences and side-effects: harm intended as a means can easily be confused with harm merely foreseen as an inescapable effect of one's conduct.\textsuperscript{706} However, this interpretation narrows the prospect of liability considerably.

\textsuperscript{697} See above n.482 and accompanying text.
\textsuperscript{699} <textit{The Kourous} [1924] P. 140, CA, 159, Sargent LJ. See below n.1383 and accompanying text.
\textsuperscript{702} Chan/Simester (2004); Lee (2009) 523, 533.
\textsuperscript{703} Deakin/Randall (2009) 520ff.
\textsuperscript{704} [2008] \textit{1 A.C. 1}, at [38], Lord Hoffmann.
\textsuperscript{705} OBG (2008) \textit{1 A.C. 1}, at [164-165], Lord Nicholls.
\textsuperscript{706} Carty (2008) 653ff. See above n.325 and accompanying text.
Claimants would need to prove a very strange, almost "pathological", business-condition: that the defendants acted maliciously or intended to harm the claimants as an end. As Lord Hoffmann said, 307 defendants can easily evade a liability rooted in a thin notion of intention by showing to have promoted self-interest, whether gaining profits or preventing losses. His Lordship chose to restrict wrongfulness, possibly for the same reasons Carty suggests to limit intention: to eschew the nuances between intended and unintended harm. The issue about which approach best controls the expansion of liability remains controversial.

6. Observations

Lumley reinforces contractual rights by compelling third parties to respect one another's agreements as a fact. Yet, non-performance is basically the concern of contracting parties. The unlawful-interference tort protects economic interests in business generally from being invaded by others abusing their competition freedom through the use of unlawful means against a third party. However, significant differences in intention and wrongfulness separate both torts, thus hindering their fusion around a common criterion.

The mental element discloses the policy of excluding liability for negligently caused economic loss which is legitimate competition. In both torts the intention relates to the result caused by the agent: the breach of contract to the promisee's detriment or the damage occasioned to the claimant's economic interests. Nevertheless, the law further restrains liability. It demands that the tortfeasor, in exercising her freedom to compete, violates the claimant's contractual rights (by procuring the breach of the relevant contract) or economic interests (by using wrongful means against a third party). Merely perturbing contractual rights or prospective economic advantages without causing breach of contract or using wrongful means is fair competition. Yet, as seen, 308 the common law accords stronger protection to contractual rights vis-à-vis other economic interests in business. In principle, it is easier to establish the conditions for imposing liability in Lumley than to prove the unlawful-interference tort. Likewise, the scope of justifications is significantly narrower in the former than in the latter. Nonetheless, where promisees' contractual rights are affected by third parties without inducing breaches of contracts, promisees may avail themselves no remedy other than the unlawful-interference tort.

There is consensus that tort liability for harm inflicted between commercial competitors must be kept restrained in congruence with the free-competition policy and that this purpose can be accomplished if liability is subjected to a given intention and wrongful means. However, there is disagreement over the dimension of each of these ingredients. OBG defined wrongfulness strictly and intention broadly but elicited academic discussion about the reasonable width of each. Leading modern scholars propose eradicating the instrumentally pursued harm, as a means to another end, from the notion of intention, given the similarity between it and side-effects. Jurists remain sceptical about using a moral-philosophical concept of intention which, as Chapter II showed, poses practical dilemmas. Still, limiting the intention to the damage targeted at the victim (as an end) could bias the balance against claimants, forcing them to prove malice, whereas defendants would easily negate liability by showing to have sought economic self-interest. Notably, perhaps OBG opted for a broader intention for the same reason that authors suggest constraining it: to avoid the subtle distinction between intended and unintended harm. In turn, wrongfulness is by no means free from problems. On the contrary, the slim notion of wrongfulness in the unlawful-interference tort clashes with the wide concept governing unlawful means conspiracy and three-party intimidation.

Finally, English tort law recognises the impact of contractual performance on the economy but offers a moderate protection against breach. Breaking contracts is not necessarily culpable. Promisors can default, paying damages instead, and specific performance is exceptional. Hence the efficient-breath theory treats Lumley as in contradiction with contractual principles. Nevertheless, I have argued that enticing others into breaking their contracts is misbehaviour independent of the breach of contract that deserves to be punished in its own right. Nonetheless, courts enforce Lumley discretely, filling contractual gaps in specific situations involving non-anticompetitive negative covenants and agreements concerning exclusive goods/services in respect of which neither compensation nor specific performance is available or adequate.

307 OBG [2008] 1 A.C. 1, at [59-60]-[132].
308 Above Chapter II, section III.2.4, pp.47ff. See below n.810.
Claimants would need to prove a very strange, almost "pathological", business-condition: that the defendants acted maliciously or intended to harm the claimants as an end. As Lord Hoffmann said, defendants can easily evade a liability rooted in a thin notion of intention by showing to have promoted self-interest, whether gaining profits or preventing losses. His Lordship chose to restrict wrongfulness, possibly for the same reasons Carty suggests to limit intention: to eschew the nuances between intended and unintended harm. The issue about which approach best controls the expansion of liability remains controversial.

6. Observations

Lumley reinforces contractual rights by compelling third parties to respect one another’s agreements as a fact. Yet, non-performance is basically the concern of contracting parties. The unlawful-interference tort protects economic interests in business generally from being invaded by others abusing their competition freedom through the use of unlawful means against a third party. However, significant differences in intention and wrongfulness separate both torts, thus hindering their fusion around a common criterion.

The mental element discloses the policy of excluding liability for negligently caused economic loss which is legitimate competition. In both torts the intention relates to the result caused by the agent: the breach of contract to the promisee’s detriment or the damage occasioned to the claimant’s economic interests. Nevertheless, the law further restrains liability. It demands that the tortfeasor, in exercising her freedom to compete, violates the claimant’s contractual rights (by procuring the breach of the relevant contract) or economic interests (by using wrongful means against a third party). Merely perturbing contractual rights or prospective economic advantages without causing breach of contract or using wrongful means is fair competition. Yet, as seen, the common law accords stronger protection to contractual rights vis-à-vis other economic interests in business. In principle, it is easier to establish the conditions for imposing liability in Lumley than to prove the unlawful-interference tort. Likewise, the scope of justifications is significantly narrower in the former than in the latter. Nonetheless, where promisees’ contractual rights are affected by third parties without inducing breaches of contracts, promisees may avail themselves no remedy other than the unlawful-interference tort.

There is consensus that tort liability for harm inflicted between commercial competitors must be kept restrained in congruence with the free-competition policy and that this purpose can be accomplished if liability is subjected to a given intention and wrongful means. However, there is disagreement over the dimension of each of these ingredients. OBG defined wrongfulness strictly and intention broadly but elicited academic discussion about the reasonable width of each. Leading modern scholars propose eradicating the instrumentally pursued harm, as a means to another end, from the notion of intention, given the similarity between it and side-effects. Jurists remain sceptical about using a moral-philosophical concept of intention which, as Chapter II showed, poses practical dilemmas. Still, limiting the intention to the damage targeted at the victim (as an end) could bias the balance against claimants, forcing them to prove malice, whereas defendants would easily negate liability by showing to have sought economic self-interest. Notably, perhaps OBG opted for a broader intention for the same reason that authors suggest constraining it: to avoid the subtle distinction between intended and unintended harm. In turn, wrongfulness is by no means free from problems. On the contrary, the slim notion of wrongfulness in the unlawful-interference tort clashes with the wide concept governing unlawful means conspiracy and three-party intimidation.

Finally, English tort law recognises the impact of contractual performance on the economy but offers a moderate protection against breach. Breaking contracts is not necessarily culpable. Promisors can default, paying damages instead, and specific performance is exceptional. Hence the efficient-breach theory treats Lumley as in contradiction with contractual principles. Nevertheless, I have argued that enticing others into breaking their contracts is misbehaviour independent of the breach of contract that deserves to be punished in its own right. Nonetheless, courts enforce Lumley discretely, filling contractual gaps in specific situations involving non-anticompetitive negative covenants and agreements concerning exclusive goods/services in respect of which neither compensation nor specific performance is available or adequate.

---

707 OBG [2008] 1 A.C. 1, at [59-60]-[135].
708 Above Chapter II, section III.2.4, pp.47ff. See below n.810.
IV. Conclusions

This chapter showed that the economic torts form an asymmetrical legal field devoid of a consolidating principle. This result partially flows from the piecemeal structure and development of tort law, which compartmentalises the conditions for imposing liability for pecuniary harm caused between competitors depending on the tort at issue. Liability is subjected to a mental element, thus excluding negligence. Yet, the content of intention varies considerably between the economic torts. Similarly, English law denies a purely intention-rooted liability and requires wrongful means. However, unlawfulness is ousted from simple conspiracy and the scope of wrongful means is not uniform in the remaining economic torts. Thus, there is no principle of liability for intentionally or wrongfully inflicted economic harm and it seems unlikely that one can be constructed. I have also stressed that there is a political explanation for the state of disorder in the economic torts. Courts have traditionally protected capital from workers’ collective action through the enforcement of economic-tort liability with a view of regulating industrial competition. Simple conspiracy and three-party intimidation owe their existence to the judicial aversion to labour organisations. Hence the relationship between courts and Parliament has been uneasy, the latter continuously reacting by granting legislative immunities to counteract those torts. Conversely, courts have followed a laissez-faire approach towards business competition, probably because business contenders struggle on equal terms. Courts have reduced the impact of the economic torts, particularly through wrongfulness, and left to the legislature the normal control of commercial rivalry. This illustrates the importance of segregating both sectors of competition. In particular, the common law has managed liability for financial harm between trade opponents consistently, adopting a circumspect attitude, however the technical irregularities overwhelming the economic torts. Although OBG disclosed discordant opinions about the role that unlawful-interference tort should fulfil in commercial competition, Lord Hoffmann’s conservative stance prevailed. This gives a hint about the residual function that the economic torts are ascribed in this area, supplementing antitrust law and helping to protect property, contract and competition freedom against extreme or abusive conduct. Furthermore, I made plain that the lack of an all-embracing standard applicable to the economic torts does not prevent courts from solving disputes between business competitors thus yielding fairness, consistency and certainty, provided that courts balance the parties’ clashing interests against each other. Indeed, intention-based liability and wrongfulness need not produce divergent outcomes, for both depend on the judicial ability to weigh said interests.

This chapter also revealed that the reasons why English law denies liability for intentionally caused economic damage without wrongful means (save for simple conspiracy) are diverse. Along with interpretations underpinned in principle, like the supposedly greater certainty of unlawfulness as compared with the prima facie tort, there is an eloquent argument that the dismissal of intention-based liability (or its acceptance in conspiracy) was basically influenced by the political and historical context within which the core economic-tort cases were decided.

Furthermore, this chapter showed that English law denies imposing liability upon those who, in the occasion of exercising a right, intentionally injure others who lack a countervailing right. However, as regards conflicts between neighbours holding equivalent rights, English law may rely on the intention with which defendants act and hold them liable in nuisance, thus attaining analogous results to the abuse-of-rights doctrine. Likewise, I demonstrated that the prima facie tort overlaps with the clearest case of abuse of rights, the scope of which is therefore wider than the former. Yet, while simple conspiracy is the exclusive representative of the prima facie tort in English law, it has scarcely been used in commercial competition. Nor is unlawful means conspiracy a better candidate in this domain, particularly considering that prospective claimants can resort to the strict-liability statutory competition torts.

On the other hand, the primacy of contractual rights over economic interests in business at large is reflected in the diverse conditions for imposing liability for inducing breach of contract in relation to those concerning the unlawful-interference tort, the latter being arguably more difficult to establish than the former. There is an ongoing discussion about whether economic interests of different sorts should be protected evenly. The distinct kinds of intention and wrongfulness each of these torts entail also reveals the fragmented feature of the economic torts.
Finally, the fact that \textit{Lumley}-tort basically helps to fill contractual gaps, providing redress in very specific covenants, and the fact that case-law does not acknowledge a two-party intimidation tort, also indicate that the economic torts perform a circumscribed task in business competition. English courts are reluctant to substitute the economic torts for statutory regulation or contractual remedies.

\textbf{CHAPTER IV}
\textbf{UNFAIR COMPETITION TORTS}

Chapter III discussed the main features of the English economic torts. The current chapter analyses passing-off and malicious falsehood as the common-law torts specifically used to tackle unfair competition. Passing-off and malicious falsehood too differ from the statutory competition torts, examined in Chapter V, which are grounded in antitrust (not unfair) conduct. Yet, as I will demonstrate, courts generally approach passing-off with the same caution observed towards the other economic torts in the context of commercial battles. Thus, I will argue that English courts have rejected a general tort of unfair competition opting for a piecemeal protection of trade values, as the two torts which are the subject-matter of this chapter illustrate. Passing-off has incessantly expanded and, in fact, protected novel commercial interests more quickly than statutes, often serving irresponsible claimants to achieve monopolistic goals. Passing-off is commonly decided through injunctions granted in interlocutory proceedings which prevent courts from pondering the effects of allowing the action. Courts have attempted to mitigate this risk by confining passing-off to its conventional boundaries but this method has not solved the issue definitively. More significantly, I will emphasise two points which are usually downplayed. First, I will show that passing-off is rooted in deliberate conduct and actually conceals the defendant’s intention to harm the claimant by drawing away the latter’s custom. However, passing-off entails strict-liability for outcomes, thereby releasing the claimant from proving the said mental element (let alone fault). Strict liability, I will suggest, reflects the superior value that the common law attributes to property in goodwill over contractual rights and economic interests in business at large which are protected through the \textit{Lumley} and unlawful-interference torts, respectively, thereby requiring proof of a mental element. Yet, I will challenge as unprincipled the stronger protection accorded to property over the other types of economic interests, proposing that passing-off should be contingent upon the defendant’s intention to harm the claimant. Secondly, I will submit that malicious falsehood resembles simple conspiracy in that it is entirely founded on malice (excluding wrongful means), it is hard-proving and it is relatively easy to justify. The fact
that malicious falsehood has a limited impact on commercial competition sidesteps the formal contradiction between malicious falsehood and the remaining economic torts which, save for simple conspiracy, require unlawful means, and also the inconsistent protection of business reputation through intention-based liability (malicious falsehood) and outcome-based strict liability (passing-off).

Section I reviews the modern development of the law against unfair practices. Among the various legal and extra-legal mechanisms offering redress against unfair commercial methods, tort law occupies a reduced area, helping to prevent and compensate for economic losses. Section II describes the elements of passing-off and malicious falsehood. In particular, I assess the rejection of a principle of liability for unfair business practices and the judicial reluctance to regulate competition except for extreme situations. However, I explain the debate within case-law and scholarship whether passing-off should be converted into an all-embracing tort of unfair trading, supporting a negative answer. Section III synthesises the principal conclusions.

I. Introduction

This section describes unfair competition law as a distinctive legal domain within which the economic torts, and especially passing-off and malicious falsehood, perform a limited function. The central issue that courts face is determining to what extent the proprietary interests in trade-values (as goodwill) must be given priority over competition freedom. This conceals an ongoing tension between the courts and Parliament concerning the distribution of the power to protect commercial competition from unfair practices.

Unfair competition law aims at avoiding excessive competition and tackles obnoxious, unfair or unethical business acts inimical to competitors and consumers. Antitrust law is a separate yet complementary discipline committed to preserving free competition through the prevention and punishment of anticompetitive conduct. Broadly speaking, unfair competition encompasses 'any act of competition contrary to honest practices in industrial or commercial matters'. Article 10(3).bis of the Paris Convention provides examples of prohibited conduct partially overlapping with passing-off and malicious falsehood, the specific torts whereby the common law counteracts unfair commercial misbehaviour. In England, the term "unfair competition" was first employed to hold that equity prevented the defendant from misrepresenting his work as the claimant's. This is passing-off, the impermissible act of deceiving the typical consumers: 'nobody has any right to represent his goods as the goods of somebody else'. At the turn of the twentieth century, the law against unfair competition was relocated within intellectual property law, then becoming the legal branch entrusted with the protection of diverse trade values: intellectual property rights ("IPRs"), which shield from the unauthorised imitation or exploitation of the right-holders' ideas, particularly industrial property in the form of trademarks (that is, unique symbols on which right-holders have a legal monopoly qualified by another person's right to use same brand descriptively); trade-names; get-up, packages and labels; and goodwill. Trade-names include descriptive words whose use is reserved to those who through effort and investment create a "secondary meaning" associated with the origin of a product, service or business, rather than with its nature or characteristics ("primary meaning"). "Goodwill "is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom.

Unfair competition law has been used with flexibility for curbing novel immoral business behaviour affecting consumers and competitors, deterring and

---

710 Article 10(2).bis, the Paris Convention for the Protection of Industrial Property 1883 ("Paris Convention").
711 I.e., acts which can pose confusion as to the competitors' business, goods, industrial and commercial activities; and allegations (false or not) made in the course of trade that can disparage those trade-values or mislead the public vis-a-vis the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of the goods.
714 "Thirty folk want beer, not explanations": Montgomery v. Thompson (1891) A.C. 217, HL ("Montgomery"), 225, Lord Macnaghten.
715 Reddaway (1896) A.C. 199, 204, Lord Halsbury.
716 Cornish/Llewellyn (2007) 3ff.
717 Mitchell (1896) 275-279; Rogers (1913) 139; Haines (1919) 2ff; Handler/Pickett (1930) passim; Henning-Bodewig (2006) 18.
718 inland Revenue Commissioners v. Muller & Co's Margarine Ltd. (1901) A.C. 217, HL, 223-224, Lord Macnaghten.
rectifying damage to goodwill. According to the dominant economic policy the common law can repress all sorts of unfair competitive methods or confine to passing-off. The moderate approach is to expand gradually the notion of "unfair competition" through the careful analysis of the harmful business practices, establishing clear precedents and construing IPRs in a manner that avoids the monopolisation of ideas whose imitation is intrinsic to competition. This reflects, I think, the tension between the private monopolistic interest in trade values (as IPRs) and the public interest in free competition resolved by case-law or statutes. Some rely on the courts' ability to tackle unfair competition without opening 'a Pandora's box of vexatious litigation'. International News Service v. Associated Press famously illustrated the friction between the judicial and legislative pressures. The claimant (AP) and the defendant (INS) were direct competitors in the market of gathering and distributing news. INS induced employees of AP's newspapers members to breach their internal by-laws, providing INS with copies of the news stories which AP had elaborated from the news collected by it, pending their publication. INS used AP's news stories verbatim in its newspapers without acknowledging their source. The U.S Supreme Court enjoined INS from copying and distributing AP's news to prevent the defendant from reaping where it had not sown. Although AP lacked a property right in the news stories not yet published it had a quasi-proprietory interest in those intangibles whose misappropriation for commercial use by INS entailed unfair practice and unjust enrichment to AP's detriment. The majority judgment, Epstein notes, solved the concrete problem that the common-law rules on property, contract and tort left unsettled. INS committed neither passing-off (by omitting the source of the news stories, INS could not compare them with AP's news) nor the Lumley-tort (the information was not confidential but intended to be published). Likewise, whereas the rule of first possession grants indefinite property in corporeal things, news can only be owned temporarily. The court sorted out this by recognising AP a "quasi-proprietary right in news" collected for publication that could only be opposed against its direct rival for a limited time. For Epstein, it was efficient not to acknowledge AP permanent ownership as news exists to be distributed. So, whereas the majority decision understood the central distinction between news, corporeal things and copyright (the duration of which is too long to be extended to the former), the dissenting judges apparently did not. Thus, Justice Brandeis held to be for Congress to create property rights in news.

Therefore, International News concerned the appropriate manner of balancing the public interest in competition against the monopolisation of valuable (unprotected) incorporeal goods and whether this duty should rest with courts or legislation. Some American contemporaneous scholars argued that case-law was more responsive to unfair competition than statutes: although Congress can address these problems with wider perspective it intervenes sporadically. For others, statutes could regulate unfair practices more dynamically than the intermittent case-law, following the evolving social and economic trends. Moreover, the common law's incremental approach over-stated extreme misconduct, leaving gaps which can only be filled by regulation.

Currently, however, unfair competition law encompasses overlapping legal fields (tort law, trademarks and consumer protection) and sources (general principles, case-law and special legislation). Furthermore, self-regulation (non/soft-law) is a major mechanism for enforcing the observance of honest trade behaviour, for example in the advertising business, without generating excessive litigation as compared with legal devices.

Consequently, the law against unfair competition is an autonomous and open-ended field whose crux is weighing competition freedom against innovation, effort and investment encapsulated in diverse trade-values. Parliament and courts

---

179 Rogers (1913) 148, (1919) passim; Haines (1919) 27.
180 The latter, more conservative tendency is illustrated with Mosler Safe Co. v. Ely-Norris Safe Co. 273 U.S. 132 (1927), Holmes J dismissing the passing-off action as the claimant (a manufacturer of safes containing an explosion chamber) failed to show that the defendant had misrepresented the fact of producing the same type of device. This case shows the difficult issue of causation. Holmes J stated that the defendant had not caused the claimant’s loss of clientele: causation. Holmes J stated that the defendant had not caused the claimant’s loss of clientele: causation.
181 Similarly, in AP v. Consolidated Press a majority of the Court of Appeals held that the AP could not enjoin the issuance of copyist's which was in the public interest. The dissenting opinion of Judge Learned Hand (1927) (J.J. 139, 157-158).
182 248 U.S. 215 (1918, "International News").
183 Rogers (1919) passim; Haines (1919) 22.
184 International News 248 U.S. 215, 239, Pitney J.
185 Ibid, 243-244, Pitney J.
186 721, 725
187 Ibid, 236
188 Epstein (1992) passim.
190 Handler/Pickett (1930) 788; Handler (1936) passim; Callmann (1942) 609.
191 Fadch1fds (1936) 3038; Chafee (1940) 1289.
permanently dispute the right to define the equilibrium between such conflicting interests.

II. The unfair competition torts

Putting aside specific statutes, English law protects businesses from unfair competitive methods through the economic torts. Yet, the preservation of trade values basically focuses on passing-off, which is mainly used to prevent unfair practices through injunctions, and malicious falsehood, which provides compensation for harm caused to competitors in their goodwill through false and fraudulent statements disparaging their goods or services. 733

1. Passing-off

1.1 Contours

Passing-off essentially helps to defend the reputation of the claimant’s product or services and consumers’ accurate information. So, it prevents claimants from losing clientele for reasons other than their own inefficiency and customers’ preferences. 734 In a celebrated case passing-off was defined as ‘[a] man is not to sell his own goods under the pretence that they are the goods of another man’. 735 Thus, the defendant misleads the claimant’s consumers into believing that they purchased the claimant’s goods or services while actually bought the defendant’s. Consumers are thus likely to be confused and prevented from making informed choices, whereas the defendant profits from the claimant’s established commercial reputation. 736 Passing-off infringes the ‘most elementary principles of commercial morality’ by stripping the claimant of its legitimate trade. 737 Nonetheless, passing-off counterbalances unfair competition in a roundabout fashion: the claimant is not the deceived consumer but the defendant’s competitor ‘whose trade is likely to suffer from the deception practised on the public but who is not himself deceived at all’. 738

Passing-off has been adapted to the changing economic context with great flexibility. Nineteenth-century courts offered equitable injunctive relief without demanding deceit and harm: 739 passing-off turned complicated for the opposite reason. Subsequent case-law enhanced the protection to trademarks and trade-names. Likewise, the commercial mutability and indefinable rationale of passing-off rendered this tort useful for safeguarding trade values against misrepresentation related to the merchandise (primary meaning) or the place of manufacture (secondary meaning), as the “drink cases” illustrate. 740

Of more significance, I think, is the incessant clash between the claimants’ interest in trade values, the defendants’ liberty to compete and the consumers’ right not to be misinformed which has pervaded the development of passing-off. As Cartry argues, the fact that passing-off is mainly resolved at interlocutory stage often prevents courts from assessing the impact of allowing the action. Accordingly, dominant firms can secure monopolistic positions by using passing-off as a general tort against legitimate competitive activities. However, to avoid the misuse of passing-off courts demand proof that the defendant misrepresented his goods as though they were the claimant’s ones and that the claimant was likely to be injured in her goodwill. 741 The requirements of misrepresentation, goodwill and likely damage to it were established in AG Spalding & Bros v. AW Gamage Ltd, 742 augmented to five in Advocaat 743 and reinstated to three in Reckitt & Colman Products Ltd v. Borden Inc. (No.3). 744

734 (1964) 77 Harv.L.Rev. 911.
739 Millington v. Fox (1838) 40 E.R. 956, Ch.
743 I.e., misrepresentation, by the defendant in trade, to its prospective/ultimate consumers of goods/services, calculated to harm the claimant’s business/goodwill, and actually or likely producing this effect: [1979] A.C. 731, 742, Lord Diplock.
744 [1908] 1 W.L.R. 491, HL (“Jif Lemon”), 499, Lord Oliver.
Jacob J stated: 'at the heart of passing off lies deception or its likelihood, deception of the ultimate consumer in particular'. Misrepresentation consists of using or imitating trademarks, trade-names or get-up in a manner calculated (likely) to deceive consumers as to the origin of a certain good, service or business (secondary meaning) distinctively linked to the claimant, the defendant pretending that the claimant's good, service or business is associated with him. Misrepresentations connected with the quality, nature, geographical area or other features of the good or service (primary meaning) may also form passing-off. Courts grant injunctions to protect provisionally the use of descriptive names, words or get-up with unique reputation. Nevertheless, it can be very difficult to prove that consumers will likely be deceived: people often purchase products for what they are, whatever their origin. Expert and survey evidence can be critical, although the likelihood of consumers' deception can more easily be established where the litigants do not compete with one each other, given the widespread licensing and diversification between them. Courts grant injunctions in these cases.

Yet, it seems to me that the decision whether passing-off shields worthwhile commercial values or yields undue advantages at the expense of the claimants' competitors hinges on a subjective appraisal. In Cadbury Schweppes Pty Ltd v. Pub Squash Co. Pty Ltd the Privy Council rejected the suit because no consumer would confuse the claimant's drink "Solo" with the defendant's "Pub Squash": passing-off requires more than a simple confusion, imitation or misappropriation of another's ideas. The defendant must normally pose a considerable risk that reasonable purchasers of the relevant goods or services will be disoriented. Consumers' experience and the manner products are displayed can be material: 'persons whose life or education has not taught them much about the nature and production of wine, but who from time to time want to purchase champagne, as the wine with the great reputation, are likely to be misled by the description “Spanish Champagne”.'

As Lord Bridge argued in Jif Lemon, courts refuse to grant injunctions if they perceive a monopolistic attempt. Here, however, their Lordships held the defendant liable for selling preserved lemon juice using a plastic container very similar in size, shape and colour to the claimant's popular "Jif". Thus, passing-off served to confer a common-law monopoly upon the claimant's industrial design that could not be registered as trademark, filling a statutory gap which was only removed with the Trademarks Act 1994. The Law Lords considered that the average inadvertent consumer looked at the shape without reading the label on the package. Hence some authors criticised this judgment for restricting free competition. The defendant had incorporated a label on its product that made it clear its origin, discounting any misrepresentation. So, Jif Lemon shows us that passing-off can furnish wider defence against unfair competition than trademark legislation: 'I still have some doubts as to whether the law of registered trade marks needs to be stretched to cover conduct readily caught by more general unfair competition rules. Thus out-of-date goods have been dealt with easily by passing off. Indeed, as Lord Scarman said, passing-off has developed by protecting unregistered marks or registered marks against practices other than trademark infringement. It has safeguarded descriptive materials (as slogans) and visual images that consumers link to the claimant's goods thanks to advertising campaigns.

Needless to say, passing-off cannot exist if the claimant lacks goodwill. This is a proprietary right over business rooted in the customer connection derived from the prestige or reputation of the claimant's products or services (that is, the public knowledge and good impression about them). Likewise, the claimant's goodwill must actually or likely be affected by the defendant's
misrepresentation. The law does not require actual economic damage because there is a proprietary interest in goodwill at stake. Hence passing-off entails strict liability. The claimant’s goodwill and the likelihood of it being harmed can more readily be proved, and injunctions granted, where both parties are rivals. Conversely, courts dismiss claims brought by celebrities against non-competitors: the risk of consumers’ confusion declines if litigants lack a common field of activity. The claimant must show that her product is of superior quality than the defendant’s merchandise and that the defendant alleged his good to be connected with the claimant’s product. Proof of the likelihood of harm to goodwill helps to dissuade prospective claimants from employing passing-off for monopolistic aims. Speculative claims, found, for instance, on successful commercial magnetism may conceal the attempt to establish a general tort of unfair competition.

Now, the harm to goodwill causes claimants’ loss of profits (like diversion of trade) which are recoverable depending on the hypothetical question about the number of consumers that would have remained with the claimant had passing-off not been committed. The claimant can also sue for the devaluation of reputation caused by the defendant’s discredited goods passed as though they were the claimant’s famous ones, provided that the consumers’ negative perception towards the defendant’s products is likely to injure the claimant. Moreover, passing-off itself involves a presumption of nominal damages (just like in trespass) alongside substantial damages.

---

765 E.g., the loss of control over the quality of the defendant’s products even if the defendant ran a different business than the claimant’s, enjoying prestige abroad: Lego (1983) F.S.R. 155.
769 McGregor (2003) 1467-68.

---

L.2 The misuse of passing-off

Traditionally, courts are loath to systematise the law around an overall tort-principle, to construe statutory rights progressively and to fill legislative gaps. As indicated elsewhere, courts interpret narrowly the private monopoly over creativity, effort and investment contained in IPRs. Not only are these rights limited in time and by the public interest in free competition (which allows the imitation of ideas and innovation to consumers’ benefit) but courts generally leave to statutes the creation of new rights to safeguard commercially valuable ideas. American case-law is analogously committed to safeguard free competition. International News was confined to its facts, the copying of published written material not protected through IPRs is permitted, tort claims disclosing monopolistic goals are rejected and IPRs are construed so as not to corner the market. Some even propose to eradicate liability for the misappropriation of trade-secrets arguing that the spread of information and expertise over industries can revitalise competition. This pro-competition judicial policy is mirrored in specific torts, strict rules of evidence and a cautious interpretation of IPRs.

Nevertheless, there has been a continuous dispute within English case-law between the conservative idea of keeping liability confined and the expansionist conception that passing-off is a ‘protean’ tort always changing and growing that resembles a general tort of unfair competition. The latter tendency, Carty suggests, has been prompted by powerful firms seeking to increase their market influence by enjoining existing/prospective competitors and is facilitated by the fact that passing-off is regularly resolved at interlocutory stage, so courts lack
time to examine in-depth the substantive issues. Yet, case-law has over and over
confined passing-off to its classic requirements.778

In Advocat their Lordships granted an injunction forbidding the
defendant from selling in England its egg-flip (a beverage made with wine) under
the name “advocat” (which contains eggs and spirit). Lord Diplock opined that
the defendant had acted dishonestly and the law should protect competitors
(whatever the number) whose business or goodwill attached to said descriptive
word has been affected by such conduct.779 Consequently, he ratified the
Champagne decision. Here Danckwerts J implied that passing-off amounted to a
wider tort of unfair competition which even protected descriptive words making
reference to the locality where a product had been elaborated.780 Yet, the fact that
the defendant had not passed its goods as the claimant’s products but used a name
that did not describe the product sold convinced Naresh that Advocat had
reinforced a monopoly instead of preventing consumers from being
misinformed.781 Cadbury reinstated the conventional stance, Lord Scarman
stressing the need for balancing the claimant’s interest in the investment in his
goods against the defendant’s liberty to compete. Liability hanged on the violation
of the claimant’s “intangible property right” in his exclusive product. A tort of
unfair trading lent itself to monopoly.782 This reasoning was applauded.783

Passing-off has experienced other extensions nonetheless. Thus, supermarket
are liable for selling their own brands using similar packaging
than that of the manufacturer provided that the former’s misrepresentation likely
caused the dilution of the latter’s trademark, thereby injuring goodwill.784 In
principle, it is for trademark legislation to protect against the erosion of the
success of the claimant’s product or image. Passing-off does not safeguard against
the dilution of the distinctiveness of brand names:785 the claimant must show the
likelihood of harm to her goodwill.786 Likewise, some courts have accepted the

780 [1960] Ch. 262, 275, 284.
781 Naresh (1986) passim.
782 [1981] 1 W.L.R. 193, 205. Lord Scarman distinguished the facts in Advocat (with which
he had agreed) from those in Cadbury: [1981] 1 W.L.R. 199.

“inverse” or “reverse” passing-off through which the defendant asserts that the
claimant’s goods are his.787 For Holyoak, this case-law perverted passing-off to
punish the misrepresentation of products as and blamed defendants for
missing to mention the true origin of the goods (a matter pertinent to IPRs) even
though the claimant’s goodwill has not been injured.788 Furthermore, certain
courts have granted injunctions for “threatened” passing-off, therefore holding
manufacturers liable to final consumers for putting products into circulation
although the latter were not passed as the rival’s merchandise. So, the defendant
was prohibited from registering the claimant’s famous internet domain-names
without their owners’ consent and from retaining them for future sale despite the
fact that the claimant’s goodwill had not been affected as the defendant had used
no name whatsoever.789

Although the common law has never suffered a ‘monopoly-phobia’,790
Derenberg suggested a broad tort to sanction immoral business practices
generally.791 Later, Brett championed an all-embracing tort against the
misappropriation of the commercial fruits of talent and effort, as this conduct was
not covered by passing-off, injurious falsehood and specific statutes.792 For
Horton and Robertson, passing-off served to prevent free-riders from parasitically
imitating their competitors’ new products by exploiting the latter’s goodwill
regardless of the absence of misrepresentation. Victims, they said, are more
vulnerable as their products have not been launched. Hence a tort such as that
proclaimed in International News could bring consistency within the disparate
European national laws against unfair practices.793

For others, passing-off should be applied flexibly to comply with the duty
of ‘effective protection against unfair competition’ established in article 10bis of
the Paris Convention.794 Still, this rule can only be implemented by statute.
Likewise, despite its narrow scope, passing-off complies with the obligation
established in the said provision, that is, to offer their nationals and the national of

787 Holyoak (1990) 567.
passim.
790 Eastern Wine Corp. v. Winslow-Warren, Ltd. 137 F.2d 955 (1943), 958-959, Frank J.
791 Derenberg (1955) 29, 34.
792 Brett (1979) passim.
other Parties the same degree of protection against unfair competition. Article 10bis does not specify the remedies to be recognised and it is perfectly legitimate to repress unfair practices through criminal law (for example, the Trade Descriptions Act 1968) while prevent them through passing-off, malicious falsehood and self-regulation.795 Furthermore, as Alkin argues, the narrow protection against specific unfair competitive practices does not foreclose the possibility that courts no longer require misrepresentation by focusing on damage to goodwill, therefore affording protection against free-riders.796 However, an overall tort of unfair competition might absorb the established economic torts and acquire an unpredictable size detrimental to commercial strife.797

Case-law has (in obiter) acknowledged a general tort and treated the loss of control over a business-name disconnected with the claimant as a sufficient ground of passing-off.798 However, Jacob LJ recently considered that general tort as unnecessary and uncertain.799 'The basic economic rule is that competition is not only lawful but a mainspring of the economy'. Thus, courts should not legislate on unfair competition.800 Although passing-off may continue to grow,801 it seems unlikely that in the near future courts will replace the torts with an all-inclusive cause of action.802 In my view, courts are generally reluctant to recognise a widespread tort of unfair trading, let alone from the sweeping passing-off. The fact that this tort is often decided at a preliminary stage prevents courts from pondering the effects of enjoining defendants from competing. Distinguishing between fair and unfair business behaviour belongs to Parliament. Courts confine liability to the specific, incrementally developed economic torts. Dane J said that a generic tort clashes with the economic and statutory torts whereby the common law defines the frontier between lawful and 'untrammelled' competition.803 However abundant the case-law stretching passing-off, courts by large adopt a laissez-faire attitude towards the harm that trade rivals inflict (or threaten) on each other. Still, this does not remove the risk of future expansions of passing-off happening, thus demanding new adjustments to conserve competition.

1.3 An intentional and strict-liability hybrid

Unlike the other economic torts, passing-off triggers strict-liability for damage. It suffices that the defendant creates the likelihood of confusion amongst the claimant’s consumers. Whether the defendant intended such effect, was reckless or negligent is immaterial to the assertion and negation of liability:804 if the effect of what the defendant says or does is to amount to a false representation, that its products or services are those of the claimant, then it is no defence to say that it was not intended or even desired.805 Although fraudulent acts can indicate that consumers were misled into confusion,806 to have acted in good faith without intending to deceive them is no justification.807

In my opinion, passing-off is regulated by strict liability and principally remedied through injunctions, given the paramount importance of property within the common law. Property is strongly protected against third parties’ invasion or unauthorised exploitation. Passing-off resembles trespass. Although passing-off safeguards the incorporeal right in goodwill while trespass defies tangible property, both torts vindicate victims’ proprietary rights preventing them from being violated. As Cane says, passing-off is rights-based while the other economic torts are conduct-based,808 I too concur with Cane that trespass entails conduct-based strict liability, as it is actionable per se (the victim need not sustain harm), whereas passing-off triggers outcome-based strict liability: damage to the claimant’s goodwill must at least be likely.809 Nevertheless, I think that passing-off is very close to trespass precisely because it only requires probable damage rather than actual harm. As a result, the typical remedy is an injunction to prevent

806 '[W]hat the defendant intended to achieve...can give some indication of what it was likely to achieve': Irvine v. Talksport Ltd [2002] E.M.L.R. 32, Ch.D., at [68], Laddie J.
808 Cane [1982] 31, 35-36, 40 n.62A.
809 Cane [1997] 45ff, 146.
damage from being caused. On the other hand, the common grounds of outcome-based strict liability (namely, tortfeasors should bear the losses arising from their business just as they profit otherwise; and the need for facilitating compensation for damage) are pertinent to passing-off and the competition torts (which also involve outcome-based strict liability), although these torts derive from conduct which is not abnormally dangerous.

As already seen, English tort law protects more strongly tangible property than pure financial interests. The harm inflicted to the former is generally recoverable in negligence unlike that caused to the latter. I argued that the true reasons for this distinction are that pure economic losses usually arise out of the exercise of the liberty to compete which justifies the infliction of harm and that competitors owe each other no duty of care. More problematically, however, the common law establishes a hierarchy between pure economic interests reflected in diverse tort liability rules. Property in goodwill enjoys the strongest protection through outcome-based strict-liability (passing-off). Contractual rights are safeguarded more narrowly through Lamley: the promisee has to show that the inducer intended to procure the breach of the contract by the promisor. Finally, economic interests in trade at large are shielded through the unlawful-interference tort which demands the defendant’s intention to harm the claimant. Nevertheless, I do not consider that property (corporeal or incorporeal such as goodwill) is in itself more valuable than contractual rights and business interests. The common law should confer an equivalent protection to the various economic interests. Specifically, the tort of passing-off should be subjected to proof of the defendant’s intention to harm the claimant. Just like the unlawful-interference tort, this is the result pursued and provoked by the defendant. Conversely, the Lamley-tort requires the defendant’s intention to procure the breach of contract: this is what the inducer pursues and produces. Therefore, liability for interference with economic interests should depend on wrongful means along with a mental element that reflects the relationship between the defendant’s conduct and the result sought as an end or as a means to another end.

In my view, passing-off at least involves deliberate conduct. It is not possible to pass one’s goods as though they were one’s competitors negligently, inadvertently or accidentally. Indeed, it is a basic principle of marketing that firms should examine their competitors’ products carefully before launching their own. The claimant does not have to show that the defendant intended to harm her or deceive consumers. Hence passing-off entails strict liability for the result, that is, the harm threatened or caused to the claimant’s goodwill by confounding consumers. But because this intention need not be proved passing-off is, I believe, at any rate deliberate, just as the statutory competition torts which comprise deliberate (antitrust) behaviour and trespass which, pursuant to the leading authorities, embodies the intentional invasion of another’s right. 811 Although Cane argues that trespassers can act without intending to interfere with landowners’ property or even ignoring that the land belongs to the claimant, 812 I consider this to be exceptional and, anyway, irrelevant to passing-off.

Furthermore, I think that passing-off presupposes the intention to harm competitors by drawing away their customers to the defendants’ benefit. The intention is presumed from the very act of pretending that what the defendant sells is his rival’s product. It is indicative that, in common language, “pretend” means ‘to behave as if something is true when the agent knows that it is not, especially in order to deceive people or as a game’. 813 In contrast, as explained in Chapters II and III, the intention in the remaining economic torts is not taken for granted. However, passing-off should no longer trigger outcome-based strict liability but, as argued in the preceding paragraph, be constrained by requiring evidence of the defendant’s intention to injure the claimant.

2. Malicious falsehood

The defendant commits this tort if he maliciously communicates to third parties written or oral lies about the claimant’s business (including assets, employees,

goods, services and customers) calculated to harm the claimant and knowing that they are untrue or being recklessly indifferent to their veracity. Successful claimants can recover all the economic losses (like loss of profits, business and goodwill) shown to be a natural and reasonable effect of the falsehood.

This tort encompasses diverse types of misrepresentations, for instance, that the claimant stopped doing business, as happened in Ratcliffe. Nonetheless, malicious falsehood is limited to punishing extreme harmful commercial lies comprising a strong mental state. So, this tort is ineffective to police comparative advertising as opposed to passing-off and specific regulations. Truthful defamatory statements of unfavourable opinion about a competitor’s goods or business practices may entail the abuse of the freedom of commercial speech to divert that rival’s clientele, not malicious falsehood. Judges are unwilling to superintend the advertising process inherent to competition which is outside their function:

‘If an action will not lie because a man says that his goods are better than his neighbour’s, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted...the Courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better.’

Malicious falsehood requires the use of deceptive information supporting the defendant’s allegation of superiority over his opponents’ products: ‘All the courts will decide is whether a specific statement...concerning the plaintiffs’ goods or services is or is not untrue’. Malice does not render the comparison tortious: it must disparage or denigrate rivals’ goods or services. Misleading comparisons are insufficient: reasonable businessmen should not take seriously

vituperative, general or fuzzy claims. Malice, Cane remarks, protects competition freedom. Malice, Carty emphasises, is the limit of commercial speech freedom. Discussing the advantages of products in a market economy is socially beneficial: misinforming consumers prompts inefficient choices.

Obviously, it is a major obstacle to prove malice, namely, that the defendant made a false statement calculated to injure the claimant knowing of its untruth or being recklessly indifferent to its authenticity. Whereas the defendant’s intention to harm the claimant is not required but suffices to establish malice, which is borrowed from defamation, gross negligence (‘carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true’) falls short of malice. Furthermore, the defendant can justify her act in the pursuit of legitimate self-interest in competition. She can also prove an honest belief in the veracity of the false declaration, although the claimant can rebut it showing the defendant’s intention to harm. The defence of honest belief preserves commercial rivalry, particularly because attributing intentions to legal entities is complex. Hence Hepple suggested resorting to the tort of negligence to circumvent the troublesome proof of injurious falsehood, as courts had done vis-à-vis employers who carelessly give inaccurate references for their former employees thereby injuring them. Likewise, for Weir it was ‘entirely possible’ that case-law made competitors liable in negligence for what they say about each other.

As seen before, Ratcliffe contains one of the three dicta from Bowen LJ cited in defence of the prima facie tort theory. Bowen LJ defined malicious falsehood as ‘an action...for damage wilfully and intentionally done without just occasion or excuse’, embracing ‘falsehoods not actionable per se...maliciously published’. Much later, Roxburgh J said that "maliciously published" signalled

814 If the falsehood transmitted to third parties concerns the claimant’s person, the defendant may be liable for defamation. If the lie is communicated directly to the claimant it may involve deceit.
815 Ratcliffe (1892) 2 Q.B. 524, 527-528, Bowen LJ; Carty (2001) 156ff; Trindade/Cane/Lanney (2007) 284.
820 Hubback & Sons Ltd v. Wilkinson Heywood & Clark Ltd [1899] 1 Q.B. 86, CA, 91-92, Lindley MR.
832 Above n.401.
833 [1892] 2 Q.B. 524, 527-528.
the wilful and intentional doing of damage without just occasion or excuse and Harman I construed malice as a dishonest or improper purpose. Thus, I conclude, malicious falsehood does not incorporate wrongful means: Bowen LJ expressed that falsehoods are not actionable per se. It is purely rooted in said malice or, as Carty says, on falsehoods uttered at peril rather than on unlawful means. Yet, as Heydon noted, malicious falsehood clearly contradicts the strict-liability passing-off. To destroy a competitor's reputation by lying about her business is tortious under conditions more severe than those applicable to the stealing of that reputation by lying about one's own trade.

Although malice reflects the courts' unwillingness to regulate commercial competition and free speech through a general unfair competition tort, it seems odd that the protection of business reputation and goodwill is subjected to disparate rules of liability. However, the fact that malicious falsehood is tough to prove and easy to rebut renders it futile (as occurs with simple conspiracy) to neutralise unfair practices. Thus, the formal inconsistency between malicious falsehood and the other economic torts does not undermine but instead reflects the non-interventionist judicial policy. Put differently, although malicious falsehood lacks wrongful means its practical ineffectiveness confirms the reduced role of the economic torts in the control of commercial competition.

3. Observations

The foregoing subsections demonstrated that courts are reluctant to intervene in competition. This attitude is patent both in the confinement of passing-off to its classic elements and in the actual uselessness of the intention-based malicious falsehood. English courts recognise circumscribed instances of economic-tort liability for unfair commercial behaviour within an incremental approach. They reject an all-embracing unfair competition tort. As many argue, the common law combats unfair competitive practices through very specific causes of actions. Courts leave the regulation of business to Parliament: 'To draw a line between fair and unfair competition...passes the power of the Court'. A broad principle is perceived as a threat to legitimate strife: 'There is no tort of taking a man's market or customers...no tort of competition...It would serve only to stifle competition.' Equally, for scholars maliciously injuring competitors is not tortious unless it involves unlawful means. Similarly, in the U.S. unfair practices are mainly tackled through passing-off and the unlawful-interference tort, not through the prima facie tort. Additionally, comparative advertising is given ample room as part of free competition.

III. Conclusions

English law employs two specific economic torts, particularly passing-off, to prevent unfair practices and compensate for consequential damage. These torts perform a discrete role which reflects, first, the balance between the claimants' proprietary interests in goodwill and the defendants' freedom to compete, and secondly, the judicial disinclination to regulate commercial battle which is mainly a statutory concern. Nonetheless, whether courts ought to protect the claimant's interest in goodwill or give priority to the defendant's liberty to compete is a difficult question subject to their discretion.

The common law has relentlessly resisted the attempt to construct a general tort of unfair trading that would mirror an intention-based tort principle. At a policy level, such a tort is said to distort free competition and disturb the harmonious relationship between courts and Parliament in the handling of trade struggle. From a formal angle, courts usually, but not always, demand the classic requirements of passing-off to mitigate its likely monopolistic effects and avoid using it to extend statutory monopolies such as the IPRs. The continuous enhancement of passing-off to shield new dimensions of trade assets demonstrates that courts can deal with emerging social issues more rapidly than the statutes.

834 Joyce v. Motor Surveys Ltd. (1948) Ch. 252, Ch.D., 254.
837 Heydon (1978) 84.
840 Mogul (1889) L.R. 23 Q.B.D. 598, 626, Fry LJ.
841 Hodgkinson [1995] F.S.R. 169, 174-175, Jacob J.
problem with this, I think, is that passing-off is usually decided without the tranquillity needed to deliberate about the impact of stretching it. Courts are then more vulnerable to convert passing-off into a monopolistic device. Although this risk can be reduced through the adherence to the orthodox constituents of passing-off, this does not guarantee that passing-off will stop growing. This tort is naturally suitable for discrepant interpretations.

In turn, malicious falsehood is confined to extreme conduct involving disparaging commercial lies. The real difficulty of proving malicious falsehood confirms that a purely intention-based liability falls short of neutralising unfair practices. Neither malicious falsehood nor simple conspiracy requires wrongful means. This clearly contradicts the other economic torts. In particular, it is puzzling that commercial reputation is safeguarded through so opposite rules as the intention-based malicious falsehood and the strict-liability passing-off. Nevertheless, the practical inadequacy of malicious falsehood diminishes the real impact of that inconsistency without hindering the courts’ conservative attitude towards commercial strife. Indeed, it shows that purely intention-based torts are powerless in business competition. The common law attaches to wrongfulness.

I also demonstrated that passing-off is the prime tort against unfair competition essentially because it prevents damage from occurring through injunctive relief. Passing-off serves to vindicate the proprietary interest in goodwill the high hierarchy of which within English law explains why this tort triggers strict liability and is mainly remedied through injunctions. Although passing-off requires harm, it suffices to show the likelihood of the claimant’s goodwill being impaired, which can be proved more easily vis-à-vis trade competitors. Furthermore, I argued that passing-off entails strict-liability for outcomes but it requires deliberate conduct, just like the statutory competition torts hinge upon anticompetitive behaviour. Although passing-off departs from the other economic torts in that the defendant’s negligence or intention to harm the claimant need not be shown, passing one’s goods as if they were one’s competitors’ products cannot be done inadvertently or accidentally but only deliberately. Moreover, passing-off actually embodies the defendant’s intention to harm the claimant by luring the latter’s customers with the pretence of being selling the claimant’s goods or services. The fact that this mental state is taken for granted from the very conduct does not imply that it is non-existent. It only means that claimants need not prove it, although its presence clearly helps to show passing-off. In this sense, I think, passing-off is apparently different but substantially similar to the other economic torts. Even so, the strict-liability ascribed to passing-off reveals the pre-eminence of proprietary economic interest in goodwill over contractual rights and economic interests in business at large which are protected through the intention-based Lumley and unlawful-interference torts. Yet, passing-off too requires wrongfulness, represented by the violation of the claimant’s goodwill. The abnormal torts are simple conspiracy and malicious falsehood.

Nevertheless, I have argued for further restricting passing-off through the requirement of proof of the defendant’s intention to harm the claimant. The different types of economic interests should be endowed with equivalent protection. The current preference for proprietary interest in goodwill over contractual rights and economic interests in trade is unprincipled. Ultimately, just as competitors are not liable for merely interfering with their rivals’ contractual rights or economic expectations without acting with the intention to cause the breach of contract (Lumley) or to harm the claimant (unlawful-interference), passing-off should no longer trigger outcome-based strict liability. Ultimately, even if the demand of evidence about the mental element in passing-off did not imply a radical change in the way in which real cases are decided, proof of the said intention might nonetheless increase the formal consistency within the economic torts.
CHAPTER V
COMPETITION TORTS

So far I have considered the common-law economic torts. This chapter is devoted to the statutory competition torts that trigger liability for harm resulting from “antitrust conduct”, that is, anticompetitive agreements between enterprises that may affect trade and the object or effect of which is to prevent, restrict or distort competition in the relevant market (infringing article 81 EC and Chapter I of the Competition Act 1998), as well as harm resulting from the abuse of a dominant position in that market (infringing article 82 EC and Chapter II of the Competition Act 1998). As will be seen, these statutes have been interpreted as conferring upon individual victims a right to damages stemming from antitrust conduct, which has traditionally been alleged in England through the generic tort of breach of statutory duty. However, s.47A of the Competition Act 1998, as amended by the Enterprise Act 2002, gives any person the right to claim compensation for damages for breaches of Chapter I and/or Chapter II without the need to frame the action as a particular statutory duty.

I will show that the competition torts play a modest role in the enforcement of those aspects of antitrust law which are the public authority’s main concern. They offer compensation for harm suffered by individual rivals, whereas anticompetitive conduct hurts consumers and competitors at large. More importantly, I will demonstrate that tortious liability for antitrust conduct is strict as regards the outcome, so that claimants are released from any need to prove a mental element. However, liability is grounded in antitrust conduct that aims to affect the market in general but often targets identifiable contenders. Such a mental element need not be established in tort, as it is implied in the antitrust conduct. This confirms that liability under competition torts is contingent on the antitrust conduct established in the administrative prosecution process carried out by the EC Commission (Competition Directorate) or the Office of Fair Trading (“OFT”), which I will indistinctly call “competition authorities.”

Nonetheless, the claimants must show they have been harmed by the antitrust conduct, a process which is often complicated and in itself restrains the ambit of liability. Furthermore, I will submit that although the economic torts and the competition torts are distinct, given their diverse origins and objectives, they regulate commercial competition only discretely. Consequently, English courts are likely to apply them so as not to curtail firms’ freedom to compete.

Section I explains the cause of action whereby the competition torts can be alleged. Section II describes the legal framework within which the competition torts operate. Section III surveys private enforcement of antitrust law, its interaction with public enforcement and the main obstacles it encounters. Section IV analyses antitrust tort liability in terms of its basis and its interface with the economic torts. Section V recapitulates the key assumptions of this chapter.

I. Compensation for damages arising from antitrust conduct

This section explains the compensation to which trade rivals harmed by anticompetitive practices are entitled. It shows that, although the ECJ declared that individuals enjoy EC rights directly effective before national courts, in particular those under articles 81/82 EC (then articles 85/86 EC), English courts nevertheless paved the way for the statutory affirmation of the right to compensation for antitrust harm.

Courts developed the tort of breach of statutory duty to provide compensation to individual victims for breaches of articles 81/82 EC. Subsequently, the ECJ recognised this Community right but delegated the elaboration of the appropriate remedies to national legislatures. Eventually, s.47A of the Competition Act 1998, as incorporated by the Enterprise Act 2002, conferred on injured persons the right to claim damages for the infringement of articles 81/82 EC and/or Chapters I/II of that statute.

447 Although the authorities enforcing UK competition law include the Competition Commission (concerning mergers, particular markets and regulated sectors) and sector-regulators (for communications, gas and electricity, water, rail, airports and postal services), the investigation and enforcement of articles 81/82 EC and Chapters I/II of the Competition Act 1998 is conducted, and

152

153
1. Seeking compensation for antitrust harm in England

In Britain, compensation for antitrust harms has been pursued through conventional torts rather than novel causes of action. The possibility of remedying injuries stemming from breaches of EC competition law through damages awards was discussed in the leading case of Garden Cottage Foods Ltd. v. Milk Marketing Board. Since 1980 Garden Cottage Foods ("Garden", a small UK enterprise) had bought 90% of its demand for butter from the Milk Marketing Board ("MMB"), reselling 95% of it to a Dutch customer. In 1982, MMB informed Garden that all its sales of bulk butter for export would be managed by independent distributors (Garden's competitors). Garden applied for an injunction alleging that MMB had abused its dominant position, in violation of article 86 EC (currently article 82 EC), by forcing Garden to deal with its competitors, who charged higher prices. Parker J refused the injunction on the ground that damages provided adequate redress. The majority of the Law Lords reinstated this judgment. Lord Diplock accepted the right to injunctions and damages for breach of the directly enforceable article 86 EC. He did not reach the issue of whether the appropriate vehicle was the tort of breach of statutory duty, but did intimate that this was the case. Conversely, Lord Wilberforce refused to decide this substantial issue in an interlocutory proceeding, although he maintained that article 86 EC could only be enforced through penalties non-payable to private victims. Later case-law ratified (in obiter) Lord Diplock's opinion.

Unless the relevant statute provides expressly for a civil action for damages (which is unusual), in principle, breach of a statutory duty does not entail tortious liability. Whether the silent statute did intend to grant a civil remedy is a complex policy question to be determined by the court. The statutes say nothing about civil remedies for breaches of their provisions. The judgments of the courts say all. Liability can only be imposed if (i) the statute intended to safeguard through a civil action the relevant class of persons and for the type of injury corresponding to the particular claimant; (ii) the defendant infringed the statutory duty owed to the claimant; and, (iii) the claimant was thereby injured. Therefore, a mere causal link between the defendant's breach and the claimant's harm is no indication of the legislative intention to confer a tort action for damages. The court must examine the text of the statute, the surrounding circumstances and the precedents. All in all, the tort of breach of statutory duty is highly unpredictable. For example, while Lord Denning MR recognised a tort action whenever the defendant interfered with the claimant's business through the commission of a statutory crime against a third party, Lord Diplock plainly rejected any such a general principle, holding that whether there was a civil remedy depended entirely on the interpretation of the statute (a rule that he applied in Garden Cottage). These knotty issues apart, the tort of breach of statutory duty is independent of negligence. Hence pure economic loss is recoverable through the former tort. Likewise, the statute establishes 'an absolute obligation...to perform or forbear from performing a specified activity', unlike 'the obligation imposed by common law...to take reasonable care to avoid injuring another'. Thus, it entails strict liability.

Notwithstanding the difficulties posed by this tort, Garden Cottage confirmed that in the UK, those harmed by the infringement of EC competition

---

862 Buckley (2005) 351. See below n.1004 and accompanying text.
laws could obtain compensation through the generic tort of breach of statutory duty. This tort is also deemed coherent with EC law, as it triggers strict liability. Furthermore, the traditional requirement that the defendant should owe a duty to the claimant for the kind of loss the latter suffered is irrelevant to the breach of competition laws; the claimant may be awarded damages despite not being the defendant’s competitor. Currently, the tort of breach of statutory duty seems superfluous: the Competition Act 1998 (s.47A) clearly confers the right to claim damages before the CAT following breaches of articles 81 and/or 82 EC or Chapters I/II of the Competition Act 1998, previously established by the EC Commission or the OFT, which have binding effect upon the CAT (s.58A). Thus, the competition torts are exceptional. Statutes rarely bestow on individuals a tort-right to sue other private parties for the harm they occasioned by infringing such legislation.

2. Reaffirming the EC right to compensation for anticompetitive harm

In Courage Ltd v. Crehan the ECJ restated the right of any person harmed by conduct in breach of the EC competition provisions to claim compensation for damages. The ECJ allowed the party in weaker economic position to an anticompetitive agreement within the UK market to sue the other party responsible for injury arising from the infringement of article 81 EC. The defence in pari delicto (that is, where both parties are equally wrongful the defendant should prevail) could only succeed against a party bearing significant responsibility in the distortion of competition, considering her bargaining power and the economic-legal background of the agreement.

Thus, Courage resembles the leading American case Perma-Life Mufflers, Inc. v. International Parts Corp., which acknowledged the standing of a weaker party to an anticompetitive contract. Courage too applies to the violation of article 82 EC and/or Chapters I/II of the Competition Act 1998. The recognition of a right to a civil action had been championed as vital to enforce the direct effectiveness of articles 81 and 82 EC. Courage was a significant advancement as those provisions are silent about such right. Likewise, Courage entrusted with national legislatures the establishment of the substantive and procedural rules for exercising the right to compensation for anticompetitive harm, subject to the principles of equivalence and effectiveness.

As already seen, in England this right was traditionally framed as the common-law tort of breach of statutory duty until it was laid down in the Competition Act 1998. The principle of effectiveness was recently added to reject a claim for restitutatory damages through an action for breach of article 81 EC, the court holding that compensation imparted sufficient relief. The proposals that the ECJ dictates the remedies to enforce EC rights, and that tort principles are codified, thus enhancing private enforcement of competition law on equal level across Europe, remain to be done; or they might never be executed, due in part to the divisions between the European legal systems.

---

870 Deakin/Johnson/Markesinis (2007) 395. Another remarkable example is the Financial Services and Markets Act 2000, s.150 allowing investors to claim damages resulting from abusive trading practices (i.e., in contravention of the Conduct of Business Rules established by the Financial Services Authority) committed by financial services providers. However, this statute, as the Trade Descriptions Act 1968, protects consumers rather than competitors: Carty (2001) 1460ff; Stanton/Skimmo/Harris/Wright (2003) 399ff.
3. Observations

This section showed that today, any commercial competitor harmed by antitrust conduct can seek compensation for damages by directly invoking the Competition Act 1998, provided that the EC Commission or the OFT has conclusively asserted the infringement of articles 81/82 EC or Chapters I/II of the Competition Act 1998, a determination which is res iudicata in the proceeding before the CAT. This statutory right encompasses the competition torts. The interpretative effort made by English courts, and the ECJ, dispelled prior doubts about the existence of such right. English law imposes tort liability for breach of statutory duty if the victim proves she is within the scope of protection of the statute. This approach influenced the ECJ’s comprehension of articles 81/82 EC. The Competition Act 1998 surpassed the EC Treaty by unambiguously granting the said action for anticompetitive harm. The common law heralded the statutory recognition of this right. Comparably, as will be seen in Chapter VII, the Chilean Competition Act explicitly acknowledges this right, thus avoiding the complexities of deciphering the legislator’s intention.

II. Competition law context

This section outlines the background within which the competition torts operate. Whereas antitrust conduct affects unknown consumers and rivals who participate in a specific market, the competition torts safeguard identifiable traders from threatened or actual damage derived from said conduct.

1. Targets

The nearly axiomatic importance of competition to economic progress is manifest in the EC, UK and U.S. modern antitrust legislation. Thus, the 'Magna Carta of free enterprise', the Sherman Act 1890, penalises both monopolies and agreements in restraint of trade ("trusts") which distribute their great economic and political power among numerous small independent producers of equivalent strength. Antitrust law principally protects consumers against anticompetitive conduct. That some competitors must abandon the market or diminish their market-share is commended as an effect of a healthy economy (one that rewards the most efficient or innovative entrepreneurs), provided that consumers can acquire goods or services of higher quality at lower prices. Likewise, even those mergers which reduce costs can be fined if they are inimical to consumer interests. Precisely, Bork censured American case-law that, by shielding small business from competition, prejudiced consumers.

2. Prohibited conduct

Formerly, UK competition law was a complex and formalistic system, comprising the Restrictive Trade Practices Act 1976, the still-in-force Fair Trading Act 1973 and a variety of common-law doctrines. The Competition Act 1998, in accordance with EC competition law, rationalised this situation: it forbids and punishes anticompetitive agreements whose purpose or effect is to prevent, restrict or distort competition (Chapter I) and the abuse of a dominant position in the relevant market (Chapter II), mirroring articles 81 and 82 EC, respectively. Although mergers can also affect competition, I focus on anticompetitive agreements and abuse of dominance as the regular practices through which contenders injure one another.
manufacturers). “Vertical agreements” concern non-competitors (such as agreements between wholesalers/distributors and retailers/sellers). By definition, therefore, horizontal agreements should be more relevant to the competition torts than vertical agreements. Moreover, compared with vertical agreements, horizontal agreements are more likely to be prejudicial to consumers. Agreements fixing prices, restricting outputs or allocating markets (“cartels”) entail the most pernicious anticompetitive effects and often are the result of conspiracy. Judicial experience signposts the harmfulness and unlawfulness intrinsic to cartels. These agreements normally have an anticompetitive object which explains the severe sanctions attached to them. Furthermore, they are presumed to restrict competition, thereby relieving claimants of the heavy burden to prove of anticompetitive effects, as evident in recent case-law denying liability. The Sherman Act (s.1) declares per se illegal ‘[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations’. Similarly, Article 81 EC and Chapter I of the Competition Act 1998 prohibit anticompetitive agreements, unless they are exempted from sanction.

Conversely, vertical agreements regularly produce consumer welfare. Whether they are punished follows from balancing their positive and negative economic consequences (the “rule of reason”) along with each party’s market power. Arrangements, *inter alia*, prohibiting from purchasing of competing products, forcing parties to deal exclusively within certain geographical areas or to sell above certain prices (resale price maintenance) are commonly anticompetitive.

In principle an agreement will be deemed anticompetitive if its object is to restrict competition. When this is unclear, the court will examine the economic impact of the contract, taking into account the structure of the market and the conditions under which the parties to the covenant operate. Conventionally, the purpose of the agreement is defined as the objective meaning and aim of the contract determined through market analysis. However, Odudu argues that parties’ subjective intention (inferred from external circumstances) serves to demonstrate the anticompetitive purpose of the agreement and also discloses and prevents its likely negative effects on the market: “knowledge of intent may help the court to interpret facts and to predict consequences”. That an agreement targeted at restricting competition necessarily entails anticompetitive consequences stems from the moral principle that intended results are more likely to occur than unintended (merely foreseen) outcomes. Thus, Odudu holds, parties’ subjective intention suffices to establish that the agreement has an anticompetitive purpose. This avoids the complex proof of antitrust effects and market assessment under the rule of reason. Courts can anticipate the anticompetitive impact of the agreement at issue.

In turn, enterprises are prohibited from abusing their dominant position in the relevant market (Article 82 EC; Chapter II Competition Act 1998). Through this practice, also called “monopolisation”, the dominant firm behaves independently of its competitors, thereby excluding them from business or exploiting consumers. This conduct is not automatically unlawful. Courts must evaluate the share of the dominant firm and of its rivals in the relevant market, the entry barriers (including legal costs, access costs and irrecoverable or “sunk” costs) and the influence of the abuse on that market. This makes it difficult to distinguish predatory pricing from an efficient reduction of prices to attract consumers. Further, the law prioritises the protection of consumers against
exploitative abuses whereby the dominant firm imposes excessive (unfair) pricing and reaps monopoly profits to maintain or increase its market-position, rather than naturally responding to the economic conditions. Only secondarily does competition shield other economic agents, including competitors, from exclusionary abuses, like refusals to supply goods/services or allow access to essential facilities (that is, substitutes being unavailable or technically, legally or economically unreasonable to replicate).

3. Regulating restrictive practices

Restrictive practices are rectified by courts and statutes. In Mitchell v. Reynolds, a bond to restrain oneself from trading absolutely or in certain location without reasonable consideration was held void, as it affected the restrained party and the public interest. This decision incepted the common-law doctrine that makes illegal the agreements in restraint of trade (for instance, exclusive purchase agreements), thus favouring the public interest in competition over contractual liberty. Nevertheless, Mogul and Allen settled that restrictive practices (whether anticompetitive agreements or abuse of dominance) did not involve unlawful means for tort purposes. However, Nordenfelt reinsuored the principle, valid in contract law, that agreements in restraint of trade are void and unenforceable unless they are deemed reasonable in the interests of the parties and the public. This shows that the doctrine of restraint of trade adapts to new market conditions, economic theories and procedures, allowing courts to distinguish legitimate restrictions on commercial contracts from restrictive practices.

These practices can likewise be illegal and unenforceable by statute. Whereas American antitrust legislation reacted against the increasingly economically powerful oligopolies, English law decriminalised monopolies in 1772 and limited statutory restrictions on commerce so as to promote economic growth; the real danger was seen to be excessive (unfair) competition. As argued in Chapter III, the nineteenth-century case-law maintained a politically conservative approach to competition, as evident in the use of simple conspiracy against workers and trade unions (unlike traders) and in judicial reluctance, affirmed in Mogul, to control commercial competition. Thus, efficient competition could paradoxically depend on monopolist corporations. Parliament reacted decades later, by enacting the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. Today, restrictive practices include breaches of relevant (EC or UK) competition provisions. Interestingly, the common-law and the statutory remedies often overlap as contracts in restraint of trade frequently entail anticompetitive effects. The common-law doctrine enables courts to delete the (severable) aspects of an agreement which render it unreasonable, whereas the relevant competition provisions proscribe and declare null antitrust agreements, given their overall impact on the economy. There is a vivid debate about the relationship between both remedies which I cannot tackle here.

Finally, the common-law economic torts and the statutory competition torts serve to counteract restrictive practices in a limited way: the competition torts permit rivals to recover losses following antitrust conduct; the economic torts prevent and compensate for damage ensuing from unfair competition. Likewise, the economic torts may substitute for the competition torts that have not been or could not be claimed. Moreover, breaches of competition rules (antitrust

---

910 Hoffmann La Roche & Co. AG v. Commission of the European Communities Case 85/76 (1979) 3 C.M.L.R. 211, E.C.J.
912 (1712) 86 E.R. 637, K.B.C.
913 Treitel (2007) 713.
915 Heydon (1971) 277-278.
916 (1894) A.C. 535.
918 Pollock (1904) passim; Broder (2005) 28, 32.
919 By repealing the Statute of Edward VI (1552).
923 In Days Medical Aids Ltd. v. Pihsiang Machinery Manufacturing Co. Ltd. (2004) E.C.C. 21, the Q.B.D. dismissed an action for breach of contract based on article 81 EC brought by a distributor against a manufacturer, holding that provision to exclude the alternatively-alleged restraint-of-trade doctrine. See: Bellamy (2007) 388. CE/Lucy (2007) passim (suggesting that this doctrine can coexist with competition law, as it renders restrictive practices unenforceable without prohibiting them).
anticompetitive acts by compensating the sustained by identifiable businesses as a result of antitrust conduct affecting consumers and rivals at large. Antitrust conduct is a deliberate act targeted at damaging anonymous persons. As apparent in anticompetitive agreements, the parties’ intent, the purpose and the effect of such arrangements are closely related.

III. Private enforcement of competition law

I will now demonstrate that, in preventing and compensating for damage derived from antitrust practices, the competition torts can be used merely to help the competition authorities in prosecuting, deterring and punishing such misbehaviour. I will suggest that the competition torts play a moderate role in this context. Tort litigation is likely to occur only after anticompetitive conduct is asserted. Moreover, the fact that the competition authorities concentrate on the most serious offences reduces the ambit of antitrust tort litigation. The complexity of proving causation and harm, along with the lack of incentives such as extra-compensatory damages, also aid to reduce antitrust tort litigation.

1. Generalities

The EC Commission and the OFT are entrusted with the enforcement of EC and UK competition laws, respectively. It is their task to declare infringements and punish antitrust practices through, for example, penalties, directors’ disqualification or imprisonment. Tort law simply assists the competition authorities, sometimes by dissuading potential infringers from committing anticompetitive acts but especially by compensating for the losses sustained by known competitors or consumers. The threat to initiate tort proceedings and obtain redress (injunctions, damages awards and restitution of defendants’ unjustly earned profits) may deter antitrust conduct, as long as there are judges able to interpret and apply the rules clearly and consistently. Empirical research shows that tort claims can prevent anticompetitive conduct, the rules prohibiting anticompetitive practices influence the volume of litigation and certain procedural safeguards curb unfounded lawsuits.

Nonetheless, antitrust-tort case-law remains sparse in Europe, even though potential claimants can seek injunctions and damages for breach of articles 81 and 82 EC. The predominant task of the regulators and competition authorities seems to reveal a state-dependent mentality in competitors and consumers, whereas in an aggressive litigation culture such as America, antitrust law is fundamentally implemented through tort actions. The paucity of private enforcement in Europe also responds to the absence of treble-damages, the lack of resources and investigatory powers of private litigants, and the adversarial nature of tort proceedings (disputes being confined to the allegations and evidence supplied by the parties, thereby excluding wide-ranging interests). Let alone the high litigation costs burdening losing parties and the prohibition of contingency fees agreements. In the last four decades, there have been no more than fifteen final judgments entered in the UK, the claimant succeeding on only one occasion.

827 See, in Salop/White (1985) passim, the “Georgetown Private Antitrust Litigation Project” (reviewing over 2,000 tort-claims filed in U.S. district-courts between 1973 and 1983).

References:

Many cases are settled out-of-court on confidential terms. The threat to commence tort proceedings perhaps prevents anticompetitive conduct, but private parties are averse to initiating litigation with uncertain prospects.\(^{53}\)

The competition torts essentially compensate for individual harm and only indirectly (or, paraphrasing Komninos, ‘reflexively’)\(^{93}\) promote compliance with antitrust legislation. Accordingly, tort claims normally follow the assertion of antitrust conduct: “stand-alone” tort lawsuits are exceptional.\(^{55}\) One reason for this is that the infringement declared by the EC Commission or the OFT is res \textit{indica\textsuperscript{a}} for subsequent tort cases.\(^{96}\) thus confining proof to damage and causation. Consequently, waiting to litigate until after the antitrust conduct is declared in a regulatory context can drastically reduce the cost and uncertainty of litigation.\(^{97}\) Conversely, stand-alone claimants have no access to the evidence gathered (if any) by the competition authorities and can only bring their actions (probably framed as breach of statutory duty) before the Chancery Division.\(^{98}\)

Stand-alone claimants therefore usually prove the antitrust conduct through a sophisticated market assessment. For example, \textit{Arkin v. Borchard Lines Ltd}\(^{99}\) rejected a stand-alone allegation of predatory pricing. The defendant had not been shown to have intended to depredate the claimant from the business and the claimant failed to mitigate its own losses by leaving the market or seeking injunctive relief.\(^{94}\) However, the High Court can stay proceedings until the public investigation concludes, so prospective claimants will likely take advantage of that investigation.\(^{94}\) Indeed, stand-alone actions can be more useful as defences or counterclaims against actions for breach of anticompetitive contracts. Stand-alone actions are less attractive as private parties cannot participate in the public investigation or access the evidence disclosed therein.\(^{94}\) Conversely, the competition authorities possess wide inspection and correctional faculties, as well as the ability to evaluate the economic impact of antitrust conduct through market analysis, all of which cannot easily be achieved in civil proceedings. The competition authorities have access to a significant range of evidence, usually by “dawn raids”. However, political and budgetary concerns mean that public prosecutions are directed at the most serious offences, thereby affecting the intensity of private enforcement.\(^{94}\) Private litigants may claim damages arising from any kind of anticompetitive practice, including ones with minimal public impact.\(^{94}\) Yet, it is implausible that private litigants regularly complain of trivial conduct that will not probably be investigated and could therefore only be remedied through stand-alone actions. The success of public enforcement determines the range of tort lawsuits commenced.

2. Avoiding the abuse of private competition-law enforcement

This section proposes that the competition torts should be accorded limited scope in this area and that procedural and substantive techniques help to prevent their being perverted. Tort actions can be misused against non-essential offences, given the difficulty in identifying antitrust behaviour and the malleability of competition law. Unmeritorious claimants can secure monopolistic positions at their rivals’ expense. For example, mergers can diminish competitors’ profits but enhance surviving companies’ efficiency (via economies of scale), thereby lowering prices to consumers’ benefit.\(^{94}\) American antitrust tort litigation has often been employed as a business strategy: firms can intimidate competitors by suing them for treble-damages and force risk-averse defendants to conclude confidential

---


\(^{96}\) S. 5A, Competition Act 1998. In America, the verdicts in government antitrust investigations are \textit{prima facie} evidence in further tort proceedings: s.5(a) Sherman Act.


\(^{100}\) Milutinovic (2007) passim.

settlements in exchange for not modifying their anticompetitive methods. Claims usually target minor anticompetitive conduct, such as vertical agreements, as opposed to cartels.\textsuperscript{946} The abuse of tort lawsuits leads to lengthy, costly and complex trials (especially as regards measuring, tracing and apportioning damages), multiple payments (diluted among numerous claimants) and inconsistent or erroneous decisions.

To prevent or lessen this problem, American courts assess the merits of the claims, evaluate the possible pro-competitive impact of the conduct at stake and limit\textit{ locus standi} at the beginning of proceedings.\textsuperscript{947} First, the claimant must prove that she suffered harm and that it flowed directly from the defendant's conduct ("antitrust injury"). The claimant must be an intended victim belonging to the class of persons (or the economic sector distorted by the antitrust conduct) that the statute was designed to protect.\textsuperscript{948} Second, "antitrust standing" is limited to those who directly purchased from the defendants\textsuperscript{949} or their competitors. So, again, claimants must show an interest protected by the statute. Conversely, indirect purchasers lack standing regardless of whether they were intended victims.\textsuperscript{950} Analogously, courts reject the "passing-on defence", by which defendants seek a reduction in the damages payable proportional to the overcharges that claimants (direct purchasers) paid to defendants and then transferred to indirect purchasers.\textsuperscript{951}

Direct purchasers are permanently and closely related to wrongdoers, so they can prove antitrust conduct and harm more easily than indirect purchasers.\textsuperscript{952} Moreover, the costs of litigation often exceed the damages that indirect purchasers can expect to receive.\textsuperscript{953} The level of optimal deterrence of antitrust conduct can only be attained if standing is limited to direct purchasers. Thus, direct purchasers

would not relocate but reduce the higher costs incurred due to the antitrust conduct, indirect purchasers thereby paying lower prices.\textsuperscript{954} For others, the real reason for the restrictions on standing is judicial unwillingness to handle highly sophisticated and substantive litigation.\textsuperscript{955}

The denial of standing to indirect victims seems sensible, as they suffer damage too unimportant and hard to prove to be worth suing over, at least individually. In addition, the lack of class actions can render impossible or excessively difficult the exercise of the EC right to compensation for anticompetitive damage, thus contrasting with the plethora of American economic-tort cases, including mass torts and breach of contract, litigated through class actions.\textsuperscript{956} Still, if indirect purchasers had legal standing and defendants could raise the passing-on defence, direct purchasers might not sue in the first place: antitrust conduct would be under-deterted.\textsuperscript{957} The CAT has confined\textit{ locus standi} to direct purchasers.\textsuperscript{958} Some propose reducing compensation (by not allowing treble-damages and class actions) for the most severe anticompetitive practices, using injunctions as the chief remedy.\textsuperscript{959}

The American experience suggests that keeping antitrust tort litigation within strict bounds can be a sound solution. However, in the UK, the extension of standing to indirect purchasers is supported by\textit{ Courage}\textsuperscript{960} and the passing-on defence can prevent claimants from unjustly enriching themselves by transferring their losses to indirect purchasers.\textsuperscript{961} Nonetheless, the troublesome calculation of the losses passed by direct purchasers to indirect purchasers poses doubts about the use of the passing-on defence otherwise than against those who overpaid taxes and transferred them to their customers.\textsuperscript{962} It has been proposed that indirect purchasers should be able to recover overcharges in the same proceedings brought by direct purchasers and using the evidence gathered therein.\textsuperscript{963}

\textsuperscript{946} Austin (1978) passim; Snyder/Kauper (1991) 551ff.
\textsuperscript{948} Bruntwick Corp. v. Paublo Bowl-O-Mat, Inc. 429 U.S. 477 (1977); the defendant bought the claimant’s competitors’ businesses driving the claimant out of the market, the court holding that the claimant’s lost profits had not derived from the antitrust conduct. See: Page (1980) passim; Areeda/Kaplow (1997) 77, 85-86; Jones (1999a) 13ff.
\textsuperscript{951} Hanover Shoe, Inc. v. United Shoe Machinery Corp. 392 U.S. 481 (1968).
\textsuperscript{952} Page (1985) passim.
\textsuperscript{954} Landes/Potter (1979) 601ff, 634-635.
\textsuperscript{955} Berger/Bernstein (1977) passim.
\textsuperscript{956} Roin/Monour (2006) passim.
\textsuperscript{957} Beard (2005) 274ff.
\textsuperscript{958} BCL Old v. Aventis (2005) CAT 2.
\textsuperscript{959} Reich (2005) passim; Furse (2008) 144.
\textsuperscript{960} (2002) Q.B. 507.
\textsuperscript{962} As suggested in Kleinwort (1997) Q.B. 380 and resolved in Marks & Spencer Plc v. Commissioners of Customs and Excise [1999] 1 C.M.L.R. 1152, Q.B.D.
\textsuperscript{963} Petrucci (2008) passim.
3. Specific difficulties

Antitrust tort disputes involve complex factual, economic and policy issues. Courts must compare the pro-competitive and anti-competitive effects of prohibited conduct and weigh legal certainty against economic efficiency. For present purposes, three particular problems deserve attention and are briefly addressed below.

3.1 Harm and causation

Unlike indirect purchasers, competitors can claim damages through the antitrust torts. Yet, they must prove injury due to the defendant’s anticompetitive conduct as distinct from the harm suffered by consumers and markets generally. Causation and harm are essential constituents of the competition torts; the need to establish these elements deters irresponsible litigation. Notably, these issues were left undecided in *Courage*. Proving antitrust harm and causation entails a hypothetical inquiry: would the claimant have made a profit had it not been wronged by the defendant? Causation is crucial to determine the defendant’s liability and the claimant’s standing. Hence, Milutinovic has suggested that causation should be defined at the outset of proceedings. Likewise, to estimate the amount of lost profits is often complicated. American courts require proof that the claimant’s harm flowed from the anticompetitive aspect of the defendant’s conduct, though they do not demand evidence of the exact amount sought. The defendant cannot profit from his wrong on the pretext that the claimant failed to prove her injury with precision. A just and reasonable estimation suffices, comparing actual harm against the profit that the claimant would otherwise have obtained. Expert testimony is crucial to persuade judges and juries that the methods for showing speculative profits were based on the facts. In *Devenish*, Lewison J was prepared to award an account of illegal profits given the harsh proof of harm.

3.2 Remedies

The competition torts provide compensation for harm flowing from antitrust conduct. Although damages can be claimed in the CAT or the Chancery Division, the CAT seems preferable, given its members (economists, accountants, well-versed judges and practitioners in private litigation) and the fact that its jurisdiction is confined to awarding damages. The High Court considers itself less prepared to handle the complex economic questions involved in assessing damages and can transfer to the CAT cases involving the infringement of UK competition rules. However, the hard calculation of damages often precludes compensation.

By contrast, injunctions are crucial to prevent anticompetitive conduct. The High Court has exclusive jurisdiction to grant injunctions subject to the applicant’s undertaking to pay damages if the action is later found to be groundless. The court must assess the risk of injustice to each party, preserving the *status quo* if both parties would equally be affected. Likewise, the court has to check that damages are not adequate, that there is a serious issue to be tried and that the claimant undertook to compensate the defendant if the action were to be rejected.

---

A central concern is how to calculate the adequate amount of fines, so as not to discourage efficient conduct but still deter antitrust practices. Lawyers and economists have extensively discussed the impact of penalties on private enforcement, particularly of punitive damages on antitrust tort actions. Landes and Posner argued that higher fines (as in treble-damages) increased private enforcement and the probability of detection above the optimal level. Polinsky and Shavell maintained that to accomplish optimal deterrence, punitive damages should represent the product of the claimant’s loss and a factor that reflected the likelihood of escaping liability, regardless of the gravity of the offence or the defendant’s wealth. Yet, Hylton recommended a fixed minimum award that would mirror the chance of anticompetitive conduct being disclosed and tort liability imposed. If the defendant’s profits exceed the claimant’s losses exemplary damages perform a punitive role: they compel the defendant to internalise such loss. Otherwise, exemplary damages dissuade potential wrongdoers from acting altogether.

The ECJ has not indicated how to achieve the compensatory ideal proclaimed in Courage. The principle of effectiveness demands full compensation. Conversely, the principle of non-discrimination prohibits national laws from enforcing EC rights through remedies less favourable than those governing domestic actions. So, English courts should award exemplary damages for the Euro-torts, as these damages are allowed vis-à-vis the English competition torts. Exemplary damages can protect against the abuse of market-power and prevent defendants from profiting by antitrust conduct. Yet, although Buxbaum had suggested limiting punitive damages awards to serious infringements, Devenish dismissed exemplary damages notwithstanding that the defendants had obtained their illicit gains through a cartel, conduct which would seem to fit Lord Devlin’s secondary category of exemplary damages. The court wanted to prevent double jeopardy. The defendants had already been fined by the EC Commission.

3.3 Exemplary damages

Chapter II showed that exemplary damages are contentious in tort law generally. I will now demonstrate that they too are polemical in the competition torts. Punitive (and extra-compensatory, that is, treble) damages are blamed for exacerbating irresponsible litigation and for discouraging infringers from denouncing anticompetitive practices, thereby undermining public prosecution and leniency programs. Conversely, it is proposed that the regulator determines the level of optimal punishment. Furthermore, punitive damages dissuade victims from avoiding or mitigating damage.

Others argue that extra-compensatory damages deter antitrust conduct by providing claimants with a potent financial reward. In particular, treble-damages foster private litigation which supplements public prosecution to achieve the optimal degree of prevention and punishment. Multiple-damages awards are efficient, as they are inversely proportional in the amount payable to probability of discovering antitrust conduct. In fact, Beccaria and Bentham proposed that the lower the chance of detecting and punishing misbehaviour the higher the penalty should be. Punishment serves deterrence if it is proportional to the offence. Similarly, Becker argued that economic efficiency and optimal deterrence could be achieved if, before undertaking a given activity, wrongdoers internalised the social costs arising from their misconduct, less the likelihood of being punished.

---

981 Robin (2005) passim.
984 Baumol/Ordover (1985) 263.
985 '[T]he disadvantage of the punishment should exceed the advantage anticipated from the crime; the expected in which excess should be calculated the certainty of punishment and the loss of the expected benefit', Beccaria (1764)/1996 49-50. 'The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence', Beccaria’s Dei Delitti e Delle Punizioni (1764, 1996), Ch.XIV, §8, trans. §6, French trans. by André Morellet, §23, quoted by Bentham [1781]/1996 Ch.XIV, §8, 166. For Bentham (ibid), i.f, the offence was nonetheless committed the punishment would be altogether ineffectual.
986 Becker (1968) passim.
Although they were exempted from the penalty: they were whistler-blowers protected by the leniency program.\textsuperscript{996} Competition authorities depend on individuals denouncing their own firms' antitrust practices, so the authorities encourage whistle-blowers via the promise of release from or reduction of fines.\textsuperscript{997}

Currently, \textit{non bis in idem} is conclusive for rejecting exemplary damages where the antitrust conduct has already been punished (or even if the fine was released under the leniency program), which is the likely scenario considering that tort actions will usually follow public prosecution. Yet, as argued in Chapter II, exemplary damages aid in depriving defendants of profits illicitly obtained through antitrust conduct, a function distinct from retribution. So, just as Devenish has been criticised for refusing gained-based damages,\textsuperscript{998} this decision is questionable in that it denied exemplary damages despite the defendants having acted with a view to profiting from their wrong. Admittedly, this conclusion is not supported by empirical evidence about the effectiveness of punitive damages as a deterrent. Still, as Kominos implies, exemplary damages belong to the category of private enforcement, whose mission differs from that of public enforcement.\textsuperscript{999} Thus, punitive damages do not in fact entail double jeopardy.

\textbf{4. Observations}

The competition torts help competition authorities to enforce antitrust laws, but play a secondary role. Potential claimants are likely to take advantage of the evidence gathered in public investigations and the binding force of the judgments asserting anticompetitive practices. Actions for damages will probably follow public prosecutions, and are therefore likely to involve the most serious offences. Areas of dispute in tort litigation will be reduced to the issues of causation and harm. However, claimants may be more interested in enjoining defendants, thereby avoiding the harm altogether. Then, although actions for damages are critical, injunctions can also be significant.

\textsuperscript{996} Devenish (2008) 2 All E.R. 249, at [48-52], Lewison J.
\textsuperscript{998} Odudor/Virgo (2009) passim; Sheehan (2009) passim.
\textsuperscript{999} Kominos (2008) 21-22.

Antitrust tort liability should be constrained within narrow bounds. This can be attained by confining \textit{locus standi} to those able to prove both direct harm and causation: competitors and direct purchasers. Exemplary damages can be a powerful incentive to litigate and a means of stripping defendants of their illicit gains. They can also discourage defendants from acting with a view to profiting from antitrust activities.

\textbf{IV. Competition torts}

Legal scholarship has focused on the competition torts as a mechanism for enforcing competition law and, at any rate, without much attention to the mental element that is my primary concern. I shall submit that the competition torts trigger strict liability for harm although they revolve around deliberate conduct that defendants often commit with the intention to injure individual rivals. The intention to harm identifiable victims need not be shown. It is implicit in the antitrust conduct that has already been punished by the competition authorities. The competition torts form a civil remedy for damages awarded to the particular victim of antitrust conduct, as a supplement to the public enforcement of competition law. Furthermore, I will contend that English courts are likely to apply the competition torts with their habitual circumspection: outcome-based strict liability does not in itself impair competition.

\textbf{I. The nature of antitrust tort liability}

The ECJ declared that fault is immaterial to the administrative sanctions triggered by infringement of articles 81 and 82 EC.\textsuperscript{1000} Yet, whether liability for antitrust harm is fault-based or strict was not clarified in \textit{Courage} but in \textit{Manfredi v. Lloyd Adriatico Assicurazioni SpA}.\textsuperscript{1001} Liability presupposes the breach of competition rules, harm and causation. Whish argued that because Member States must answer for the harm caused by violations of non-directly-effective EC provisions,\textsuperscript{1002} individuals should obviously be liable for the injury arising from the breach of the

\textsuperscript{1002} Francovich v. The Republic (Italy) Joined Cases C-6/90; C-9/90 [1993] 2 C.M.L.R. 66, ECJ.
directly applicable articles 81 and 82 EC. The underlying rationale of strict liability is, I think, the same as that of breach of statutory duty: strict liability is imposed because the defendant infringes a specific statutory duty (as articles 81 and 82 EC) which must be observed in absolute terms. Similarly, states are strictly liable for harm caused by actions in excess of their legislative discretion; otherwise, a "sufficiently serious breach" is required.

Strict liability is morally justified in that tortfeasors must answer for their acts. Legitimate activities become wrongful given their undesirable effects. The causal link between the defendant’s conduct and the victim’s harm is the gist of liability. Nevertheless, some consider fault-based liability to be a better deterrent of anticompetitive practices than strict liability, although negligence is indeed presumed from breaches of competition statutes. For Law and Economics, the choice between fault and strict liability is contingent upon the legal costs (like compensation) and precaution costs that each regime generates. Thus, tortfeasors lack an incentive to be careful if avoiding harm is more expensive than causing it. In this case, the defendant would not be liable in negligence (according to the Hand formula), so strict liability may be the only way by which victims can secure compensation. The choice is also determined by the class of risk involved. If the risk can only be prevented by prohibiting victims from acting at all, defendants should not be held liable. Strict liability offers full compensation and serves to control the level of hazardous activities regardless of the defendant’s blameworthiness, whereas fault liability can be more efficient as regards non-dangerous activities, encouraging victims and injurers to achieve the optimal standard of precaution.

The economic torts reflect a compromise arrangement to exclude negligence, which also touches the competition torts. Rivals cannot be liable in fault, for they owe no duty not to carelessly or intentionally harm one another. This explains the general denial of compensation for negligently inflicted pure economic loss. Likewise, fault liability is excessive: competitors would answer for all the losses that a reasonable person would have foreseen as likely effects of the antitrust conduct, even to indirect victims (such as final consumers). On the other hand, EC law does not make liability dependent on the defendant’s intention to harm a particular competitor. This intention can be extremely difficult to show, as competitors necessarily target each other. Even the objective intention to drive rivals out of the business can be hard to prove through economic evidence such as market analysis. In turn, strict liability is supported by the wording of articles 81 and 82 EC. These provisions impose unequivocal prohibitions without leaving addressers any margin of discretion. Further, the Competition Act 1998 does not subject the recovery of damages to fault or intention. As seen, the most accepted tort to claim damages for breach of EC (and UK) competition provisions in England is breach of statutory duty, which triggers strict liability. Conversely, in Spain and France this class of liability is rooted in the defendant’s fault, proved by the claimant or presumed from the breach of statute, respectively. In my view, this species of tortious liability is neither grounded in negligence nor in bare causation of harm. Rather, it is strict liability for harmful consequences underpinned in deliberate (antitrust) conduct targeted at undermining competition generally. Moreover, antitrust conduct often implies the defendant’s intention to harm a recognisable opponent. Yet, for pragmatic reasons

---

1003 Whish (1994) 64.
1004 See above 664 and accompanying text.
1008 See above n.317.

---

1012 See above Chapter II, section III, pp.42ff; Steiner (1987) 110; Stannett/Skidmore/Harris/Wright (2003) 270.
1014 See above 664 and accompanying text.
1015 See above 664 and accompanying text.
the competition torts entail strict liability for outcomes: the claimant need not show that the defendant intended to injure him.

Konninos recently wrote that antitrust tort liability is strict given its compensatory function, whereas antitrust administrative liability requires the defendant’s fault or intention, as it fulfills punitive and deterrent aims. This confirms that antitrust conduct is intentional. Thus, just like passing-off, the competition torts presuppose deliberate conduct and often the intention to harm a discernible rival, which need not be demonstrated. The best example and most conspicuous form of abuse of dominant position, which incorporates the defendant’s intention to eliminate its contenders, is predatory pricing. This is reflected in the competition torts. Although the intention to drive competitors out of the market is conceptually distinguishable from the intention to injure a particular person, predatory pricing usually injures one or a few known adversaries. Thus, predators commonly intend to harm concrete competitors.

Unilaterally cutting prices is ‘the very essence of competition’ unless its goal is to eliminate rivals. However, to show that the defendant targeted at a particular competitor is complex. Striving for efficiency and consumer welfare involves a desire to defeat rivals. Accordingly, proof revolves around the negative impact of the abusive conduct on the market. Thus, McGee saluted the result in Mogul, since the defendants had caused no social loss through their predatory practice which ceased before the case concluded. Predatory pricing is usually irrational conduct, as in Tuttle, and an expensive way to gain market power. In America and in the EC, the defendant’s abuse of dominant position in the relevant market is inferred from the fact of selling products at loss, namely, below the average variable costs (“AVC”), with the intention of expelling rivals from the market. Furthermore, the CAT asserts that the longer a (super) dominant firm sells its products below AVC the easier is to presume the intention to exclude competitors. To sell at prices below the reasonably anticipated AVC is, some contend, per se unlawful. However, American courts also demand evidence of the defendant’s ability to recoup the losses incurred to sell below costs through the exercise of market power in the long term. Conversely, the ECJ had not required such proof. Whish suggests that this element should be proved if the defendant lacks considerable market power and an intention to eliminate rivals is not patent.

Nevertheless, the association between both kinds of intention may not be so evident in other types of antitrust behaviour. A hard-core cartel has the object or effect of distorting competition, rather than the intention of injuring single rivals. Even so, the fact that antitrust conduct is deliberate and intended to undermine competitors, if not concrete rivals, reveals that the competition torts do not sanction the infliction of harm pure and simple. These torts entail strict liability for harm but rest on deliberate conduct. As Tune put it, intention-based liability serves to repress deliberately-inflicted harms which the agent could have avoided. Conduct-based strict liability is irrelevant. Competition is not an abnormally dangerous activity but often produces social benefits regardless of the individual losers it inevitably creates. As argued, the outcome-based strict liability in the competition torts has a pragmatic justification: claimants are heavily burdened with proof of individual harm directly caused by the defendant’s antitrust act, as separate from the negative impact that the latter had on the market, consumers and competitors generally. As Cane indicates, the difficulty of showing the defendant’s intention explains the imposition of outcome-based strict

---

1096 This conduct: ‘has the reasonably foreseeable result of driving a rival from the market’; ‘goes beyond a normal competitive response’; ‘is disproportionate to the threat’; and ‘has the object or effect of preserving or strengthening a dominant position’. Claymore Dairies Ltd v. OFF [2005] CAT 30, at [270]. See: Thompson/O’Flaherty (2008) 962.
1097 Matsushita 475 U.S. 574, 594, Powell J.
1099 McGee (1958) passim.
1102 Tune (1974) 86.
liability. Otherwise, the chance of being compensated would be excessively reduced.\textsuperscript{1034}

The economic torts and the competition torts have diverse sources and underlying policies.\textsuperscript{1035} Courts create the economic torts as a means of restraining liability in line with competition freedom. Hence the economic torts involve a certain form of intention and (with exceptions) wrongful means. The competition torts are a legislative invention whereby individual victims can obtain compensation for the economic harm they have suffered from another’s antitrust conduct. These torts supplement the public enforcement of competition law. However, these differences do not preclude the common law from approaching both categories of torts consistently. As suggested elsewhere, English courts are likely to implement the competition torts as cautiously as they do the economic torts and, therefore, remain immune to the influence of EC law.\textsuperscript{1036} Moreover, the hard proof of harm and causation effectively restricts the prospect of compensation. As with the economic torts, the competition torts play a limited purpose in business rivalry.

2. The overlap with the economic torts

Steiner proposed to redress anticompetitive harm through the economic torts so as to keep liability within manageable boundaries, thereby excluding compensation where damage was a side-effect of legitimate competition.\textsuperscript{1037} Hoskins and Whish suggested that the tort of breach of statutory duty was no help in ascertaining causation, that is, whether the claimant’s harm derived from the defendant’s antitrust conduct or from other facts, such as the claimant’s own fall in productivity or failure to react to market conditions.\textsuperscript{1038}

It has been postulated that antitrust harm could be claimed through the unlawful-interference tort, inasmuch as the defendant had intended to harm the claimant, for example, by driving the latter out of the market or preventing her from entering the business through predatory pricing.\textsuperscript{1039} Anticompetitive conduct can shape the element of wrongfulness in the three-party unlawful-interference tort. The breach of competition law is autonomously actionable (through the competition torts) by the third party (direct victim), thus complying with the requirement established in \textit{Ong}.\textsuperscript{1040} Moreover, it is clear from both the ECJ’s case-law and the English law that anyone harmed by antitrust conduct has the right to seek compensation. Nonetheless, although application of the unlawful-interference tort provides consistency and legal certainty,\textsuperscript{1041} as seen before the scope of wrongfulness varies noticeably between the economic torts. Likewise, antitrust conduct can also underpin liability under the torts of three-party intimidation and unlawful means conspiracy.\textsuperscript{1042} Conversely, simple conspiracy seems ineffective to handle commercial competition.\textsuperscript{1043} Finally, although some courts and authors extend \textit{Lumley} to inducing breaches of EC law,\textsuperscript{1044} I think that a more reasonable approach is to limit \textit{Lumley} to inducing breach of contract.

Nowadays, under the Competition Act 1998, antitrust harm is clearly compensable in tort without proof of the defendant’s fault or intention. The economic torts are subsidiary. In the U.S. some postulate a doctrine unifying the competition torts and the economic torts around commercial practices and compensable damage.\textsuperscript{1045} However, in England both sets of torts form separate categories with different sources and goals. The economic torts, with their mental and wrongfulness components, reflect the courts’ indisposition to control commercial rivalry. The competition torts belong to the regulatory system designed to punish and deter antitrust conduct, which partly explains that they entail outcome-based strict liability. These torts are rooted in deliberate conduct that is targeted at preventing, restricting or distorting competition at large, although it often embodies the defendant’s intention to harm a particular rival. Once antitrust conduct is asserted by the public authority, the claimant does not have to demonstrate any intentional element, because it is presumed from the

\textsuperscript{1035}Cane (1996) 50. 
\textsuperscript{1037}Steiner (1987) 59. 
\textsuperscript{1038}Hoskins (1992) 260-261; Whish (1994) 64-65. 
\textsuperscript{1040}[2008] 1 A.C. 1, at [44], Lord Hoffmann. 
\textsuperscript{1042}Jones (1999a) 122-123. 
\textsuperscript{1043}See above n.467 and accompanying text. 
\textsuperscript{1044}Hollerman (1989) 2 C.M.L.R. 917, at [31]; Gibson J; Reid (1998) 141ff. 
\textsuperscript{1045}Waller (2003) 59.
antitrust conduct. In addition, as many have argued,\textsuperscript{1046} to require evidence of a specific intention would be exaggerated, given the dearth of antitrust case-law and that claimants are heavily burdened with proof of damage and causation. Yet, the economic and competition torts play all a marginal role in business struggles. Moreover, British courts are likely to enforce them with their usual prudence.

3. Observations

This section showed that the competition torts generate strict liability for consequences, although it is rooted in deliberate conduct. Accordingly, fault-based liability is ousted. Antitrust conduct is targeted at the market itself but regularly entails the agent’s intention of harming recognisable adversaries. Such intention need not be verified in tort proceedings because it is latent in anticompetitive conduct. Not only is liability sufficiently restrained through the requisite damage and causation, but also the defendant’s intention to injure the claimant can irrebuttably be inferred from the fact that the antitrust conduct specifically hurt the individual claimant. As a result, the competition torts are simply an adjunct to competition law.

Antitrust conduct can form the wrongful means in the principal economic torts. Yet, it appears improbable that, assuming that the competition authority has conclusively stated antitrust conduct, the competition torts will be displaced by the economic torts. This is for the economic torts require proof of the facts and of the defendant’s intention. Nevertheless, the peculiar structure and goals of the competition torts do not impede the CAT and the ordinary courts from applying this kind of tort liability with the caution traditionally observed in the economic torts.

V. Conclusions

The competition torts make a limited and indirect contribution to the prevention and punishment of the transgression of competition rules. Antitrust law is mainly enforced by the public authority. A central motive for this imperfect function lies in the nature and rationales of tort law, as distinct from those of competition law. The competition torts particularly help to compensate for the economic harm occasioned by anticompetitive conduct to particular traders. Yet, antitrust behaviour largely impairs consumers and competitors in general: only concomitantly can it injure recognisable entities. Moreover, the benefit that tort claimants obtain from a successful public investigation of antitrust conduct exceeds the service that tort law renders to the competition authority: tort actions follow and hinge on the conclusive declaration of antitrust conduct. Consequently, tort litigation is confined to the most serious offences, those which drew the public authority’s attention. Thus, arguments in litigation concentrate on damage and causation, which has the effect of restricting tort claims to those parties able to prove these complex issues, namely, direct purchasers and competitors.

The main thrust of my argument is the mixed nature of antitrust tort liability. The core is deliberate conduct whose object or effect is to hurt indeterminate economic agents within a specific market, but which can also incorporate the intention to harm identifiable rivals. The effect is strict liability for the harm caused to an individual claimant. The defendant’s intention to injure the claimant need not be proved: the requisite state of mind is implicit in the antitrust conduct and is also inferred from the fact that this act distinctively harmed the concrete claimant. This confirms that the competition torts form an appendix to competition law. They complement the legislative regulation of antitrust conduct that protects numberless consumers and contenders. Nevertheless, as compared with the economic torts, the competition torts do not make things easier for claimants. It can be intricate to identify the harm sustained by a particular claimant from the negative impact of the antitrust practice upon countless unknown victims. Ultimately, English courts are likely to administer antitrust tort liability with their common reluctance to assume legislative powers in commercial strife. It is this \textit{laissez-faire} approach (which may often have the effect of promoting competition) that brings the economic torts and competition torts together. Tort law in general plays a modest role in the realm of business rivalry. Specifically, the competition statutes allow individual victims, especially adversaries, to sue for harm arising out of antitrust breaches, whether in contract or in tort. What makes this remedy unique is that it originates in public (competition) law as contrasted with the common-law economic torts.

CHAPTER VI
FUNDAMENTALS OF CHILEAN TORT LAW

This chapter attempts to describe the basic principles of Chilean tort law. It claims that, for the sake of consistency with the existing law and as a matter of legal policy, Chilean courts and jurists should weigh victims’ right to be compensated for pure economic loss flowing from commercial competition against wrongdoers’ liberty to compete. I will argue that tort liability involving business rivals should not be regulated by the overall principle of *culpa* but limited through requiring that the defendant causes economic harm to the claimant with intention or gross negligence. I will contend that this kind of misconduct discloses the abuse of the right/liberty to compete, whereas carelessly caused economic harm is just a side-effect of legitimate competition. I will suggest that, although Chilean courts have traditionally restricted compensation for negligently caused economic losses for lack of causation or for uncertainty of damage, this method is unsuitable for trade opponents who owe one another no duty of care.

Section I introduces the sources of tort law, emphasising the practical importance of legal scholarship and case-law for the development of this field. Section II underlines the central principles and functions of Chilean extra-contractual civil liability. Simple fault is the default rule in most areas of tort law but cannot adequately manage liability for harm arising from business competition. In this domain liability should be limited through the defendant’s intention to harm the claimant or at any rate gross negligence, both of which simultaneously increase compensation to all direct losses. Section III infers what the Chilean courts’ approach towards compensation for pure economic loss would be by analysing the existing case-law. Section IV reviews the meaning and impact of the abuse of rights as a specific fount of tort liability as well as a defining feature of unfair practices and anticompetitive conduct. Section V assesses the justification for wrongfulness and breach of statutory duty with respect to *culpa*.

Section VI sets out the chief conclusions.

1. Overview

This section describes the legal sources of Chilean law. Although case-law and legal doctrine are secondary formal sources they are in practice critical to elaborate the law of delict from the general rules enshrined in the Chilean Civil Code (“CHCC”). Hence the influence of these sources upon this thesis. Further, a consistent case-law is fundamental to achieve legal certainty and justice.

1. Legislation and the CHCC

It is validly argued that the 1789 French Revolution and subsequent codification influenced the political independence alongside the inception of new and rational law in Latin America. The CHCC (1855), perhaps the most authoritative and original code in the region, is in the legal-classicist tradition, manifested in the respect for the formal sources, especially statutes. It is written in a persuasive style, containing numerous definitions and examples aimed to provide for legal certainty didactically. Its author, Andrés Bello, used multifarious sources to produce a code suitable for the reality of his time, reflecting the French liberalism in commercial matters and the Spanish conservatism in family law. Its juristic-linguistic excellence and ideology grounded on liberty, equality and private autonomy have endured several legislative reforms. Its generic norms, including the principle of tort liability for *culpa*, have been applied without alterations to tackle novel problems. The primary formal source of Chilean law, which is affiliated to the civil-law tradition, is legislation, as visible in the definition of statute, in the rules on statutory interpretation, in that customs constitute law only if a statute so recognises it and in that case-law is a

1047 I.e., the Roman law and Alfonso X (The Wise)'s Siete Partidas; the natural lawyers; the modern tradition predisposed to abstraction, epitomised by *culpa*, and refined by Grotius, Domat and Pothier; Savigny’s and Bentham’s ideas; the Code Napoléon and its commentaries.


1049 [A] declaration of sovereign will which, expressed in the form prescribed by the Constitution, orders, prohibits or permits' (article 1 CHCC).

1050 Articles 189 CHCC.

1051 Article 2 CHCC.
secondary authority. Moreover, for Chileans legislation is a main way of handling social challenges. Specifically, statutes and regulations have played a major part in the building of the Chilean economy. Since the 1950s the growing commercial exchange with the U.S. has influenced Chile into adopting the same market-oriented paradigm. Thus, Chilean competition laws prohibit identical kinds of antitrust conduct than in America (and in the EU). In sum, business issues are dealt with prospectively by legislation and retrospectively by courts. Tort law’s role is residual.

2. Case-law

Courts have conventionally been regarded as mechanical interpreters of the law whose decisions entail merely doctrinaire authority: they lack legislative powers. From the beginning of the Chilean state (1810) courts have been structurally and ideologically apolitical. Lower judges follow the higher courts’ rulings seeking to be promoted. The judiciary has continuously decided controversies in a conservative fashion, protecting contract, property and economic freedom, while failing to safeguard the democratic values during Pinochet’s sadly notorious dictatorship. Under article 3 CHCC, case-law is an indirect legal source which binds the particular litigants exclusively: ‘It is only for the legislator to explain or interpret the law in a generally compulsory manner. Court decisions have no binding force but in respect of the cases on which they are pronounced’. This norm is usually construed as excluding stare decisis, even vis-à-vis the Supreme Court’s findings. Judges cannot simply cite precedents as a justification even on analogous issues. Final judgments produce res iudicata effect though limited to the concrete litigants. Notably, article 3 CHCC emanates from article 5 of the Code Napoléon which prohibited French courts from dictating general rules as they had.

1052 Article 3 CHCC.
1053 Dominguez (2007b) 315.
1054 ‘Judges are no more than the mouth that pronounces the words of the law’: Montesquiou (1748/1873) Book XL Ch.6, 182.

often done during the old regime. Yet, since Chilean courts have never been allowed to interpret rules with an overall mandatory impact, the “presumption of truth” attached to final judgments is solely to avoid contradictory decisions. However, this is an idealised goal. Similar cases are commonly decided in antithetical directions, thereby sacrificing legal certainty, equality before the law, equality before justice and due process. Outstandingly, Streeter construes article 3 CHCC in conformity with these principles: although the conclusive section of judgments binds the concrete litigants alone, court decisions’ reasoning must be followed (yet not mechanically repeated) in future equivalent disputes. It is also argued that the Supreme Court should develop a uniform and predictable case-law. Still, without legal reform it is unrealistic that precedents can be binding. Only occasionally have courts acknowledged that judicial coherence and legal certainty presuppose treating analogous cases alike.

Nevertheless, Chilean case-law fills the legislative lacunas and renders the principles or rules concrete. Courts elaborate legal notions and institutions along with solving new questions through the old code provisions. Thus, courts settled compensation as the primary function of torts. Moreover, it is recognised that the general tort principles demand continuous specification by courts and jurists. Furthermore, the Supreme Court and the competition tribunals have constructed the bases of competition law and described antitrust practices resembling the Anglo-American methods in this field. As Lawson observed, civilian systems are really judge-made law, so legislation is less significant.

1060 Neither the law nor any authority shall establish arbitrary differences’ (article 19 No.2 Chilean Constitution 1980, “CHC”).
1061 "The equal protection of the law in the exercise of rights... Any decision issued by a court shall be founded on a previous proceeding legally tried” (article 19 No.3 CHC).
1066 formerly, the Comisión Resolutiva ("CR"); currently, the Tribunal de Defensa de la Libre Competencia ("TDLC").
remarkably in tort, than in the common law and civil courts are not invariably uncreative. These impressions, I think, are germane to Chile.

If French courts have been crucial in developing tort law congruently with socio-economic trends and precedents, Chilean judges have often interpreted tort rules cautiously. Yet, regardless of its reduced ability to innovate and refine principles, Chilean case-law is undoubtedly the practical source of tort law. Courts apply the principle of *culpa* and assess causation and damage with ample freedom. However, the absence of *stare decisis* and clear judicial reasoning renders case-law unpredictable in critical points, including the determination of fault and quantification of damages. Indeed, it is difficult to delimit legitimate from illegitimate conduct without precedents being followed. Additionally, it seems unfeasible that Chilean case-law becomes a compulsory source. Cultural factors, like the false belief that inventiveness hinders legal certainty, block changes. But I am optimistic that the level of judicial consistency can be raised.

3. Legal doctrine

Jurists have made a fundamental contribution to legal development in civilian systems, keeping the law ahead of the facts, envisaging emerging problems and proposing solutions. For instance, French scholars masterly explain case-law from theoretical and practical perspectives. Analogously, Chilean academics exercise a persuasive influence upon lawyers and judges: they contemplate judicial tendencies and scientific, technological, economic or social phenomena, suggesting answers to future issues.

Moreover, jurists have been the real promoters of change in Chilean tort law, from Alessandri’s (1943) vastly cited treatise to Barros’ (2006) ambitious work. Alessandri almost completely relied on contemporaneous French commentators (Planiol, Ripert, Josserand, Henri and León Mazeaud), whose ascendancy over twenty-century Chilean tort-doctrine arguably surpassed that of the French Civil Code itself. Barros and other leading scholars use wider European and Anglo-American materials. Conversely, Latin-American doctrine is scarcely influential, given the modest legal-cultural exchange between Chile and its neighbours. Latin-American jurists remain anchored to European doctrines and only gradually build their own. Bello’s approach is worth imitating: foreign solutions should not be unthinkingly transplanted into Chile but adapted to the local needs. Thus, comparative law helps to discard unworkable solutions. This thesis starts with such premise.

4. Observations

Statutes are at the top of the hierarchy of formal sources. However, case-law and doctrine are central to interpreting the general principles of delict and solve new problems: hence my focus on these sources. Likewise, a consistent case-law is vital, more than judicial creativity, to attain equality and fairness.

II. Extra-contractual civil liability

This section expounds the Chilean tort principle of *culpa*. I argue that, to preserve competition freedom, liability for economic injuries inflicted between traders should be restrained through the defendant’s intention to harm the claimant or gross negligence, which Chilean law equates to the former. I too propose that compensation for all direct harms (foreseeable and unforeseeable) should for the sake of legal consistency be restricted to breach of contract and tort committed with the said intention or gross negligence.

---

1069 Lawson (1955) 55. See also: Puig (1956) 659ff; Merryman (1985) 36-37, 47.
1074 Lawson (1953) 66ff; Merryman (1985) 56ff.
1078 Luis Claro, possibly the greatest Chilean private-law scholar, lacked time to cover tort liability in his *Explicaciones de Derecho Civil Chileno y Comparado*, the most exhaustive Chilean civil-law treatise which comprises seventeen volumes published from 1898 to 1944.
I. Fundamental categories

Civil liability comprises the defendant’s obligation to repair the harm done to the claimant through the intentional or careless breach of contract (contractual liability)\textsuperscript{1095} or by an intentional (delict) or negligent (quasi-delict)\textsuperscript{1096} act or omission (extra-contractual, delictual or tortuous liability).\textsuperscript{1097} However, they differ basically from each other in that contractual liability arises from the infringement of a pre-existing duty, whereas tort liability emanates from the harm caused by the tortfeasor to the victim regardless of any previous agreement.\textsuperscript{1098} Thus, contracts and “illicit acts” (a term used more frequently than “delict” and “quasi-delict”) create obligations.\textsuperscript{1099} Another significant and practical difference is that a breach of contract forms a rebuttable presumption of fault,\textsuperscript{1100} save for the obligations of means, while tort claimants must generally prove defendants' negligence or intention.\textsuperscript{1101}

Tune argued that contract and tort often overlap, thereby rendering their theoretical distinction rather arbitrary.\textsuperscript{1095} Nonetheless, as Díez-Picazo said, the parties cannot easily evade the agreed form of distributing their risks by resorting to tort.\textsuperscript{1096} Specifically, Chilean case-law supports the non-cumul principle that forbids promises from bringing tort actions for damages against defaulting promisors where the harm derives from the breach of the relevant contract. This is for contracting parties bind themselves to their own will and the pacta sunt servanda.\textsuperscript{1099} As will be seen in Chapter VII, the contract-tort separation is particularly relevant to tortious liability for interference with contract.

Tort liability ensues from the breach of the generic or specific duty not to harm others culpably (carelessly or intentionally): alterum non (reminem) laedere.\textsuperscript{1093} Although this duty is not strictly an “obligation” as the parties are indeterminate,\textsuperscript{1094} it represents a principle under which reparation of damage is the main function of tort law. Thus, compensation relates to the victim’s loss; not to the defendant’s blameworthiness. From a corrective-justice angle, tort law’s mission is to rectify the balance between the wrongdoer and the victim altered by the injury.\textsuperscript{1099} Compensation is usually a sum of money equivalent to the victim’s (effectively proved) harm. This proportional rule prevents the claimant’s unjust enrichment and preserves the defendant’s right to a due process.\textsuperscript{1096} Similarly to English law,\textsuperscript{1097} Chilean tort victims must in principle be fully compensated for their losses as if they had not been injured, irrespective of the kind of harm suffered and of whether the defendant acted with intention (dolo) or fault (negligence).\textsuperscript{1099} Nevertheless, tort liability also serves to punish wrongdoers,\textsuperscript{1099} to prevent or discontinue harm through precautionary (injunctive) measures, to provide for in-kind reparation (specific performance)\textsuperscript{1100} and even to divest defendants of their illicit gains.\textsuperscript{1110}

As section III shows, carelessly caused pure economic loss (embodied into lucrum cessans) is generally compensable in Chile, as opposed to England. Financial damage is not discriminated against because, as suggested in Spain, it represents an attack on the claimant’s right of property enshrined in the Constitution.\textsuperscript{1102} Moreover, I will argue that neminem laedere must be tempered as regards the harm commercial competitors inflict each other by requiring the defendant’s intention to injure the claimant or at least gross negligence. Fault-based liability clashes with the liberty to compete for business rivals owe one another no duty of care. Further, I will show that, along with the pre-eminent

\textsuperscript{1095} The place in which contractual liability is treated signals its centrality within the law of obligations: Book IV, Title XII, On the Effect of Obligations, articles 1545ff CHCC.
\textsuperscript{1096} See, however, Descheemaker (2009) 67, 184 (holding that the Roman law incorporated intentional and faulty acts into delict, whereas quasi-delict covering strict-liability events).
\textsuperscript{1097} Treated in Book IV, Title XXXV, On Delicts and Quasi-delicts, articles 2314ff CHCC.
\textsuperscript{1099} Articles 578/1437/2284 CHCC.
\textsuperscript{1100} Article 1547 CHCC; Gatica (1959) 75.
\textsuperscript{1101} Article 1698 CHCC.
\textsuperscript{1102} Tune (1974) 19ff.
\textsuperscript{1103} Díez-Picazo (1999) 264, 268.
\textsuperscript{1093} Articles 44/1437/2284/2314/2329 CHCC; CS, 24.1.2002, GJ/259/38.
\textsuperscript{1094} Alessandrì (1943) 43ff.
\textsuperscript{1097} Livingstone (1880) 5 App.Cas 25, 39, Lord Blackburn.
\textsuperscript{1099} See below section 3.3, pp.20ff.
\textsuperscript{1100} Articles 1699/2333 CHCC; article 680 Chilean Civil Procedure Code (“ CPC”).
\textsuperscript{1102} Roglerò (2002a) 75ff.
compensatory role, economic-tort liability performs important preventive and retributive goals, particularly in connection with unfair and antitrust practices.

2. Fault-based liability

2.1 Introduction

To understand why tort liability for pecuniary damage involving commercial competitors ought to be qualified through an intentional element it must first be considered that the tortfeasor’s ordinary fault in principle does trigger liability.

While strict liability is exceptional and necessarily regulated by statute, \textit{culpa} (which in broad sense covers negligence and intention) is the overall and supplementary tort rule whereby courts balance the litigants’ conflicting interests. Victims must bear their losses unless intentionally or negligently caused by another person. \textit{Culpa} justifies and limits the duty to compensate for harm which is attributed through the causation test.\footnote{Barros (2006) passim.}

As Barros argues, fault/intention-based and strict liabilities are grounded in corrective justice, which signals the relationship between the wrongdoer’s conduct and the victim’s injury. Strict liability is not simply an efficient regulatory instrument to accomplish public goals but it is a legal choice, rooted in corrective justice, for protecting the victim’s interest regardless of the defendant’s blame.\footnote{Barros (2006) passim.}

Compensation is a cost that wrongdoers must face in exchange for profiting from their injurious activities.\footnote{Barros (2006) passim.} Nonetheless, Holmes said, social life would be intolerable if strict liability was the general regime.\footnote{Barros (2006) passim.} Fault/intention-based liability is warranted for, as criminal-law jurists maintain, the law has to repress wrongful conduct and not only wrongful effects (that is, the invasion of protected interests).\footnote{Barros (2006) passim.}

However, Chilean courts expand negligence through the legal presumptions of fault (such as for the acts of others),\footnote{Articles 2320/2322 CHCC.} which defendants can only rebut by showing to have taken all the available or imaginable measures to prevent the accident.\footnote{Barros (2006) passim.} Thus, fault liability becomes virtually indistinguishable from strict liability.

2.2 Negligence

Fault means the infringement of the duty not to harm others which is usually considered that the tortfeasor’s ordinary fault in principle does trigger liability. However, the social value of the defendant’s activity, the costs of avoiding damage, and the relationship between the wrongdoer and the victim. Whether the defendant acted negligently is a normative issue under the Supreme Court’s control via cassation.\footnote{Tapia ([1941]/2006) 27.}

Fault is assessed objectively, comparing the defendant’s act with the applicable standard of care. The defendant’s guilt is immaterial save for increasing compensation.\footnote{Tapia ([1941]/2006) 27.}

The CHCC does not define fault, but under Pothier’s influence it adopted in article 44 the Roman tripartite division of fault: gross negligence (\textit{culpa lata}), slight negligence (\textit{culpa leve}), and slightest negligence (\textit{culpa levísimas}). Hence fault is conceptualised as the...
absence of diligence in the performance of a contract or in the execution of an act.\textsuperscript{1114} This division is traditionally restricted to contract;\textsuperscript{1115} the slightest negligence, it is said, brings about tort liability.\textsuperscript{1116} Conversely, Barros extends the triple classification to tort: \textit{culpa leve} is the residual and appropriate category to measure the behaviour that can legitimately be expected from strangers in extra-contractual relations.\textsuperscript{1117} As Díez-Picazo argued, it is unreasonable to impose on tortfeasors the highest level of care that only a few persons can observe.\textsuperscript{1118}

Likewise, foresight is intrinsic to fault (which is accordingly defined as ‘the possibility of foreseeing what has not been foreseen’)\textsuperscript{1119} and to causation (the harm imputable to the defendant). The defendant is liable for the harm that a reasonable person would have foreseen. Moreover, a direct harm is generally also foreseeable.\textsuperscript{1120} Thus, through foreseeability courts resolve the issue of causation with relative ease, applying the “but for test”.\textsuperscript{1121} Whether damage was a direct effect of the breach of contract or the delict and whether damage was foreseeable at the time the contract was made or the tort committed are factual problems within the trial courts’ discretion.\textsuperscript{1122}

Conversely, since unforeseen harm outreaches carelessness and is remote, it is generally unrecoverable. It is noteworthy that, under article 1558 CHCC, defaulting promisors are liable for the damage foreseen or foreseeable at the time of concluding the contract. However, liability extends to all the direct losses (including unforeseen or unforeseeable ones) flowing from the intentional or grossly negligent breach of contract.\textsuperscript{1123} Article 44 CHCC aligns gross negligence with intention (\textit{dolo}) in civil law generally. Gross negligence is deemed as objectionable as deliberate conduct.\textsuperscript{1124} Interestingly, French case-law enhances compensation to all direct losses in case of intentional or grossly negligent breach of contract. Although the French Civil Code does not include a rule like article 44 CHCC, \textit{faute lourde} embodies a reprehensible act contrary to good faith.\textsuperscript{1125} \textit{Faute lourde} sometimes involves an abnormal behaviour revealing the debtor’s incapacity to fulfil the basic contractual duties, thus equivalent to \textit{dol}.\textsuperscript{1126} Yet, currently French courts require proof of the gravity of the defendant’s act as the real cause of the breach.\textsuperscript{1127}

Chilean courts and jurists tend to restrict article 1558 CHCC to contract. Consequently, tortfeasors must answer for all harms arising from delict or quasi-delict. This is for tort liability connects persons who were completely strangers to one another until the harmful conduct took place. Conversely, contractual liability (except for deliberate or grossly negligent breach) is confined to the risks that the parties could contemplate and distribute when concluding their agreement.\textsuperscript{1128} The restriction of compensation in contract hinges on private autonomy, corrective justice and good faith. It originated from an old French rule, generalised by Pothier, reiterared in article 1150 Code Napoléon and adopted by English law.\textsuperscript{1129}

In the latter the paramount importance of the contracting parties’ consent is reflected in that not even deliberate or extremely careless breach expands compensation beyond what losses were foreseen by those parties at the time of making their covenant.\textsuperscript{1130} Moreover, promises cannot elude the limitation of contractual liability through the bringing of tort claims. The \textit{non-cumul} principle, settled in French case-law,\textsuperscript{1131} forbids promises from so doing in Chile as well. Further, it is argued that tort liability involves full compensation for intentionally or carelessly inflicted harm which is only narrowed through causation. Conversely, in contract full compensation is restricted to intentional or grossly

\textsuperscript{1114} Tapia (1941/2006) 339ff; Alessandri (1943) 172.

\textsuperscript{1115} Under article 1547 CHCC, if the contracting parties have not stipulated differently, the defaulting promisor is liable for \textit{culpa lata}, \textit{culpa levissima} or \textit{culpa leve} depending on whether the contract is for the benefit of the promisee, the promisor or both parties, respectively.


\textsuperscript{1117} Barros (2006) 80ff.

\textsuperscript{1118} Díez-Picazo (2001) 1026-27.


\textsuperscript{1120} Gatica (1959) 100ff, 125.

\textsuperscript{1121} Domínguez (2001) 14ff.

\textsuperscript{1122} CS, 12.8.1953, RD/509/1972.

\textsuperscript{1123} Article 1150 of the Code Napoléon is the equivalent to article 1558 CHCC. Further, although Spain lacks a similar provision, courts and jurists admit the same effect: STS, 30.3.2005, RJ/6312; Montes (2007) 732, 744.

\textsuperscript{1124} CS, 10.11.1920, RD/19/1941; Alessandri (1939) 77-78; Somarriva (1939) 38; Gatica (1959) 126ff.; C/Claro (1937) 527 (rejecting the application of article 1558 CHCC to \textit{culpa lata}).

\textsuperscript{1125} Planol/Ripert (1945) 177-178; Jousserand (1950) 309; Colín/Capitant (1960) 48; Mazenau/Maezourd/Touc (1962) 572-573.

\textsuperscript{1126} Com, 11.7.1995, Bull.civ.JV.No.215.


\textsuperscript{1129} Hadley (1854) 156 E.R., 151, Alderson B.


negligent breaches. It is criticised that the constraint of contractual liability has a deleterious impact on commercial transactions and that it underestimates that contracting parties can insure against wider liability.\textsuperscript{1132}

The contrary thesis, with which I agree, is defended by Barros, to whom tort and contractual liabilities are limited to direct and foreseen losses except for illicit acts or breaches of contract committed with intention or gross negligence. Foreseeability is inherent to fault, so authors of quasi-delict (unless perpetrated with gross negligence) should answer for foreseeable harm alone.\textsuperscript{1133} Chadwick and Tapia said that contract-breakers and wrongdoers were liable for all direct harms derived from their intentional conduct. Deliberate breach of contract was equated with delict. Conversely, liability for careless (but not grossly negligent) breach of contract does not cover events outside the contracting parties’ will and expectations.\textsuperscript{1134} Likewise, Gatica identified a punitive aim in the extension of compensation to all losses arising directly from intentional or grossly negligent breach of contract. This explains the prohibition and nullity\textsuperscript{1135} of the covenant excluding \textit{ex ante} liability for such misbehaviour.\textsuperscript{1136} As Domínguez argues, the intentional breach of contract discloses total disregard for honouring promises, thereby deserving a private retribution.\textsuperscript{1137}

In my view, the distinction between carelessly and intentionally (or grossly negligently) caused economic harm is all significant in contract and tort. Full compensation is confined to foreseeable harm as what persons contractually linked or not can expect from each other. For the sake of legal consistency foresight should regulate fault in contract and in tort.\textsuperscript{1138} In turn, intention and gross negligence are implicitly sanctioned in both contexts by stretching the duty to compensate for all direct losses, comparably to the English economic torts. Yet, to draw the distinction between unforeseen damage and indirect damage is complex. This, needless to say, can produce mistaken judgments either awarding or denying compensation. The causal relationship between the wrongdoer’s act and the victim’s harm can become blurred.

\textsuperscript{1132} Domínguez (1990) 133.
\textsuperscript{1133} Barros (2006) 92.
\textsuperscript{1134} Chadwick (1938) 169; Tapia (1941)2006 558ff.
\textsuperscript{1135} Article 1465 CHCC.
\textsuperscript{1136} Gatica (1959) 117-118, 139-140.
\textsuperscript{1137} Domínguez (2000) 516ff.
\textsuperscript{1138} In Spain, it is argued that, as a matter of justice, defendants should be accountable for all harms intentionally inflicted upon promisees or third parties: Yzquierdo (2001) 249.

3. Intention

3.1 Conceptual issues

Article 44.6 CHCC defines \textit{dolo} as ‘the positive intention to inflict injury upon another’s person or property’. \textit{Dolo} is a factor vitiating consent,\textsuperscript{1139} an element enhancing contractual liability for all direct injuries;\textsuperscript{1140} and the gist of delict (intentional tort).\textsuperscript{1141} Indeed, \textit{dolo} is essentially a delict. The deliberate breach of contract is tortious: it is placed beyond the parties’ agreement.\textsuperscript{1142}

Several private-law scholars suggest using that concept of \textit{dolo} in criminal law in the interest of legal coherence and certainty.\textsuperscript{1143} Criminal delict is ‘any voluntary act or omission punished by the law’;\textsuperscript{1144} the word “voluntary” denoting the agent’s consciousness about the causal relation between his conduct and the outcome.\textsuperscript{1145} Yet, while in private law \textit{dolo} involves a generic intention to injure, criminal intent implies the foresight and desire of committing the statutorily described conduct. Additionally, in civil law \textit{dolo} is reduced to \textit{dolus directus} (the intention to harm the claimant as an end or as a means to another end). Conversely, in crime \textit{dolus directus} (to seek to commit the offence as an end)\textsuperscript{1146} and \textit{dolus eventualis} or recklessness (to foresee and accept that result without desiring it, as different from “conscious negligence”, that is, to expect certain result although believing it will not happen) are punished equivalently.\textsuperscript{1147}

\textit{Dolo} involves the intention to harm another person as a means or as an end. An obvious illustration is the unfair competitive act aimed at ruining rivals.\textsuperscript{1148} The best example, however, is perhaps the abuse of rights in its most

\textsuperscript{1139} Articles 1458/1459 CHCC.
\textsuperscript{1140} Article 1558 CHCC.
\textsuperscript{1141} Articles 2284/2314 CHCC.
\textsuperscript{1144} Article I, Chilean Criminal Code.
\textsuperscript{1145} Etchebery (1987) 229ff.
\textsuperscript{1146} CA.Santiago, 3.10.1989, RD/664/1733.
\textsuperscript{1147} CS. 21.4.1960, RD957/1960; CS. 3.6.2002, GJ/264/114 (shooting at another’s body with a high-calibre shotgun, injuring and thereby killing the victim, is murder: the defendant recklessly accepted the most serious effect).
\textsuperscript{1148} álvaro/Lizana (1995) 118.
intense sense, as paradigmatically showed in the case of someone who was found liable for maliciously publishing an advertisement in a newspaper in order to discredit a certain brand of automobiles and its seller,\textsuperscript{113} a situation close to malicious falsehood. Likewise, authors maintain that the exercise of a right becomes wrongful if it is solely targeted at injuring others.\textsuperscript{115} The difficulty is that because \textit{dolo} is defined by statute (and legal definitions are binding)\textsuperscript{115} the claimant must prove the defendant’s intention to injure, even though the proof is indirect and inferred from facts.\textsuperscript{115} Although the examples available do not concern commercial competitors, they show that Chilean courts further restrict \textit{dolo} to malice. Thus, maliciously requesting the embargo of the claimant’s property meets that concept, while the bringing of actions for the recovery of money by seizing the defendant’s goods is within the claimant’s legitimate right.\textsuperscript{113} The obstruction by the servient tenement’s owner of a drainage canal merely for disturbing the dominant tenement’s owner’s easement is deemed a delict.\textsuperscript{114} The intention to harm has also been presumed from the fact that the defendant eluded his obligations and simulated the transfer of his goods to a company he had founded with relatives and from which he later retired, thus defrauding his creditor.\textsuperscript{115}

However, jurists allege that \textit{dolo} is not realistically reduced to the defendant’s disinterested malice but typically includes the infliction of harm as a means of seeking self-benefit.\textsuperscript{116} Similarly, Spanish authors propose to extend \textit{dolo} beyond the damage deliberately caused as to include the taking of advantage of one’s position.\textsuperscript{115} In Chile it is agreed that the intentional breach of contract is often prompted by the promisor’s intention of profiting at the promisee’s expense quite apart from malice.\textsuperscript{118} Pothier, on whom Bello relied to define \textit{dolo}, endorsed a wider concept which embraced malice, the mere acceptance of damage and bad faith. Likewise, Pothier equated \textit{culpa lata} with \textit{dolo}.\textsuperscript{119} Moreover, French courts treat as “intentional” the deliberate refusal by the promisor to perform his obligations with awareness of injuring the promisee. Jean Mazeaud applauds this view since promisors break contracts lured by self-interest. Furthermore, \textit{faute lourde} could not be aligned with \textit{faute dolosive} if the latter was circumscribed to disinterested malice.\textsuperscript{116}

In Chile, Rodríguez extends \textit{dolo} to recklessness (foreseeing and accepting the victim’s harm as a likely consequence of the defendant’s act).\textsuperscript{119} This finds support in certain case-law which demands the intention to cause \textquote{injuria}, that is, an illicit act (\textit{injuria}) and harm. Thus, \textit{dolo} is defined as deliberate wrongful conduct, including recklessness.\textsuperscript{116} This idea, I think, mirrors \textit{vorsatz} (§826 BGB): the intention to harm or the conscious indifference to the injury derived from a wrongful act,\textsuperscript{116} and also the Spanish tendency to treat as intended the inevitable and prejudicial effects of the defendant’s conduct despite not being deliberately pursued.\textsuperscript{116} However, as jurists affirm, recklessness is a criminal-law category whose counterpart in private law is gross negligence, albeit the latter is objectively assessed.\textsuperscript{115} Accordingly, I submit, recklessness is irrelevant to civil law: gross negligence is equated with intention for all legal effects, particularly in contract and tort.\textsuperscript{116} Grossly disregarding another’s interests resembles the intentional acceptance of a harmful consequence. Moreover, gross negligence plays an evidentiary role: the troublesome proof of \textit{dolo} can be avoided because it can be inferred from \textit{culpa lata}.\textsuperscript{116}

Therefore, the dominant trend in Chilean law excludes recklessness from intention, whose place is occupied by gross negligence. Furthermore, Chilean case-law acknowledges the equivalence between gross negligence and intention.


\textsuperscript{111} Rodríguez: (1992) 34; (1999) 164ff.

\textsuperscript{112} CA.Espíque, 18.6.1953, RDJ/504/781; Chadwick (1939) 17; Corral (2003) 209-210


save that the former is presumed from the breach of contract\textsuperscript{1168} whereas \textit{dolo} must always be proved.\textsuperscript{1169} Conversely, some argue that the claimant should demonstrate the defendant’s extreme carelessness. First, article 44 CHCC identifies gross negligence with intention for all private-law purposes. Secondly, it seems unfair that whereas the promisor who intentionally breaks a contract is not obliged to compensate for losses unless he is shown to have acted with \textit{dolo}, the promisor who does so acting with gross negligence would answer for all direct damage without need for the promisee to prove such misconduct.\textsuperscript{1170} However, recent case-law has held that the promisee who seeks full compensation for the losses following breach of contract must show the promisor’s intention or gross negligence.\textsuperscript{1171} Still, as authoritatively opined elsewhere,\textsuperscript{1172} case-law declared that tort compensation includes all direct losses flowing from delict and quasi-delict alike. Nonetheless, I consider that “full compensation” is confined to foreseeable harm that people can normally expect to commit or suffer during their contractual or spontaneous relations. The rationale for increasing contractual liability in the presence of intention or gross negligence is retributive, or at least extra-compensatory. For the benefit of legal consistency such criterion should extend to tort liability.

Ihering rejected tortious liability for pure economic loss caused with gross negligence in order to protect free competition.\textsuperscript{1173} This observation, I think, comes into conflict with systems which enshrine \textit{culpa lata dolos aequiparatur}. Gross negligence reveals disregard for another’s interests close to the intention to harm, thus deserving comparable sanction. French jurists and courts accept that axiom although their Civil Code does not acknowledge it. The clearest way of recognising the analogy between gross negligence and intention is, as article 44 CHCC illustrates, via legislation.\textsuperscript{1174} Tort liability normally follows the slightest fault. Yet, liability should be restricted in harmony with competition freedom where trade adversaries are implicated, through the requirement of intention or gross negligence. English law excludes the latter as an alternative ingredient in deceit. Hence subsequent courts imposed liability for pure economic loss arising from negligent misstatements.\textsuperscript{1175} Conversely, Chilean courts avail themselves of gross negligence as a control device similar to intention.

3.2 Restraining tortious liability congruently with competition freedom

Intention and gross negligence can be efficient mechanisms to apply tort liability between commercial rivals without hindering their liberty to compete. This mental element is embodied, Barros suggests, in the abuse of market power, unfair practices and bad faith interference with another person’s contract.\textsuperscript{1176}

In France, Starck claimed that tortious liability served to safeguard the victim’s person or tangible property but to deter and punish the infliction of economic harm and non-pecuniary damage. He showed that French courts imposed fault liability for the harm caused to person and to corporeal assets but they sometimes subjected liability for financial losses to a “characterised” fault like that incorporated into unfair competition (\textit{concurrence déloyale}), that is, acts contrary to the honest business behaviour.\textsuperscript{1177} French law does not remedy the damage which is the natural and inevitable consequence of the normal exercise of an individual liberty or right, like competition, unless it is abused.\textsuperscript{1178} Furthermore, for De Van-Karila the damage is not a mere effect but a constituent part of such a socially valuable activity as competition. Thus, the fact that the defendant infringed the duty not to harm others negligently does not trigger liability; except to the extent that he abused the right to injure. So, following Starck, De Van-Karila argues that pecuniary harm is not \textit{per se} wrongful but the defendant has the right to inflict it out of competing. Conversely, the victim’s

\textsuperscript{1168} Article 1547 CHCC.
\textsuperscript{1169} Article 1459 CHCC; CS, 10.11.1920, RDJ/19/IV/415.
\textsuperscript{1170} CA-Concepción, 2.7.1984, GI/49101; Chadwick (1938/1939) passim; Rodriguez (1992) 58ff;
\textsuperscript{1171} CS, 26.12.2007, 5649-2006LegalPublishing/38447; CS, 15.1.2008, 3070-
\textsuperscript{1173} Zweigert/Kötze (1998) 598.
193.
\textsuperscript{1175} Limpens/Kruithof/Meinertzhagen-Limpens (1980) 32ff.
\textsuperscript{1176} Barros (2006) passim.
\textsuperscript{1177} E.g., Paris, 6.11.1989, D.1990.564, n.D.Thouvenin (holding that the rights to inform consumers and to criticise competitors are denigrating and culpable when exercised without prudence and objectivity).
right to security in her bodily integrity and tangible property prevails over the defendant’s freedom to act.\textsuperscript{1179}

The differentiation between physical damage and economic harm is, I think, analogous in France and England. Stronger protection is given to physical and corporeal property. Ownership of tangible resources is shielded through the per se actionable tort of trespass and property in goodwill is protected through passing-off which involves outcome-based strict liability. Likewise, the interference with bodily integrity and corporeal property is protected through the tort of negligence or the generic fault principle. Conversely, English law generally denies liability for carelessly inflicted pure economic harm: compensation must be sought through the economic torts which presuppose intention. Certain French case-law demands a “characterised fault” which is implicit in unfair practices and helps to restrict liability independently of whether economic loss is deemed indirect or uncertain. However, “characterised fault” is controversial and less stringent than the mental element contained in the economic torts.\textsuperscript{1180} If Chilean courts are to enforce liability in accordance with competition freedom, they ought to demand the defendant’s intention (to harm the claimant or to procure the breach of contract) or at any rate gross negligence.

3.3 The effect of \textit{dolo} and \textit{culpa lata}: enhancement of compensation

Although intentionally inflicted harm invariably entails liability, the width of tort liability primarily depends on the quantity and intensity of harm rather than on the wrongdoer’s blameworthiness.\textsuperscript{1181} However, the tortfeasor’s intention to harm or gross negligence enhances the duty to compensate to all direct losses. Intention is more reprehensible than simple fault as wrongdoers know their acts will produce a result disapproved by the law. Total disregard for legal prohibitions exceeds negligent conduct. Extra-compensation is also consistent with the greater difficulty in assessing harm and in establishing the causal link between the defendant’s conduct and the claimant’s injury.\textsuperscript{1182} Therefore, French courts award more damages to victims of deliberate acts in spite of dismissing the dichotomy delict/quasi-delict.\textsuperscript{1183}

In Chile, an intentional or grossly negligent breach of contract increases liability (article 1558 CHCC) within which authors discover a retributive goal.\textsuperscript{1184} This rationale extends to delict and quasi-delict (comprising gross negligence). So, like in the tort of deceit, defendants respond for all direct losses.\textsuperscript{1185} Comparably to France and Spain, Chilean extra-contractual liability mainly serves to compensate for the victim’s harm.\textsuperscript{1186} Yet, deterrence and punishment are intrinsic to \textit{culpa}.\textsuperscript{1187} Likewise, Chilean trial courts perform a camouflaged punitive function. Formally, courts recognise a purely reparatory policy to restore the victim’s \textit{status quo}.\textsuperscript{1188} However, implicitly they use punitive criteria to determine contributory negligence\textsuperscript{1189} and order higher awards of non-pecuniary injury within their discretion.\textsuperscript{1190} The nature of the defendant’s conduct\textsuperscript{1191} and the gravity of the defendant’s fault\textsuperscript{1192} are among other significant retributive strands. Through this concealed method courts elude the risk of their decisions being quashed since punitive damages are not enshrined in the law.

In Spain, Reglero champions punitive damages as a salutary dissuasive to supplement compensation both for non-economic damage and loss of profits where the tortfeasor intentionally (or grossly negligently) injured the victim or unjustly enriched himself from his wrong.\textsuperscript{1193} For Reglero, exemplary damages do not endanger \textit{non bis in idem} and the due process: they differ from criminal

\textsuperscript{1179} De Van-Karilla (1995) \textit{passim}.

\textsuperscript{1180} See below nn.1402ff, nn.1430ff and accompanying text.


\textsuperscript{1183} Van Gerven/Levy/Larouche (2000) 302, 332.


\textsuperscript{1191} CS, 19.5.1999, FM/486/730; CS, 13.11.2003, GI/281/104.

\textsuperscript{1192} CS, 14.4.1928, RDJ/26/19/141; CS, 2.12.1998, FM/481/2737.

\textsuperscript{1193} In Chile, third parties (neither authors nor accomplices) can be divested of their illicit profits emanated from another’s intentional tort: articles 1458/2316 CHCC; CS, 5.7.1967, RD/J/44/174; Alessandri (1943) 169; Peñalillo (1998) 87; Cortés (2003) 62; Díez-Picazo (1999) 50. Yet whether those who profited from the tortfeasor’s gross negligence must make restitution of their gains is controversial. In favour: Barros (2006) 164; Cf:ucci (1936) 62; Alessandri (1943) 483.
sanctions. Nor end up claimants unjustly enriched as they are compensated commensurately with the defendants’ objectionable misconduct. 1194

Nevertheless, without legal reform it is unlikely that Chilean courts will manifestly acknowledge extra-compensatory and exemplary damages. Legislation seems requisite to certainty and equality, as illustrated by Article 1371 of the Catala’s proposals, the most recent (and criticised, particularly by the bench) attempt to enact punitive damages for ‘manifestly deliberate fault’ (which includes malicious and reckless, but not grossly negligent, breach of contract) and for ‘fault with a view to gain’ (a kind of intention resembling Lord Devlin’s second category of exemplary damages). 1195 Today the award of punitive damages in Chile faces several obstacles: the legality principle (nullum crimen nulla poena sine lege) whereby only conduct previously described and sanctioned by statute can be punished; 1196 non bis in idem; the insufficiency of procedural guarantees for defendants provided by civil litigation; and the possible unjust enrichment of victims as a result of being awarded sums for harm that they did not suffer, thereby boosting irresponsible litigation. 1197

4. Observations

I have argued that fault-based liability for economic harm inflicted between business rivals is inimical to the liberty to compete. This result can be avoided if liability is subjected to proof of the defendant’s intention or gross negligence. Although courts could control liability by holding economic loss to be uncertain or remote, this is a flawed expedient: it takes for granted that trade competitors can be liable in negligence when the fact is they owe each other no duty of care. Although I am not aware of economic-loss cases in which gross negligence has been applied article 44 CHCC aligns it with intention in private law. Gross negligence is more stringent than mere fault though it is easier to prove than intention. This can be useful particularly given that Chilean courts often restrict dolo to the intention to harm as an end (malice).

I have also argued that the principle of full compensation should be limited to the direct and foreseeable losses arising from negligent breach of contract or quasi-delict. Liability for unforeseeable harm should be confined to breaches of contract and torts committed with intention or gross negligence. The intensification of liability fulfils an extra-compensatory or retributive function with respect to such reprehensible conduct. 1198 The legal basis for this increase is article 1558 CHCC which, by reason of legal consistency, should also influence extra-contractual civil liability. In effect, fault is the failure to foresee what a reasonable person would have foreseen.

Accordingly, compensation cannot include harm beyond that expectation. Conversely, where the wrongdoer intends to harm the victim or acts with extreme negligence, which is equivalent to reckless indifference, the wrongdoer is no longer treated through an objective standard of care but must assume responsibility for all losses consequential upon his conduct. Moreover, the punitive criteria used by courts to award higher sums for non-pecuniary harm are pertinent to pure economic loss, in particular that derived from intentional or grossly negligent misbehaviour. Courts need not wait until Congress allows punitive damages. They can directly award higher sums for damages in tort or order the restitution of illicit profits relying on article 1558 CHCC.

Finally, a general principle of liability for negligence may produce order although not necessarily sound case-law: ‘An undifferentiated approach may satisfy the quest for uniformity but is unlikely to produce desirable decisions’. 1199 Rather than using culpa as an abstract concept, Chilean courts and jurists should distinguish and categorise the diverse types of intention required for triggering tort liability in commercial competition. Consideration of the mental elements embodied in the English economic torts might help to attain such aim. Even in the English law of restitution it has been argued that fault should be refined by incorporating various mental elements, such as intention, knowledge and recklessness. 1200

1196 Article 19/No.3 CHC.
1200 Virgo (2009b) passim.
III. Pure economic loss

So far I have demonstrated that *culpa* ought to be qualified through intention or gross negligence vis-a-vis commercial competitors. This section shows that *culpa* in principle covers all types of harms. Yet, I will argue that liability for pure economic loss caused between trade rivals should be limited through intention or gross negligence. Fault-based liability is in principle undesirable even if it is dismissed on the basis that pure economic loss is remote or unproven. Competitors necessarily harm and owe no duty of care to one another.

1. Conceptual structure

Damage is widely understood as the infringement of a subjective right or legitimate interest in the claimant’s person or goods, whether economic or non-pecuniary. Compensation is limited to abnormal or serious harm as opposed to mere inconvenience.120 The claimant must prove that she was personally injured as a direct consequence of the defendant’s act. The existence, quantification, certainty and causation of damage are factual issues within trial courts’ jurisdiction.120 Nonetheless, it is argued that the question about the certainty of harm is a legal issue to be determined by the Supreme Court via cassation.120 The great problem is that case-law has not clarified the essence and contours of compensable damage. This concept is as sweeping as *culpa* and the abuse of rights. Legal certainty and coherence require that the Supreme Court takes control over the definition of the conditions for liability and that these conditions are specified according to the fact-situations concerned.

Chilean judges and scholars are seldom familiar with the expressions “pure economic loss”, “expectation/positive interests” (which place promisees as though contracts would have been performed) and “reliance/negative interests (which

---


123 Two impressive exceptions: Domínguez/Domínguez/Domínguez (1996) passim; Barros (2008a) 410, 414-415 (associating negative interests with *damnum emergens* and positive interests with *lucrum cessans* and specific performance).


125 Article 1556 CHCC (similar to article 1149 of the French Civil Code).


129 I.e., Alessandri (1943) and Barros (2006).

130 CS, 15.11.1919, RDJ/18/27/164; Alessandri (1943) 221.
non-pecuniary damage arising from the defendant’s false accusation. The defendant was found liable for carelessly inflicting economic harm to the claimant’s commercial reputation. His false, serious and negligent accusation had prevented the transaction from succeeding. The claimant was awarded as *lucrum cessans* the price of the frustrated export up to the amount proved at trial.1212

Conversely, there is copious case-law on “relational” or “indirect” pecuniary harm, normally framed as *lucrum cessans* and suffered by claimants as a consequence of the direct victim’s personal or proprietary injury. The most recent cases concern indirect victims stripped of the means of support formerly provided by direct victims negligently killed or injured in traffic or work accidents. As will be seen in the next paragraph, these claims frequently fail not because the defendant acted with simple fault but because *lucrum cessans* is deemed non-existent or remote. Courts dismiss actions based on an estimation of the direct victim’s likely labour life, since claimants overlook normal events which would mitigate the harm, such as diseases, discharge or the end of the work before the direct victim reached the retirement age.1213

This indicates that courts are likely to reject compensation for pure economic loss occasioned between commercial competitors on the grounds of uncertainty of damage and/or lack of causation, a method with which I will disagree.

2. Uncertainty and remoteness

In principle, as a result of the legal recognition of subjective rights, all kinds of damage intentionally or negligently caused must be compensated.1214 Nevertheless, in Chile the prospect of pure economic damage being compensated is not auspicious. Trial courts customarily characterise *lucrum cessans* (the type of harm nearest to pure economic loss) as uncertain, a decision which is not reviewed by the Supreme Court.1215 Trial courts award non-economic

...
expected income, at least for certain periods, under normal circumstances.\footnote{1223} For instance, the owner of a patent which the defendants had reproduced in breach of copyright claimed the sum that the defendants earned from selling the illicitly copied materials. The court set aside the claim declaring the damage to be merely possible rather than reasonably likely. The claimant could not prove that he was prepared to manufacture as many materials as the defendant illicitly produced. The court confined compensation to the value of those materials.\footnote{1224}

Courts also regard \textit{lucrum cessans} as too remote a consequence of the defendant’s conduct. Thus, the defendant’s city council had refused to issue a permit to execute a dwelling project requested by the claimant’s real-estate developer. The Supreme Court, allowing a constitutional action (called “\textit{recursos de protección}”),\footnote{1225} brought against the defendant, ordered the latter to issue the permit that it had arbitrarily and illegally denied. Nonetheless, the claimant issued a tort action for damages flowing from the delay, including the direct increase of financial costs, the fall in profitability of the project and the loss of the opportunity of diverting recourses to better alternatives. Eventually, the Supreme Court dismissed this claim for lack of causation. The claimant had assumed an obvious financial risk in incurring expenses when he had a mere expectation to have the project approved. The defendant’s refusal to issue the permit was at that time legitimate because it has not been declared arbitrary or illegal.\footnote{1226}

3. Compensating without hindering competition

That tort liability should be imposed consistently with the liberty to compete is a recent contention in Chile.

Barros argues for restricting compensation for pure economic harm because commercial rivals naturally and intentionally harm one another. He salutes the refusal of liability except for specific torts (as in England) or extreme behaviour against good commercial customs embodying the agent’s intention or reckless indifference to harm the claimant (as in §826 BGB). He promotes the confinement of liability to situations incorporating the abuse of the right to compete, that is, unfair practices and anticompetitive conduct. He however notes that courts can constrain fault-based liability by treating pure economic loss as indirect or uncertain.\footnote{1227}

Indeed, this is the technique through which Chilean courts approach \textit{lucrum cessans} and which squares with French law. Consequently, compensation for pure financial losses is admitted at the outset and is then qualified by reason of their being remote or speculative or having already been repaired.\footnote{1228} Similarly, American case-law sometimes denies compensation for mere expectations frustrated by outsiders who invaded the claimants’ prospective business on the ground of being conjectural.\footnote{1229}

This procedure is coherent with the widely accepted (in Chile) duty not to harm others carelessly and with the fact that corporeal goods and incorporeal interests, such as contractual rights and purely financial interests, are equally protected by the right of property enshrined in the Constitution.\footnote{1230} Nevertheless, even if this method attains analogous results to those arrived by the English and German tort regimes, I think that it mistakenly assumes that competitors owe each other a duty of care while in fact the reverse is true.

I will therefore insist on requiring a mental element more stringent than simple fault as far as trade adversaries are involved. As Fleming argued, the crucial issue in the tort of negligence is to limit liability, amongst others, through the concepts of duty and causation.\footnote{1231} Extending this analysis to the field of harm between commercial rivals, I will suggest that Chilean courts opt for controlling this species of liability through an intentional element which is consistent with the essence of competing.

\begin{footnotesize}
\begin{itemize}
\item[1224] CA.Pedro/AguirreCerda, 6.10.1986, RDJ/83/47248.
\item[1225] See below nn.1267ff and accompanying text.
\item[1231] Article 19/No.24 CIC.
\end{itemize}
\end{footnotesize}
4. Observations

Chilean courts should, for the sake of legal consistency, qualify *neminem laedere* in line with competition freedom. I think that they can find a valuable guide in the arguments that lead Anglo-American tort law into foreclosing the recovery of carelessly caused pure economic loss. Using the devices available in Chilean law, courts can restrict liability through the requirement of the defendant’s intention to harm the claimant or gross negligence. This control mechanism may not only prevent floods of litigation but confine liability to abusive misconduct, thus signalling that the role of tort liability in the regulation of business battle must remain a thin one.

Yet, I admit that this suggestion might be considered as unwarranted or exaggerated. First, it can be deemed contrary to the principle of liability for negligently caused harm. If the lower courts subjected liability to intention or gross negligence their decisions might be quashed via cassation for infringing the code rules on delict. Furthermore, courts may choose to restrict liability between commercial rivals using the familiar criterion of holding pure economic loss as indirect, uncertain or unproven, as they have done *vis-à-vis* *lucrum cessans*. However, it is still possible that courts might reinterpret the delict rules in line with the Chilean Unfair Competition Act (“UCA”), which defines unfair practices as intentional conduct. Moreover, I do not think it incompatible with *neminem laedere* that courts explicitly recognise that competitors owe each other no duty of care. The best approach to this species of tort liability should acknowledge that negligently caused economic harm is a side-effect of business competition. To discard liability for lack of causation or uncertainty of damage practically solves the tension between the litigants’ conflicting interests but at the expense of misunderstanding the gist of competition and sacrificing the defendant’s liberty to compete. Additionally, this technique makes liability dependent upon causation and damage whereas it is the defendant’s conduct that should really matter. Consequently, Chilean law has much to learn from ‘conservative regimes’ such as the English economic torts.

IV. Abuse of rights

This section shows that Chilean law accepts the principle of liability for intentionally inflicted economic harm even if it is brought about on the occasion of exercising a right. The most notorious case of abuse of rights involves deliberately caused damage which, as I will contend, helps to control liability between trade opponents. The abuse of rights underpins unfair practices and antitrust conduct, especially the abuse of dominance.

1. Introduction

The modern doctrine of the abuse of rights, which emerged from French case-law, attempted to rectify both legal formalism (the conception that rules predetermine the solution of all possible conflicts) and absolutism of rights (radicalised in the Code Napoléon). Consequently, subjective rights were considered as relative legal powers to accomplish worthwhile goals rather than being used capriciously. More importantly, this doctrine attempts to moralise the law and provides a strong justification for imposing tort liability for damage arising from the abnormal exercise of rights.

2. The academic debate

Planiol and Ripert disapproved of the abuse of rights declaring that subjective rights could exclusively be limited from outside, by statute or contract. The term “abuse of rights”, they argued, was self-contradictory. A right cannot simultaneously be exercised in conformity and against the law. Conversely, Josserand accepted the concept of an abuse of rights which involved the exercise of a right against its social or economic rationale established by the law. Chilean jurists have been entangled in analogous controversy. Thus, for Rodriguez the abuse of rights is absurd and simply means that the agent acted without any right at all. Liability should not be imposed for the harm caused to

another person out of exercising a legitimate interest.\footnote{Rodríguez: (1998) passim; (1999) 78ff.} In contrast, Barros accepts the idea of an abuse of rights which can consist of the defendant’s intention to harm the claimant or the violation of the minimum standards of sociability, good customs and good faith governing reciprocal relations. The wider the scope of the right determined by the law, the narrower the space left to the abuse of rights.\footnote{Barros: (2000) 611ff.}

As Barros explains, Chilean law recognises “subjective rights” as an independent category including personal rights (such as in contract) and real rights (like property). Subjective rights give holders legal entitlement to exercise a claim (protected through procedural and substantive remedies) against third parties who owe the duty not to invade such rights. Nonetheless, subjective rights are limited in two ways. First, they are constrained externally by statute or by contract to permit a pacific coexistence between individuals enjoying equal freedom. Thus, the right of property must neither violate the law nor encroach on neighbours’ rights. \footnote{Articles 578/1545 CHCC.} Likewise, contractual rights exclusively bind the contracting parties: they are not absolute, so cannot be enforced against third parties. \footnote{Articles 190(No.21 CHCC.} Furthermore, the liberty to compete must not be exercised against morals and public order. \footnote{Barros: (1999) passim; (2006) 611ff.} Secondly, subjective rights are limited internally: they must not be exercised abusively. \footnote{As many assert: Mostt (1995) passim; Winterk (2000) 107; Barandiarán (2002) passim; Ortízar (2003) 74-75; Valdés (2006a) 211, 555-556; Gómez (2006) 5.}

Then, right-holders abuse their rights if they act within the external margins defined by the law but exceeding the internal bounds of the right at stake. Thus, I think, the abuse of rights limits and justifies tort liability for intentionally caused economic harm along with yielding content to unfair practices and antitrust conduct. A good example is the abuse of a dominant position which is prohibited by the law but simultaneously entails the abuse of the liberty to compete. \footnote{Ortízar (2003) 69.} Likewise, for Spanish jurists the abuse of the right to compete embraces unfair competition the unlawfulness of which emanates from its abusive character. \footnote{Menéndez (1998) passim; Molina (1993) 60ff, 125-126; Massagué (2002) 100ff; Font/Miranda (2005) 27ff.}

3. The Chilean approximation

The abuse of rights lacks express statutory recognition in Chile just like in France. However, it is implicit in several rules whose clarity and conciseness question the need for it to be codified.\footnote{Ortízar (2003) 69.} For instance, a partner’s bad faith or inopportune resignation from a company is null.\footnote{Articles 2110/2111 CHCC.} Likewise, landowners are entitled to dig water-wells in spite of preventing their neighbours from receiving water. However, landowners must block their water-wells if they are useless or less valuable than neighbours’ damage.\footnote{Articles 36, Chilean Waters Code.} These and other rules confirm the existence of a general principle. Jurists and judges concede that the abuse of right involves unlawful conduct against good customs and good faith, thereby triggering tort liability, particularly if the defendant intentionally injured the claimant. \footnote{CA.Santiago, 27.7.1943, RDI/41/27561; CS, 28.5.1996, RDJ95/157; CS, 9.11.2004, GI/293/11; Ducci (1958) 43; Alessandri (1942) 251ff; Díez (1997) 38; Corral (2003) 125; Barros: (1999) passim, (2006) 64ff.}

Yet, as Guzmán argues, Chilean courts and legal writers should refine the abstract notion of “abuse of rights” through a neat categorisation of fact-situations. Typification is critical to lift the level of legal development.\footnote{Guzmán (2003) 316ff.} Not for nothing is the casuistic classic Roman law seen as a model to imitate. Similarly, Spanish authors regard the abuse of rights, which is enshrined in article 7.2 SCC, as too diffuse to be helpful. Indeed, courts are forced to use the general principles or the rules regulating the relevant activity to decide whether the defendant behaved unlawfully. \footnote{Menéndez (1998) 137; Atienza/Ruiz (2000) passim.}

Therefore, Chilean courts and scholars should specify the undifferentiated concepts of intention, damage and abuse of rights to tackle more effectively the harm in business rivalry.

4. The prototype of abuse of rights

In Chile, the intentional infliction of harm without justification is the paradigmatic case of abuse of rights, just like what happens with German law (§226 BGB). French law or the American prima facie tort theory. Chilean courts usually associate the abuse of rights with the defendant’s disinterested malevolence which underpins civil delict. The classic case concerned a buyer of a car who, having found defects in it, made exaggerated requests to the claimant (car-seller) who resisted them. Through the newspaper advertisements whereby the defendant offered his car for sale, he denigrated the car-brand and the seller. The court found that the defendant had abused his right of property which only allowed him to offer his car for sale without injuring the claimant. The defendant was declared tortiously liable. The facts of this case fairly correspond to malicious falsehood and disparagement of products as a major category of unfair conduct.

Nonetheless, the abuse of process is perhaps the form of abuse that most typically generates tort liability. This also uncovers certain judicial inclination to confine the abuse of rights to very extreme misconduct, such as the intentional or grossly negligent causation of damage. This is the case with the creditor who in a collection proceeding requested and obtained the attachment of some assets knowing that they belonged to a third party as distinct from his debtor. Here the abuse of the right to request seizure was inferred from the defendant’s intention to harm the claimant. Similarly, the defendant who carried out execution against the claimant’s property knowing that the claimant was not a partner in the debtor’s company, a fact easily verifiable in the Commercial Registry, was found to have abused its right to sue as he had injured the claimant acting with extreme inattention. Conversely, a court held for the defendant who had acted as executant in a mortgage foreclosure and successively requested the nullity of the public auction of the encumbered real estate, thus preventing it from being transferred to the claimant (buyer). The court took into account that the claimant could not prove the defendant’s intention to injure her. Likewise, the defendant had legitimately sought procedural measures despite annoying the claimant. Although the court distinguished several variants of the abuse of rights (including negligence, abnormality, absence of legitimate interest and conduct contrary to good customs or good faith), it confined the abuse of rights to malicious behaviour. In another case, the defendant published a newspaper advertisement announcing that the claimant had ceased to work for him. The court held that the defendant had legitimately informed the public without intending to harm the claimant. Moreover, the claimant was found to have contravened a non-compete clause inserted in the contract for personal services with the defendant by attempting the constitution of a company operating the same type of business as the defendant’s trade. These examples also demonstrate that the abuse of rights is rather like an alternative manner of describing intentionally inflicted harm.

However, the malicious exercise of a right is a strange hypothesis of abusive conduct, proof of which is hard and can effortlessly be negated through justification. The claimant must bring evidence that the defendant intended to harm him as a means to another end or acted grossly negligently. Indeed, the intention to harm the claimant can be surmised from the absence of utility for the defendant. For instance, it can be inferred from the irrational act of digging a water-well seeking no benefit whatsoever. This recalls French law and Spanish law. Yet, in Spain the abuse of rights is independent of tortious liability. It involves the abnormal exercise of a right and serves to prevent imminent or foreseeable harm through the actions of cessation and of restoration of the status quo. It also triggers tort liability if the victim shows damage and unlawfulness. The abuse itself operates as a rebuttable presumption of fault.

---

125 CA-Santiago, 9.11.1992, GJ/149/58.
126 CS, 16.9.1912, RDI/11/177.
127 Article 56, Chilean Waters Code; Alessandri (1943) 262ff.
128 E.g., Civ(1), 19.11.1996, Bull.civ.I.No.404 (holding that the claimant-buyer had abused his contractual right to enforce a penal clause upon failure to show that he had suffered damages following the breach of a non-compete covenant by the defendant-seller).
129 Pursuant to article 7.2 SCC, the abuse of rights encompasses the exercise of a right maliciously (inferred from abnormal conduct or the lack of benefit) or manifestly exceeding its legal limits (e.g., unfair or antitrust conduct). The leading case (STS, 14.2.1944, R/293) defines the abuse as the exercise of a right with the intention to harm the claimant, without any serious legitimate purpose or in an objectively abnormal way. See: Molina (1993) pasión; Concepción (1999) 63.
5. Beyond tort

Chilean law accepts the abuse of rights even outside tort law. This happens with the registration in Chile of the claimant’s international trademark, the defendant misappropriating the claimant’s prestige and shielding its products from competition.\(^{1266}\) Similarly, the TDLC held that the defendant had abused its right on a registered trademark over a generic product (used for Japanese food) as his only goal was avoiding all competition (in the distribution and sale of that product). The association of a product by a generic name through a trademark afforded a clear advantage to the defendant, preventing rivals from employing such name and imposing entry barriers to the relevant market. This unfair practice was aimed at attaining, keeping or increasing a dominant position in the relevant market.\(^{1265}\) Accordingly, it fell within the TDLC’s jurisdiction.\(^{1266}\)

Likewise, there is abundant case-law on recurso de protección involving the abuse of certain rights or liberties enshrined in the Constitution. Recurso de protección is a constitutional action that empowers the courts of appeal and the Supreme Court to issue all kinds of orders to safeguard one or more of these rights or liberties, including the right of property\(^{1267}\) and economic freedom,\(^{1268}\) to prevent third parties from arbitrarily and/or illegally interfering with the exercise of these rights by their holders.\(^{1269}\) Recurso de protección restores the victim’s status quo, although victims can later bring tort actions before civil courts for the harm arising from the violation of such rights. The defendant’s conduct is abusive if it causes abnormal annoyance to the claimant, according to its intensity, duration and/or geographic area.\(^{1270}\) Thus, a recurso de protección brought against a foster-home institution alleging that the uproar made by the children maintained by it violated the claimant’s right to live in an environment free of contamination\(^{1271}\) was dismissed: the noise reflected a natural expression of childhood, as illustrated by Oscar Wilde’s *The Selfish Giant*, rather than a contaminating activity.\(^{1272}\)

There are only a few reported cases on tort proceedings following the declaration of abuse of constitutional rights through recurso de protección. Moreover, these cases do not concern competitors.\(^{1273}\) However, there is case-law which reflects the need for balancing the litigants’ conflicting interests, which is the kind of issue that the economic torts imply. It is often difficult to separate the abuse of rights from a collision of rights. Thus, a neighbour brought an action against a clay-pigeon shooting club arguing that this activity disturbed her property right. The court concluded that such activity seriously affected the claimant’s right, thereby becoming illicit, arbitrary and abusive. The sport practiced in the respondent’s property did not fit in any of the constitutional limits to private property. This was for the “social function” of property relates to national security, public interests, public health and environmental conservation.\(^{1274}\) Some applauded that the court defined the abuse of rights by reference to arbitrary conduct.\(^{1275}\) For others there were two equally, legitimate and competing rights which should have been balanced in their merits without employing the abstract notion of abuse of rights.\(^{1276}\)

In another case, the respondents (bank shareholders) had exercised their right not to withdraw dividends paid for their shares. Consequently, the dividends were converted into capital. The claimant argued that the respondents (the claimant’s debtors) had abused that right, thus undermining the claimant’s property over the contractual right against the respondents. The Supreme Court ruled that the respondents had acted exclusively to obtain a pecuniary advantage unrelated to the banking activity. The respondents had abused their right to capitalise part of the dividends, thereby injuring the claimant.\(^{1277}\) Some criticise the decision since the claimant was not affected given that the respondents’

\(^{1264}\) CP/Cen, 31.5.1996, DecisionNo.974.

\(^{1265}\) Article 3(c) of the Law 1991/2003 (DFL 1/2005), i.e., Chilean Competition Act 2003 ("CHCA").


\(^{1267}\) Article 19/No.24 CHC.

\(^{1268}\) The right to undertake any economic activity not contrary to morals, public order or national security, complying with the legal norms which regulate it: article 19/No.21 CHC. Independently of recurso de protección, any person can bring recurso de amparo económico (Law 1891/1990 to denounce a third party’s breach of article 19/No.21 CHC to the competent court of appeal.

\(^{1269}\) Article 20 CHC.


\(^{1271}\) Article 19/No.8 CHC.


\(^{1273}\) E.g., CS, 9.11.2004, GI/293/114 (dismissing the action for damages to the reputation brought by a former undergraduate against a university which had legitimately suspended him for plagiarising another student’s work).


\(^{1277}\) CS, 22.4.96, FM/449/523.
obligation was still pending and was therefore unenforceable. For others, this case clearly represented the abuse of rights or at any rate a conflict of rights.

The contrast is that in the abuse of rights the claimant lacks any right at all (as in Pickler) although the defendant is liable. In the collision of rights both litigants have clashing interests, such as in nuisance. However, the result can be identical. Thus, it appears that Chilean law has not refined these categories but uses them as generic formulas.

6. Observations

The abuse of rights serves to justify liability for anticompetitive conduct and unfair practices as well as to understand the need for compensating intentionally inflicted economic harm. Although the abuse of rights can also consist of negligent behaviour, tort liability for economic damage arising from competition should be limited to the most extreme case, namely, dolo or culpa lata. In this form the freedom to compete can be preserved. In any event, Chilean case-law has usually confined the abuse-of-rights doctrine to the deliberately caused harm.

I have argued that the most conspicuous case of abuse of rights is simply another way of depicting intentionally occasioned injury which is worth compensating. The abuse of rights can reveal wrongful conduct and be invoked to make tort actions more persuasive. Yet, to prove the abuse of rights, particularly the intention to harm or gross negligence, is often complex. The abuse of the liberty to compete renders unfair commercial practices unlawful. The connection between unfair competition and the abuse of rights is evident in systems lacking specific legislation, as the French law, but also even if unfair competition is statutorily forbidden, as now happens in Chile. The only difference is that claimants can choose between using the special statute or the tort principles. The abuse of the right to compete also reflects the abuse of a dominant position although the claimants can seek compensation without need for invoking the abuse of rights but solely rely on antitrust conduct.

Finally, Chilean courts employ crude categories such as culpa, damage and abuse of rights. It would be more useful if, rather than codifying these abstract notions, judges elaborated a catalogue of concrete fact-situations.

V. Wrongfulness

I will now show that, for tort purposes, Chilean courts and jurists generally incorporate wrongfulness (which I use as a synonym of unlawfulness even though the latter is narrower) into fault which must in principle be proved. However, fault is presumed and absorbed by wrongfulness where the defendant infringes a specific statutory duty intended to protect the class of persons and from the type of harm matching the claimant. Nevertheless, I will suggest that the presumption of fault is inconvenient vis-à-vis the breach of competition laws.

I. Role and justification

In Chile unlawfulness is not generally regarded as an independent component of tortious liability but subsumed under culpa, that is, the breach of a generic or specific duty of care imposed by the law and which is objectively assessed. Culpa is equivalent to the French faute, which Planiol labelled as an “illicit act” and Henri and León Mazeaud as an “error of conduct.” Wrongfulness is part of fault and can alternatively comprise the breach of the general duty not to harm others, the violation of a specific statutory duty or the infringement of another’s rights. In the two last cases the act is presumed to be culpable. Unlawfulness is also embodied in harm and causation: the defendant’s conduct is treated as wrongful because it is culpable and it directly injured the victim. Trial courts evaluate causation as a fact, while the Supreme Court decides the normative issue of attributing the harm to the defendant’s act. In sum, as Descheemaeker

1279 Ortiz (2003) 89, 100.

argues, there is no need for distinguishing wrongfulness from fault, damage and causation: wrongfulness is invariably understood as the breach of duty.\footnote{Descheemaeker (2009) 17.} Conversely, Rodríguez champions the autonomy of wrongfulness. He argues that wrongful conduct is necessarily culpable even if the tortfeasor acts in good faith. The effect is to confine the justification, proof of which lies on the defendant,\footnote{Rodríguez (1999) 115-116.} to acts that do not violate the law.\footnote{Articles 1437/2284 CHCC.} For Corral, unlawfulness is the breach of the general duty not to harm others or of the specific (legal or regulatory) prohibition. In his opinion, courts should give content to _neminem laedere_. Unlawfulness is merely tautological if it is limited to infringement of the duty not to cause wrongful damage. He maintains that wrongfulness is an independent element of liability since the law defines delict and quasi-delict as acts which cause "injuria",\footnote{Corral (2003) 118ff.} a term that encompasses both unlawfulness and harm. Corral asserts that although fault, wrongfulness and damage are different they often materialise simultaneously.\footnote{Busto and Peña argue that unlawfulness prevents the excessive expansion of liability. This is for courts to assess whether the defendant infringed a legally protected interest (which involves the duty of care, the class of persons protected and the damage) before evaluating culpability (that is, the breach of duty). Conversely, had unlawfulness been covered by fault the question whether the defendant’s conduct was wrongful would be totally uncertain.\footnote{Busto (1998) 187-188; Peña (2002) passim.} Del Olmo also values wrongfulness as a sound device to control liability for negligently caused pure economic loss. He shows that the policy reasons to exclude liability, such as the fluid transmissibility of information not consumable by its use, should be analysed in relation to the duty of care rather than in connection with the issues of causation and foresight.\footnote{Del Olmo (2001) 275ff, 367.}}

In contrast, Spanish courts generally consider unlawfulness as an autonomous component of liability which signals the illicitness of conduct. Consistently with the earliest signification of _injuria_ in Roman law, unlawfulness is the violation of the general duty not to harm others enshrined in article 1902 SCC.\footnote{E.g., STS 21.1.2000, RJ/225; Puig (1956) 672-673; Yzquierdo (2001) 28; Reglero (2002a) 52ff.} For Pena, wrongfulness was ignored in France partly because _faute_ was imprecisely translated as _culpa_. He maintains that wrongfulness is independent of fault since strict liability ensues from illicit acts regardless of fault and because justifications negate wrongfulness, not negligence. Thus, wrongful conduct may be faultless.\footnote{E.g., STS 28.2.1984, RJ/686; STS, 29.12.1997, RJ/9602.}

Busto and Peña argue that unlawfulness prevents the excessive expansion of liability. This is for courts to assess whether the defendant infringed a legally protected interest (which involves the duty of care, the class of persons protected and the damage) before evaluating culpability (that is, the breach of duty). Conversely, had unlawfulness been covered by fault the question whether the defendant’s conduct was wrongful would be totally uncertain.\footnote{E.g., STS 30.12.1995, RJ/225; Puig (1956) 672-673; Yzquierdo (2001) 28; Reglero (2002a) 52ff.} Del Olmo also values wrongfulness as a sound device to control liability for negligently caused pure economic loss. He shows that the policy reasons to exclude liability, such as the fluid transmissibility of information not consumable by its use, should be analysed in relation to the duty of care rather than in connection with the issues of causation and foresight.\footnote{E.g., STS 30.12.1995, RJ/225; Puig (1956) 672-673; Yzquierdo (2001) 28; Reglero (2002a) 52ff.}

**3. Wrongfulness under question**

Wrongfulness is challenged even in Germany where it constitutes a distinct condition for liability. The modern "conduct-theory" considers artificial and troublesome the division supported by the "result-theory" between fault (the breach of the due care) and wrongfulness (the infringement of the protected interests listed in §823 BGB or the improper conduct defined in §826 BGB). The risk of separating both elements is that perfectly legitimate acts, like luring away a competitor’s customers without violating any right of the claimant, can be treated as wrongful conduct. Hence the conduct-theory merged fault with wrongfulness, which is understood as the defendant’s objectively culpable act that infringes the victim’s right. One effect of this conception is to allow compensation for negligently caused pure economic loss on the ground that the defendant violated the claimant’s “right” to an established and operating business. For its part, the result-theory roots strict liability in the infringement of the protected interests under §823.1 BGB.\footnote{E.g., STS, 12.12.1997, RJ/1995. See: Santos (1967) 618-619; Albaladejo (1997) 490; Martin-Casale/Soled (2005) 239ff.}
In sum, unlawfulness seems more suitable for furnishing legal certainty about the prohibited conduct in casuistic systems as the Roman (iniuria) or the English (breach of duty of care). Conversely, a broad fault principle such as that of French or Chilean law swallows unlawfulness: whether liability is excluded for absence of fault or of unlawfulness is a merely theoretical debate. But Spanish law shows that it is even possible to recognise unlawfulness alongside endorsing a general rule of culpa.

4. Breach of statutory duty

Just as the contract-breaker’s fault is inferred from the breach of contract (except for obligations of means), the infringement of the statutory duty defined by statute or regulation is in Chile deemed wrongful and culpable behaviour (“culpa infraccional”).

Culpa infraccional normally involves the violation of statutes establishing criminal offences, the perpetration of which injures victims. It must be noted that under the principle of legality criminal offences can only be created by statute. Likewise, criminal judgments condemning the accused constitute res iudicata in subsequent civil proceedings, thus forming irrefutable evidence as to the facts and the offender’s culpability. Court decisions declaring the contravention of other statutes or regulations entail similar effect, particularly the assertion of antitrust conduct by the TDLC or the Supreme Court. Moreover, the failure to apply this legal presumption of culpability is an error of material influence on the outcome of the case. Thus, it can be annulled via cassation. In contrast, the acquittal of the accused from criminal or administrative charges is not binding upon civil courts: the absence of criminal liability does not exclude tort liability. Therefore, the treatment of breach of a statutory provision is comparable to that of French, German and English law. In France the violation of express mandatory rules is culpable unless justified. In Germany victims have under §823.2 BGB the right to recover damage flowing from the risk that the statute intended to prevent. Likewise, the breach of the statute imposing a certain standard of conduct is a rebuttable presumption of fault. In England, the victim injured by the violation of a statute whose purpose is to protect her against such harm can bring a tort action for breach of statutory duty. Similarly, Chilean courts consider the breach of statute by the defendant as the cause of the claimant’s harm if the claimant falls in the statutory protection. There must be a sufficient connection between the defendant’s breach of the rule of conduct and the claimant’s (statutorily protected) interest and damage. Legislation may redundantly require this causal link, which is anyhow intrinsic to liability. Furthermore, the practical impact of culpa infraccional is remarkably analogous to the strict-liability tort of breach of statutory duty: claimants must only prove harm and causation.

Corral, acknowledging the autonomy of wrongfulness, argues that the breach of criminal/administrative statutes asserted in the corresponding proceedings is res iudicata and forms a presumption of unlawfulness. But fault, except when the statute establishes strict liability, must be shown. In turn, Domínguez criticises that civil courts infer fault for tort purposes exclusively from the contravention of the criminal/administrative statute, whereas criminal/administrative fault has to be proved independently of that breach. Domínguez notes that since civil courts do not assess whether the defendant could foresee the harm caused, they eventually impose strict liability for outcome which contradicts the principle of fault. In brief, although in Chile fault is generally

1291 Article 1547 CHCC.
1295 See below n.1358 and accompanying text.
1297 Article 179.1 CPC; CS, 24.10.2000, GJ/244/98. Acquittals form conclusive evidence where the accused did not commit the act, had no participation in it, or the incriminatory proof was absent: article 179.2 CPC; CS, 13.6.1952, RDJ/49/168; CS, 8.7.1971, RDJ/68/1721; Barros (2006) 964-967.
1299 CS, 22.4.1998, GJ/24/115.
1300 E.g., Article 171, Chilean Road Traffic Act (Law 18290/1984).
1304 E.g., CA.Pedro/Aguirre/Cerdá, 11.3.1988, RDJ/85/1828.
included into wrongfulness, the breach of statutory duty constitutes wrongfulness from which fault is deduced, as in France.\textsuperscript{1314}

5. Observations

Whether wrongfulness is autonomous or incorporated into fault is a formal choice. Courts must always evaluate the litigants’ conflicting interests and clearly establish which types of injurious conduct are unacceptable. Specifically, the harm derived from business competition is at first sight justified, unless the defendant abused her right to compete.

There is reason for fearing that behind the presumption of fault following the breach of statutory duties courts may end up applying strict liability for results, thereby betraying the fault principle. However, as will be shown in the next chapter, antitrust conduct entails strict liability for outcomes as a practical means of facilitating the institution of tort actions once the competition authority conclusively declares that conduct, a decision which is binding upon civil courts. Yet, this species of tort liability is neither based on the bare causation of harm nor in negligence but on the deliberate antitrust conduct targeted at consumers, competitors and markets, although it often aims at identifiable rivals. I will reject the idea that antitrust tort liability hangs on simple fault presumed from the breach of the statute. I will instead propose that this liability is founded on the defendant’s intention to harm the claimant which is inferred from the antitrust conduct. This is wrongful misbehaviour from which the defendant’s intention to injure a known rival can be deduced. This is an adequate criterion for imposing tort liability between business adversaries.

VI. Conclusions

This chapter showed that Chilean law is prepared to compensate for negligently caused economic loss in various fact-situations which, although have not until now implicated commercial competition, give an indication that even in this field courts would \textit{prima facie} accept fault-based liability. However, I have demonstrated that the prospect of recovering \textit{lucrum cessans} is reduced because case-law tends to consider it as uncertain or indirect. I have argued that even if this procedure practically limits liability and attains results similar to the English economic torts it mistakenly assumes that competitors owe each other a duty of care and ignores that negligently caused harm is a side-effect of legitimate business strife. Thus, I proposed to replace the principle of \textit{culpa} with the defendant’s intention to harm the claimant or, at least, gross negligence, which is statutorily equivalent to the former and similar to recklessness (proper of criminal law), as it disclose a notorious disregard for the claimant’s interests. Moreover, I have shown that the intentional infliction of economic harm often discloses the abuse of the right (or liberty) to compete which is manifest in unfair practices and anticompetitive conduct. Furthermore, antitrust conduct is \textit{per se} abusive and wrongful, operating as threshold of liability, the defendant’s mental state being presumed from that conduct. To require an intentional element (which must be proved except when is inferred from antitrust behaviour) is coherent with the nature of competitive activity and the pro-competition policy underlying the Chilean economic constitution. Additionally, it deters irresponsible litigation. Eventually, courts and scholars must realise that the \textit{neminem laeder} principle suffers an important modification when tackling economic harm arising from business rivalry.

I have also demonstrated that in Chile tort liability is conceived of as fulfilling basically compensatory and deterrent aims. Exemplary damages are not an alternative without statutory recognition, thus discovering a clear association of punishment with criminal liability. Still, courts implicitly use retributive criteria to award higher compensation for non-pecuniary harm which in my view could reach pure economic loss. The seriousness of the defendant’s conduct, which \textit{dolo} and \textit{culpa lata} blatantly reveal, stands out among such punitive considerations. Furthermore, I have maintained that compensation for all direct harms should be limited to breaches of contract and torts committed with the intention to harm the claimant or gross negligence.

Wrongfulness is traditionally embodied within fault. Yet, I showed that wrongfulness can only help to control liability for harm caused between commercial competitors if it is subsumed under intention or gross negligence, that is, abusive and unjustified conduct. Likewise, the breach of competition laws is

\textsuperscript{1314} Whittaker (2008a) 364, 373.
wrongful behaviour although I questioned that fault could be presumed from it. Fault cannot govern tort liability for antitrust conduct as competitors owe no duty of care to one another. Moreover, antitrust conduct is committed with the intention to affect the market in general and often with the intention of injuring recognisable rivals.

Lastly, the Chilean law of delict needs to specify its abstract concepts of intention, economic harm and abuse of rights, through the elaboration of taxonomies of the fact-situations encapsulated in each of these categories. This is, I think, a precondition for dealing with new issues successfully. Still, courts should also aim at increasing the levels of consistency, justice and certainty through the observance of precedents. It would certainly help to this if the Supreme Court retained the control over the elements of tort liability.

CHAPTER VII
TORT LIABILITY FOR ANTITRUST AND UNFAIR PRACTICES

Chapter VI suggested that in Chile tortious liability for economic losses based on the code delict rules should be enforced congruently with the liberty to compete through the requirement of the defendant’s intention to harm the claimant or gross negligence. Chapter VII focuses on tort liability for damage arising from anticompetitive conduct and unfair practices, including interference with business and contractual relationships. My main contribution to the current literature is to maintain that, for this species of liability to be applied consistently with competition, it ought to be deemed rooted in the tortfeasor’s intention to harm the claimant or to procure the breach of contract, as the case may be, or in gross negligence which is equated to intention in Chilean private law.

Since even carelessly caused economic harm is a side-effect of legitimate commercial competition and rivals owe each other no duty of care, fault and strict liability are unsuitable for regimenting business battle. Although competitors often injure one another intentionally, this mental element significantly limits the principle of culpa. It implies that unfair practices and antitrust conduct undertaken against a statutory requirement are abusive. The component of intention identifies the wrongful character of the conduct, thereby producing the effect of restricting liability similarly to the result attained through the unlawfulness test in the English economic torts. Unfair competition law belongs to the realm of private law so its concern is to protect individual competitors from per se abusive and wrongful acts through preventive and compensatory remedies, including tort liability. Unfair practices can only be committed intentionally or grossly negligently. Subsequently, I will demonstrate that, just like the English competition torts, Chilean tort liability for antitrust conduct is strict liability for outcomes (the harm sustained by an identifiable competitor) though grounded in intentional anticompetitive behaviour. I will show that the defendant’s mental element is not a condition for imposing antitrust tort liability as tort actions are designed to supplement the public enforcement of competition law by compensating for individual harm. The law promotes the bringing of tort lawsuits following the assertion of antitrust conduct by the competition authority (the
TDLC and the Supreme Court as court of last instance) after the investigation conducted by the Fiscalía Nacional Económica (National Economic Prosecutor) *de motu proprio* or at a private party's request. Claimants must overcome the burdensome proof of particular damage arising from the antitrust conduct as different from the latter's detrimental impact on the market, consumers and competitors generally. Yet, it would be erroneous to categorise antitrust tort liability as founded on presumed fault or as conduct-based strict liability. Although this is not explicitly stated in tort literature, I will argue that the mental element is inferred from the fact that antitrust conduct directly harmed a recognisable competitor. By the same token, it is unlikely that competitors will be prepared to issue tort actions relying on the code delict rules without a previous declaration of antitrust conduct, as they would need to prove the latter in the first place let alone the defendant's intention or gross negligence.

Section I introduces antitrust law and unfair competition law as separate albeit complementary disciplines. Whereas anticompetitive conduct and delict differ in the intention and harm each involves, unfair practices and tort engage the same types of intention and damage. Likewise, tort actions complement the public enforcement of competition law through compensation for damage flowing from antitrust conduct. Conversely, the law tackles unfair practices principally through preventive remedies while tort compensation is merely ancillary. Section II demonstrates that tortious liability for anticompetitive conduct is underpinned in intentional conduct though triggers strict liability for outcomes. It shows the improbability that claimants bring tort actions independently of the declaration of antitrust conduct by the competition authorities. Section III analyses tort liability for unfair competition and its position vis-à-vis the other remedies established by the law to handle unfair practices. Section IV is devoted to liability for interference with another's contract and business relations, given its great potential as an economic tort in Chile. Section V outlines the principal conclusions.

I. Competition law context

This section contrasts competition law against unfair competition law and explains the influence of these differences upon the purposes served by tort liability in each area.

1. Competition freedom and limitations

In Chile, the liberty to undertake any economic activity without infringing the relevant legal norms, national security, the morals and the public order is conferred upon persons as of right.\(^\text{1315}\) Alongside property, economic freedom underpins the "public economic order" set forth in the Constitution.\(^\text{1316}\) Economic freedom encompasses the liberties to work, to carry out business and to compete. The latter involves the liberty to access, to remain in and to leave the market. Competitors are allowed to fight for clientele unless they commit unlawful acts, whether unfair (for example, attacking the quality of rivals' products/services) or antitrust (preventing, restricting or distorting competition).\(^\text{1317}\) Right-holders can defend their rights through *recurso de protección* which, as already seen,\(^\text{1318}\) restores the *status quo* of the victim threatened, disrupted or deprived of her right by the arbitrary and/or illegal act/omission committed by a third party. Likewise, the victim can subsequently bring a tort action before the civil court to recover the damage arising from that arbitrary and/or illegal conduct the existence of which is *res judicata*. The case-law on *recurso de protección* elucidates the gist of wrongful conduct.\(^\text{1319}\) However, it is for the competition authorities to investigate and punish antitrust practices themselves in a separate proceeding.\(^\text{1320}\)

The liberty to compete must neither be abusive nor contravene the economic regulations,\(^\text{1321}\) morals (including good faith and good commercial

---

1315 Article 19/No.21 CHC.
1318 Above nn.1267ff and accompanying text.
1319 E.g., CA Santiago, 8/8/1993, 2120-1993/LegalPublishing/20205 (stating that a concerted practice intended to drive the claimant out of the market or threatening her with producing this effect violates the claimant's economic freedom).
1321 These regulations shall not undermine the essence of competition or make it impracticable: article 19/No.26 CHC.
Morals and public order pervade civil law and limit private autonomy as society evolves. Both criteria support a market of freely negotiated contracts and freely transferred goods but operate ex post, for instance, invalidating contracts with illicit object/cause. Special public-law regulation is needed to safeguard competition from the abuse of economic power ex ante, imposing positive obligations and quasi-criminal sanctions upon contraveners. Thus, the role of private law in the protection of competition is marginal as compared with that of administrative law.

2. Connecting antitrust law with the law against unfair competition

2.1 Fundamental differences

Antitrust law and unfair competition law are distinct yet complementary areas. Competition law is a public-law domain concerned with safeguarding consumers, competitors and markets generally against antitrust conduct. Competition law is "political": it selects and punishes the offences representing a serious threat to the marketplace, thereby permitting (through the de minimis rule) conduct not detrimental to the public interest. Antitrust conduct comprises the execution or entering into by one or more persons of any deed, act, contract or agreement which actually or potentially prevents, restricts or hinders free competition. The key acts are cartels (agreements or concerted practices between businesses targeted, among others, at fixing sale/purchase prices, limiting production or assigning themselves market zones/quotas) and the abuse of a dominant position in the relevant market.

Conversely, unfair competition law is a private-law branch whose preoccupation is the excess rather than the lack of competition due to acts contrary to good faith or good commercial customs. This legal discipline is "technical" as it cannot renounce to prevent and punish per se wrongful acts which falsify or undermine the equality of opportunities between competitors through socially reprobated means, encompassing force and machinations, regardless of their repercussions on the market. However, to decide whether the loss of clientele or market-share suffered by a business derived from unfair or legitimate competition is indeed a difficult question.

2.2 Interfacing anticompetitive conduct and unfair competitive behaviour

Antitrust law and the law against unfair competition are intimately interconnected and structured around freedom of enterprise. Thus, the breach of competition laws can simultaneously constitute antitrust and unfair conduct. The former Chilean Competition Commissions (superseded by the TDLC) sanctioned a wide range of unfair practices which were subsumed under antitrust conduct: acts of conflict, denigration, imitation, appropriation of another’s reputation and misleading comparative advertising. These tribunals often refrained from deciding disputes involving the breach of industrial property law.

Today civil courts have vast jurisdiction on unfair competition, whereas the TDLC can only investigate and punish predatory pricing and other unfair practices (like commercial disparagement and misleading advertising) provided that they are targeted at acquiring, maintaining or increasing a dominant position in the relevant market. Thus, unfair practices fall within competition law depending on their market impact alongside the defendant’s purpose and market power. For example, selling below costs to promote a given product may be

---

2. Lira (1944) 260ff, 322.
3. Articles 10/146/1460/1468/1469/1470/1471/1472/1473/CHCC.
6. Article 3 CHCA.
anticompetitive if it continues over time and is used to prevent potential or eliminate actual competitors.\textsuperscript{1337} Likewise, if a civil court finds anticompetitive conduct on the occasion of trying unfair competition it must remit the case to the National Economic Prosecutor who may request the TDLC to impose a penalty inasmuch as the infringement is sufficiently serious.\textsuperscript{1338}

Indeed, a single conduct can theoretically be unfair, anticompetitive, contrary to consumers’ rights and violate competitors’ IPRs.\textsuperscript{1339} Furthermore, a same unfair practice can be remedied through diverse actions (that is, cessation, prohibition, declaration, removal of effects and tort lawsuits), even in separate proceedings.\textsuperscript{1340} So, there is potential for inconsistent case-law concerning the same facts. For instance, one civil court could allow the action for cessation against the same conduct that other court validated. Analogously, the TDLC could hold as legitimate an act found unfair by a civil court.\textsuperscript{1341}

Yet, I think that there is nothing strange in the fact that the same conduct affects different interests protected through various regulations which pursue their own objects as has rightly been pointed out.\textsuperscript{1342} Accordingly, there is no genuine conflict between the TDLC and civil courts because they are looking at distinct aspects of the same behaviour. Admittedly, there is the possibility of clashing judgments between civil courts about identical acts and parties although regarding diverse remedies. Nonetheless, the defences of \textit{lis pendens} and \textit{res iudicata} can partly counteract these problems.

3. Observations

Anticompetitive conduct and unfair practices are sources of tortious liability. However, antitrust conduct is punished for its results whereas unfair practices are wrongful in themselves. Consequentially, tort law essentially provides compensation for individual harm arising from antitrust conduct while it primarily helps to prevent unfair practices from happening.\textsuperscript{1343} Thus, French courts use the law of delict to protect the fraternity between competitors, preventing \textit{concurrence déloyale}. In turn, the liberty and equality between competitors is within the remit of competition law.\textsuperscript{1344}

This difference, I think, also explains that antitrust conduct triggers outcome-based strict tort liability, just as happens with the English statutory competition torts. Conversely, unfair conduct entails intention-based tort liability, analogously to the English economic torts. Tort actions, which redress particular victims, aid the public enforcement of competition law, which concentrates on the overall impact of anticompetitive conduct. By contrast, unfair competition law and tort law protect a common individual interest reflecting their private-law nature.

Finally, both antitrust conduct and unfair practices are prohibited by the relevant statutes. However, only antitrust conduct triggers tort liability for breach of statute. The finding of antitrust conduct by the competition authority binds the civil court, so tort proceedings are confined to proof of damage and causation. Conversely, tort liability for unfair practices is, as provided by the UCA, entirely governed by the code rules on delict. Thus, the claimant must show damage, causation and the defendant’s fault, yet I will argue for requiring a mental element.

II. Tort liability for antitrust conduct

Anticompetitive conduct affects the public interest in competition represented by consumers, competitors and markets as such. Tort law merely permits the recovery of individual harm sustained by identifiable contenders.

I. Administrative liability for anticompetitive conduct

Whether the infringement of competition laws amounts to antitrust conduct is decided by the competition authority and the imposition of sanctions must comply

---

\textsuperscript{1337} CS, 26.5.2005, 4927-2004/LegalPublishing/32235.
\textsuperscript{1338} Article 10 UCA.
\textsuperscript{1339} I.e., infringing the UCA, the CHCA, the Consumer Protection Act (Law 19496/1997), the Intellectual Property Act (Law 17336/1970) and the Industrial Property Act (Law 19039/1991): article 2 UCA.
\textsuperscript{1340} Article 5 UCA.
\textsuperscript{1341} Menchaca (2007) 34f.
\textsuperscript{1342} Poblete (2007) 120.
\textsuperscript{1343} Baylos (1978) 359; De la Vega (2001) 56.
\textsuperscript{1344} Le Tourneur (1991) 2003 passim.
with the constitutional principles of legality and culpability;1345 hence the
prohibition on the legislator from presuming criminal liability; the respect for non
bis in idem; the presumption of innocence; and the need for proportionality
between punishment and offence. The competition authority must observe these
constitutional safeguards since antitrust conduct and its accompanying sanctions
are essentially equivalent to criminal misdemeanour and punishment.1346 So,
whether antitrust conduct is categorised as an administrative contravention or as a
quasi-criminal offence is a political issue.1347

Some authors champion strict liability relying on that article 3 CHCA
defines antitrust conduct in terms of its object or effect upon the market regardless
of the defendant’s motives. These scholars attempt to detach competition law
from criminal law in relation to the conduct, sanctions, institutions, proceedings
and remedies each involves.1348 In my opinion, however, since liability for
antitrust conduct is basically similar to criminal liability, the gist of which is the
defendant’s blameworthiness, the former cannot be strict either. Moreover, as
Peña says, strict liability seems inappropriate for regulating a non-risky activity as
antitrust conduct.1349

In fact, the Supreme Court held that the agent’s intention to prevent,
restrict or hinder competition freedom is central to antitrust conduct.1350 This
mental state is typically proved indirectly. Thus, in a cartel several persons act in
concert with the positive intention to bring about the said consequences. Still, the
fact that the defendants charge similar prices synchronically or coincidently is not
conclusive of the collusion if there are other plausible causes, such as the
equivalence between the services rendered by each of them or the existence of
fierce competition leading into quickly imitating their rivals’ market methods.1351
Likewise, courts infer the defendant’s intention to produce graphic or phonetic
confusion between the claimant’s original merchandise and the defendant’s
replica in order to profit from the claimant’s name and reputation, from the
commercialisation of the copy by the defendant.1352 Conversely, such intention is
not found if the claimant had not sold her products in Chile.1353 This means that
she was not competing with the defendant.

What shapes antitrust conduct as intentional is its object or effect
detrimental to competition. Antitrust conduct is defined by article 3 of the CHCA
in terms of an object or effect to prevent, restrict or hinder free competition. Since
the intention relates to the purposes of an action, antitrust conduct is necessarily
intentional as opposed to negligent. Moreover, pursuant to article 30 CHCA the
declaration of antitrust conduct by the competition authority is binding upon the
civil court deciding a subsequent tort case. The conduct, facts and juridical
categorisation established by the TDLC or the Supreme Court are res iudicata.1354

Then, although the intention contained in the antitrust conduct differs from the
intention to harm a particular competitor,1355 the former is indubitable evidence
for the latter in tort litigation. Therefore, the ensuing tort liability is strict for the
outcome but rooted in intentional conduct.

2. The difficult case for stand-alone tort actions

In Chile competitors have not brought tort actions based on the code rules on
delict independently of the previous declaration of antitrust conduct by the
competition authority.1356

The only reported case decided before article 30 of the CHCA was enacted
concerned a tort claim grounded on the antitrust conduct asserted by the then

---

1345 Article 19/No.3 CHC.
1346 Chilean Constitutional Tribunal, 26.8.1996, DecisionNo.244; Cury (1992) 73ff; Valdés:
(2006a), (2006b) passim.
15ff; Roxin (1997) 72-73.
1348 Moot (1995); Vergara (2006) passim. Vergara has served as National Economic Prosecutor,
which explains his choice for strict liability.
1350 CS, 4.7.2007, 6226-2006/Legal Publishing/36684.
Competition Commission; and the few (pending appeal) reported cases commenced after that provision came into force also involve follow-on actions.\footnote{1357 See below section 5.1, p.242.} Thus, this area will probably develop through follow-on lawsuits as claimants only have to show they were harmed by the defendant’s antitrust conduct definitively affirmed by the TDLC. As said, article 30 of the CHCA obliges civil courts deciding tort claims to rely on the conduct, facts and juridical categorisation settled by the TDLC, which resembles the abundant Chilean tort case-law succeeding the declaration of criminal or administrative offences.\footnote{1358 See above n.1303 and accompanying text.} Although this provision is silent about the defendant’s fault, jurists seem to understand that fault is presumed from the antitrust conduct, proof being reduced to damage and causation. Further support for this rests on the fact that antitrust tort actions are tried in summary (not protracted) proceedings.\footnote{1359 Barros (2006) 963; Valdés (2006a) 281, 309. See below section 5.2, p.244.} The inchoate case-law adopts this view\footnote{1360 See below section 3, pp.239ff.} with which I will disagree.\footnote{1361 Witkcr (2000) 72-73; Valdés (2006a) passim.} Consequently, there is little likelihood that stand-alone actions will be filed. Moreover, civil courts can be strongly persuaded into rejecting tort claims based on the same conduct that the competition authority considered as pro-competitive.\footnote{1362 CA.Concepción, 30.12.2008, 360-2005: see above n.1212 and accompanying text.} A recent decision was already mentioned, which awarded compensation for negligently caused pure economic loss (lucrum cessans).\footnote{1363 CS, 16.6.2005, 5719-2004.} However, this case was preceded by a competition investigation where the Supreme Court concluded that the defendant had neither perpetrated an unfair practice nor attempted to denigrate the claimant’s business but had in good faith mistakenly denounced to third parties that the claimant’s product was contaminated.\footnote{1364 CA, 229ff.} Yet, the claimant has succeeded in tort until now, pending the Supreme Court’s decision on cassation.\footnote{1365 CS, 3516-2009.} Still, it is noteworthy that the litigants are not competitors. Had they been so, the claimant might not have sued the defendant. But it is even more problematic that a claimant can be awarded compensation for economic harm negligently caused by his rival after the

competition authority held the conduct as pro-competitive and notwithstanding that commercial contenders owe each other no duty of care.

3. Justifying and restraining liability

Harming individual rivals is justified as an inevitable side-effect of exercising the liberty to compete which is, by itself, beneficial to consumers and markets. Legitimate competition is often aggressive\footnote{1366 Tunc (1974) 93ff.} and Chilean courts seem to know it: businesses must overcome competition through commercial strategies and market instruments.\footnote{1367 CS, 23.8.2004, 2943-2004.} Accordingly, tort liability can only be imposed after balancing the claimant’s interest against the defendant’s freedom to compete. A useful restraining factor is unlawfulness, whether it is expressed through nominate torts (England), a generic clause proscribing unfair acts ($826 BGB) or the abuse of the right to compete.\footnote{1368 Perš (2000) 229ff; Martens/is/Unberath (2002) 889ff; Van Dam (2006) 70.} The latter is the Chilean route. As Barros suggests, the abuse of rights is represented by the antitrust conduct which exceeds allowable competition.\footnote{1369 Barros (2006) 1044ff.} The doubt is whether the claimant should additionally prove that she was intentionally or grossly negligently injured. In Spain, De la Vega contended that the anticompetitive conduct declared by the competition authority should count as evidence of the defendant’s fault, given the proximity between wrongfulness and culpability in antitrust harm. He argued that because antitrust conduct is normally deliberate, the presumption hinged on objectively wrongful conduct. Thus, tort liability becomes strict in outcome.\footnote{1370 De la Vega (2001) 200ff.} Similarly, Chilean jurists and courts infer the defendant’s fault from the antitrust conduct. They claim that article 30 CHCA does not require proof of fault or intention, which is consistent with the confuse case-law on culpa intracciones.

I concede that proof in such cases is limited to causation and damage. Antitrust conduct was already investigated and assessed by the competition authority. Moreover, the legislator is promoting the bringing of tort actions as an aid to the public enforcement of antitrust law, an incentive which might be lost if
claimants had to prove the defendant’s fault or intention to injure on top of the complex harm and causation. Nevertheless, simple fault should not be presumed from antitrust conduct. Chilean courts and scholars have not fully realised that antitrust tort liability can neither be rooted in the bare causation of harm nor in negligence. To construe it as “conduct-based strict liability” or as grounded in “presumed fault” is to misunderstand the gist of competition, where identifiable rivals are unavoidably deprived of clientele and market-share. Conduct-based strict liability violates the principle of culpability which governs the quasi-criminal sanctions imposed by the competition authority and affects the subsequent tort litigation. Further, strict liability can only be established expressly by statute, which is not the case with article 30 of the CHCA. In turn, to impose fault liability is to ignore that accidentally inflicted harm is a side-effect of competition; that rivals owe one another no duty of care; and that the anticompetitive conduct on which tort liability rests is intentional, never careless. Perhaps in other contexts the defendant’s fault can properly be inferred from the breach of the relevant statute as the activity in question imposes reciprocal duties of care on their participants. But competition is a peculiar occupation, for opponents inexorably hurt each another without bearing any duty to abstain from acting carelessly. The limit is abusive deeds encapsulated in antitrust behaviour which is intentional and shapes the ensuing tort liability. Once the claimant shows that she was specifically injured by the defendant’s antitrust conduct the latter can be deemed tantamount to an intentional tort (delict).

Yet, the interpretation advanced here is not exempt from difficulties. First, the intention to harm (dolo) must generally be proved, while the CHCA apparently contains no exception to this rule. Secondly, antitrust conduct targets at indeterminate people, whereas civil delict is intended to harm particular victims. Nevertheless, these problems are not insurmountable. First, dolo by its nature can only be shown indirectly, from the defendant’s conduct, and judicial presumptions constitute a means of proof. The primary evidence from which the intention to harm (or gross negligence) can be inferred is the antitrust conduct itself. Secondly, it is not rare that the antitrust conduct is directed against recognisable competitors,

as predatory pricing conspicuously illustrates. Any sensible person entering a market does an analysis which reveals the competitors and their market position. So, competition is normally aimed at affecting known rivals. Moreover, once the tort claimant shows that she was injured as a result of the defendant’s antitrust conduct it seems logical to deduce that the defendant really intended to harm her as distinguished from consumers and other competitors at large. In a sense this mental element is embodied into the causal link between the defendant’s antitrust conduct and the claimant’s harm.

Although the argument presented here may not change the result (whatever the nature of liability claimants need not prove the defendant’s fault or intention) it is worth emphasising that, particularly while this is still a novel area in Chile, antitrust tort liability hangs on intentional conduct although it is strict in the outcome. As Barros recently said, there is no universal prohibition not to injure others. Strict liability is exceptional and surely does not govern competitors who defeat one another by offering better or cheaper products. Additionally, I submit, mere fault is not enough either. Intention or serious disregard for another’s rights is the minimum standard, implicit in antitrust conduct, on which the consequent tort liability repose.

4. Causation issues

To succeed claimants must show that their actual market-share, clientele or sales and/or their possibilities of further business were lost or diminished (damnum emergens and lucrum cessans, respectively) due precisely to the defendant’s antitrust conduct. The problem is that the claimant’s economic loss often arises from other causes, such as fashion and the claimant’s own inefficiency, all the more if the claim is brought independently of the declaration of antitrust conduct. In fact article 30 of the CHCA applies to follow-on tort actions, just like s.47A of the Competition Act 1998 provides.

---

1371 Article 1459 CHCC. Moreover, article 707 CHCC provides for a general presumption of good faith.
1372 To presume a fact is to infer it from certain known antecedents or circumstances (article 47 CHCC). Judicial presumptions are regulated in article 1712 CHCC and articles 426/427 CPC.
Although the TDLC can evaluate evidence with discretion, proving antitrust conduct and its negative impact is usually troublesome. Thus, TDLC's judgments finding cartels have been reversed by the Supreme Court as the facts did not unequivocally disclose collusion: there were alternative explanations for parallel conduct. These adversities can doubtlessly permeate into tort litigation. As Araya explains, compensable damages must be segregated from the overall impact of anticompetitive conduct (for example, the social net cost paid in excess by potential/actual purchasers of the monopolised product/service). The pitfall is determining with relative certainty which profits victims would have made had anticompetitive conduct not happened. It is the kind of hypothetical question set by *lucrum cessans*.

5. Early case-law

5.1 Prior to article 30 CHCA

As far as I have been able to discover, there are no stand-alone cases reported in Chile. Possibly the first dispute on liability for anticompetitive harm was governed by the former Competition Act which lacked a provision as article 30 CHCA. The defendants, two Chilean commercial airlines with dominant position in a national route, had been punished by the competition authority for predatory pricing (benefiting passengers in the short term with lower fares though leading to monopolistic positions in the long run). The claimants' airline company and its partners' natural persons subsequently sued in tort the defendants alleging *damnum emergens*, *lucrum cessans* and non-pecuniary loss. The defendants were in first instance held jointly and severally liable for unlawfully pursuing illicit aims (dumping). Moreover, their intention to harm the claimants was inferred from the fact of restricting the claimants' participation in the relevant market, thereby depriving them of expected benefits. This conduct, its object and effect transgressed the honesty and loyalty owed by the defendants to their competitor. This decision was approved by the Court of Appeal and the Supreme Court, the latter grounding the defendants' joint and several liability in their collusion. Since the term "collusion" is not defined by statute, the court understood it according to its natural and obvious sense, that is, as an illicit agreement that causes harm to another person.

This case highlights that antitrust tort actions are likely to follow the statement of anticompetitive conduct. Concretely, this case took such declaration as indisputable evidence, as Chilean courts generally do in respect of *culpa infraccional*. Still, liability was subjected to the defendant's intention to harm the claimant. Nonetheless, this mental element was conclusively presumed (*iuris et de iure*) from the predatory pricing. This confirms that antitrust tort liability requires intentionally inflicted economic loss although it operates as strict liability for outcomes. The case also suggests, however, that such intention may be clearer in predatory pricing than in other types of antitrust conduct, even though it was noted that the defendants had acted in concert which is close to a cartel. Finally, joint tortfeasance (solidarity or *responsabilidad solidaria*) was founded on the defendants' combination, thereby committing the same wrong, echoing the joint tortfeasance present in the tort of simple conspiracy. Precisely, the most representative examples of joint tortfeasance in Chile are cartels and combined actions perpetrated with the purpose of injuring the claimant. In general, as in criminal law, authors and accomplices are jointly and severally liable if they participate in the perpetration of the same delict. Accomplices are equated to the authors of delict.

---

1375 Through the "rules of sound criticism" (article 22 CHCA): i.e., according to the experience, logic, scientific knowledge and common sense (CS, 13.5.1971, RDJ/68/1/128), which are deemed suitable for an expert tribunal (CS, 10.1.2006, 4332-2005/Legal Publishing/53842). Conversely, civil courts must assess proof applying strict procedural rules.


5.2 Under article 30 CHCA

The two first tort lawsuits issued after article 30 CHCA came into existence have been recently decided by the same lower court, pending appeal. Both proceedings followed a single antitrust investigation where the Supreme Court sanctioned the defendant for predatory pricing. Between 2001 and 2004 the defendant had sold fibre-cement sheets at prices artificially below production costs, so attaining a dominant position and driving the claimants out of the market. 1386 Relying on article 30 CHCA, the civil court presumed the defendant’s fault from the said antitrust conduct and confined proof to damage and causation. One of the claims was rejected for lack of causation: the claimant had sold its own products at lower prices than the defendant’s. 1387 The other action succeeded. The claimants established that they had been solvent before the predatory pricing, that the defendant had offered them a high price for acquiring their business after a due diligence process, and that as a result of the defendant’s conduct their sales had deeply fallen, thereby leaving the market and eventually going into liquidation. On the basis of the Supreme Court’s finding, the civil court concluded that the defendant had persistently sold its product below manufacture costs, increasing its market-share while the claimants diminished theirs, and that the defendant could survive the predatory practice through loans with banks and associated companies along with exports turnover. The claimants were awarded the value of their business as determined by the defendant in the said due diligence (damnnum emergens), the profits they would have made without the antitrust conduct considering their former solid position (lucrum cessans), and non-pecuniary damage (their commercial discredit vis-à-vis creditors, competitors and clients). Interestingly, the court alluded to the defendant’s intention to harm the claimants. It defined predatory pricing as the sale of products/services below the costs with the "purpose" of injuring actual or prospective competitors by expelling them from the market or preventing them from entering into it, the defendant acquiring or increasing a dominant position. 1388 Again, therefore, predatory pricing presents itself as a patent situation in which the intention incorporated into antitrust

conduct coincides with the intention ingrained in civil delict. Predatory pricing undermines competition to the consumers’ detriment but often aims at recognisable adversaries.

6. Observations

It is incorrect to presume the defendant’s simple fault from antitrust conduct because this is intentional behaviour and rivals owe no duty of care to one another. Antitrust tort liability is strict liability for outcome: the claimant only has to show that she was injured by the antitrust conduct. Once these facts have been established, the court can presume the defendant’s intention to harm the claimant. Yet, the sophisticated issues of harm and causation will possibly keep litigation quite selective.

III. Tort liability for unfair practices

This section shows that tort law performs a restricted role in fighting against unfair practices in Chile, albeit new legislation can invigorate it. It argues that the requirement of intention or gross negligence is particularly appropriate for restricting liability derived from unfair practices.

1. Introduction

Chile has traditionally handled unfair competitive practices through self-regulation 1389 and norms disseminated in specific statutes. 1390 The UCA was only enacted in 2007. This novel legislation makes it worth outlining some foreign experiences. Domestic laws are heavily influenced by national traditions and

1386 CS, 29.11.2006, 3449-2006/Legal Publishing/35642.

1389 E.g., the Code on Publicity Ethics 2007 (http://www.achap.cl/achap) binds the members of the Chilean Association of Advertising Agencies, inter alia, to found comparative advertisement on genuine, demonstrable and objective information without inducing the public into confusion.
1390 E.g., the prohibition on employees, agents and partners from competing with their employers, principals and companies, respectively, in the same business executed by the latter (articles 160/No. 2 Chilean Labour Code; articles 331/404 Chilean Commercial Code). It is also forbidden to register as trademarks a symbol which can induce consumers into error, confusion or deception, as to the origin, quality or genre of products, services or businesses, or violate the public order, morals or good customs (including the principles of fair competition and commercial ethics); article 20(f)(k), Chilean Industrial Property Act (Law 19039/1991).
idiosyncrasies, employing procedural and substantive mechanisms to control unfair practices without ascribing to a given legal family. Thus, while self-regulation is pre-eminent in the UK, private law is largely used in France, Germany and Spain.\textsuperscript{1391}

In particular, in France concurrence déloyale (unfair or “disloyal” competition) has mainly been punished by case-law through a general tort of unfair competition based on the delict rules. French courts have grouped unfair practices around acts of confusion, misappropriation and slavish imitation of the competitor’s product; disparagement; disorganisation within competitors’ enterprises (such as inducing breach of contracts and violation of trade secrets); and market-disruption (for instance, false advertising).\textsuperscript{1392} For example, it has been declared as unfair competition the imitation by which the defendant enriches himself by selling the copied product at a lower price than the claimant’s original product.\textsuperscript{1393} Courts punish the direct or indirect exploitation of the competitor’s goods/prestige/clientele,\textsuperscript{1394} including “parasitic competition” where the litigants do not compete with each other (there is no confusion) albeit the defendant profits from the claimant’s reputation/technique/investment. Whereas Kamperman proposes a neat distinction between concurrence déloyale (remediable in tort) from concurrence parasitari (which should be redressed in restitution),\textsuperscript{1395} courts do not always draw a clear divide.\textsuperscript{1396} The prospect of paying tort compensation can be an effective deterrent to unfair practices, all the more if the defendant enriched himself from his wrong.\textsuperscript{1397} Yet, the remedies are predominantly preventive, similar to the English injunctions, targeted at stopping unfair practices causing or likely to cause harm to goodwill and loss of profits,\textsuperscript{1398} whereas proof of damage is often complicated by numerous possible causes.\textsuperscript{1399} In sum, a general tort of unfair competition appears consistent with the recoverability of negligently caused pure economic loss in France.\textsuperscript{1400} The claimants must show the unfair conduct, damage and causation.\textsuperscript{1401} However, currently the Cour de cassation does not subject the tort action for unfair competition to proof of the defendant’s intention to harm the claimant,\textsuperscript{1402} as it formerly did.\textsuperscript{1403} Case-law sometimes requires a “characterised fault” which is incorporated into the unfair practice itself. Yet, this fault is very difficult to distinguish from mere negligence. Indeed, Serra maintains that to the extent that simple fault suffices for an act to be unfair, courts render the action for unfair competition a more efficient means for defending the liberty to compete. Conversely, he criticises the lower court decisions which sometimes demand the defendant’s intention to injure the claimant in order to protect freedom to compete.\textsuperscript{1404} In my view, French case-law shows that “characterised fault” is not a uniform standard but actually resembles simple fault, which is detrimental to commercial competition.

In Spain unfair practices have been combated principally through statutory remedies and the abuse of rights. Unfair acts actually involve the abuse of the right to compete to the detriment of rivals. The abuse of rights (article 7.2 SCC) requires either the defendant’s intention to harm the victim or the defendant’s objectively antisocial or abnormal conduct. To recover tort damages the claimant must prove the defendant’s fault.\textsuperscript{1405} Still, as in France and England, the main remedies are preventive, like the cessation or removal of the effects arising from unfair practices or the publication of the judgment in cases of denigration or false advertisement, without need for proving the defendant’s fault.\textsuperscript{1406}

\textsuperscript{1395} Kamperman (1997) 25ff.
\textsuperscript{1396} E.g., Com., 18.11.1997, D.1998.260, n.R.Bout (holding the defendant tortiously liable for diverting the claimant’s customers who, through a system of electronic coupons, automatically obtained a discount for the defendant’s product when they purchased the claimant/non-competitive product in the same department-store).
\textsuperscript{1397} Tanc (1989) 135-136, 140.
\textsuperscript{1398} E.g., Com., 19.7.1971, D.1971.691 (prohibiting the defendant from using the same commercial name as the claimant’s before he commenced to do business in the same location where the claimant traded); Com., 28.4.1980, JCP 1982.II.19791, n.I.Azema (declaring the claimant’s former director and the company constituted by him jointly and severally liable to the claimant for competing against the latter, and for hiring two of its employees, and banning them from carrying out business within certain territory for certain period) (Azema criticising that this decision arbitrarily forbade legitimate commercial activities).
\textsuperscript{1400} Weitz (1997) 56ff; Galand-Cavall (2005) 91.
\textsuperscript{1401} Whittaker (2008) 362, 380-381.
\textsuperscript{1403} E.g., Com., 18.4.1958, D.1959.87, n.F.Derrada.
\textsuperscript{1404} See above n.1402. In France tort liability for unfair practices requires the defendant’s bad faith rather than the intention to harm the claimant: see above n.1180, below nn.1430ff and accompanying text.
\textsuperscript{1406} Molina (1993) passim; De la Vega (2001) 60ff.
2. The UCA

This is the first Chilean systematic legislation on unfair competition, which is defined as ‘conduct contrary to good faith or good customs which, through illegitimate means, aims at diverting customers from an agent of the market’.\(^\text{1407}\)

This definition signals that unfair practices are intentional and illicit conduct. Wrongfulness is necessary as competition is normally legitimate however fierce.\(^\text{1408}\) Thus, the UCA follows the Spanish statute,\(^\text{1409}\) on its part borrowed from the former German Unfair Competition Act (1909).\(^\text{1410}\)

Although the UCA protects competitors, consumers and any person injured in her legitimate interest by unfair practices,\(^\text{1411}\) it primarily defends competitors\(^\text{1412}\) as evident in the general clause and the examples of *per se* unfair acts contained in the UCA, which fairly correspond to the French classic taxonomy and partially match passing-off, malicious falsehood and *Lanley*-tort, namely: acts of confusion and deception; acts of denigration; inducing breach of contract; misleading comparative advertisement; and abuse of legal process.\(^\text{1413}\)

This technique is valued for furnishing flexibility and legal certainty. Yet, it is feared that civil courts might misinterpret the general clause and treat as unfair perfectly legitimate acts, thereby boosting the bringing of groundless claims to intimidate rivals. Moreover, the fact that separate actions concerning the same acts can be filed in different civil courts can create inconsistent case-law, although this can be avoided through the defences of *litis pendens* and *res indicatrix*.\(^\text{1414}\)

The UCA offers a wide range of private-law remedies to prevent unfair practices and compensate for individual harm.\(^\text{1415}\) Any person directly threatened or affected in his legitimate interests can claim the cessation and/or the prohibition of the unfair practice; request the declaration of such conduct and/or the removal of its effects through the publication of the judgment at the defendant’s expense; and sue for damages in tort.\(^\text{1416}\)

The actions for cessation, prohibition and declaration serve the prime goals of preventing and eliminating unfair practices before becoming irreparable.\(^\text{1417}\) However, the UCA does not include restitutionary remedies.\(^\text{1418}\) It only prevents unjust enrichment prohibiting claimants from bringing tort suits if they had already been compensated for the harm following the same conduct.\(^\text{1419}\) The *actio in rem verso* is usually rejected where the claimant avails herself of a specific remedy. Some argue for allowing victims to choose the remedy that best suits their interests, unless they had negligently failed to plead opportunely another more appropriate form of redress.\(^\text{1420}\) Nonetheless, the principle proscribing unjust enrichment can always be invoked to support a claim: reaping without sowing is a notorious indicator of unfair conduct.\(^\text{1421}\) Moreover, this principle seems more appropriate than tort liability to tackle “parasitic” competition.\(^\text{1422}\)

3. Initial case-law

A recent first-instance judgment allowed the actions for the declaration and cessation of unfair conduct.\(^\text{1423}\) The defendant’s petrol station had contracted with Shell (the claimant) to sell preferably the latter’s lubricants/fuels and not to exhibit/sell third parties’ products using Shell’s logo. The defendant sold products of unknown origin employing Shell’s trademark/sign, this being deemed by the court an act ‘which unduly takes advantage of another’s reputation, inducing confusion between one’s own goods... and those of another’.\(^\text{1424}\) The defendant, the court held, had intentionally and illicitly deviated Shell’s customers by offering them products of other distributors as if they were Shell’s. This was also

---

\(^{1407}\) Article 3 UCA.


\(^{1409}\) Article 3 of the SUCA defines unfair acts as ‘those contrary to good faith as an objective rule of conduct based on economic competition’. See also: Massager (2002) 100.

\(^{1410}\) Section 3 of the current German Act against Unfair Competition (UWG/2004) does not prescribe acts *contra bonos mores* but unfair practices capable of producing ‘more than an insubstantial impact on competition to the detriment of competitors, consumers or other market participants’. See also: Garcia (2005a) 121, (2005b) passim.

\(^{1411}\) Articles 1/2 UCA.


\(^{1413}\) Article 4 UCA.


\(^{1415}\) Tapia (2007) passim.

\(^{1416}\) Articles 5/6 UCA.

\(^{1417}\) Poblete (2007) 100.

\(^{1418}\) Conversely, article 19.1 of the SUCA allows IPR right-holders to seek restitution. The great advantage over tort is that *culpa* is immaterial; Fernández-Novoa (1997) 93ff.

\(^{1419}\) Article 6 UCA.

\(^{1420}\) Peláñez (1996) 83ff.


\(^{1422}\) Kamperman (1997) 77.

\(^{1423}\) 13ºCivil Court Santiago, 24.4.2009, 5057-2007 (pending appeal).

\(^{1424}\) As defined in article 4(a) UCA.
considered as deceptive conduct inducing consumers into error about the origin of the products really bought.\textsuperscript{1425} Another dispute concerned the two major Chilean publishing houses of legal texts. Editorial Jurídica de Chile, which has the legal monopoly on the preparation, edition and publication of the “Codes of the Republic of Chile”, claimed the cessation, prohibition, removal of effects and damages against LexisNexis Chile. It alleged that the defendant had edited, marketed and commercialised under the name “Codes” diverse digests of laws which are merely private compilations, thereby inducing consumers into confusion as to the nature of the goods purchased and deviating the claimant’s clientele to the defendant. The court dismissed the claim as the defendant’s digests contained a legend informing readers their not being “Codes of the Republic” but private academic systematisations of different laws. The court also reasoned that consumers were well-informed about legal texts and that the word “Code” usually refers to systematisations of bodies of laws rather than “Codes of the Republic” which the defendant had anyhow not employed.\textsuperscript{1426} The conduct at issue squares with the tort of passing-off. The case shows that preventive remedies can be more effective than compensation.

4. Observations

Tort law plays a limited function in deterring and punishing unfair competition as compared with alternative legal and extra-legal mechanisms. Tort actions provide compensation for individual harm flowing from unfair practices but other remedies better prevent these acts from happening. Although a general clause of unfair competition contained in a special statute (as the UCA) just formally differs from the delict rules enshrined in a civil code,\textsuperscript{1427} such legislation can promote the enforcement of tort liability against reprehensible business conduct. Perhaps litigants and courts will use the general delict principles against unfair practices now that a special statute is telling them they can.

Eventually, the control of tort liability through a mental element unlike simple fault can work even more appropriately here than in relation to antitrust conduct. First, as the UCA confirms it, unfair practices are intentional and abusive. Secondly, as private-law areas, unfair competition law and tort law protect the interests of individual competitors. Thirdly, only exceptionally unfair practices affect the public interest forming abuse of dominant position, in which case can be punished by the TDLC or the Supreme Court. Apart from this situation, however, unfair practices must be proved afresh before a civil court, so there is no basis for outcome-based strict liability.

IV. Liability for interference with prospective or existing contracts

This section argues that, if Chilean law is to enforce tort liability for interference with likely or actual contractual relationships as a specific instance of unfair competition, it should follow the more conservative English pattern. Rather than requiring the third party’s knowledge or bad faith as in France, Chilean law ought to recognise liability for inducing breach of contract (subject to the defendant’s intention to cause the breach) and liability for interfering with contractual performance without causing any breach (subject to the defendant’s intention to harm the claimant or gross negligence).

1. Introduction

Chilean jurists have barely discussed liability for interfering with another’s contract.\textsuperscript{1428} Using French sources, Alessandri championed tort liability for knowingly and culpably assisting (as accomplice) with the breach of another’s contract, such as the person who purchases a real estate to stop competition from the claimant to whom that property had been leased previously.\textsuperscript{1429} French courts hold tortiously liable the person who buys a property knowing that it had been offered in sale to the claimant whose contractual right must be respected by third parties as a social fact, especially if it is publicly

\textsuperscript{1425} As sanctioned in article 4(b) UCA.

\textsuperscript{1426} 26thCivilCourtSantiago, 15.6.2009, 3266-2008 (pending appeal).

\textsuperscript{1427} Kamperman (1997) 69.


\textsuperscript{1429} Alessandri (1943) 62-63.
registered. Liability hangs not on the defendant’s intention to harm the claimant but on the defendant’s bad faith.\footnote{See: López (1986) 262ff; Viney (1995) 367ff; 384; Bar/Drobnig (2004) 212-213; above n.1180, nn.1402ff and accompanying text.} Accordingly, the defendant is not liable for interfering with another’s exclusivity contract of which he lacked personal knowledge.\footnote{Com. 3.10.1968, JCP.1969.II.15964, n.R.Prieur. The defendant’s knowledge of the contract interfered with is sufficient to form unfair competition: Com. 21.3.1989, Bull.civ.IV.No.97.} Conversely, it has been declared liable the third party who knowingly collaborated with a seller in the breach of the latter’s obligation not to compete with the promisee (buyer) however passive his role in the breach.\footnote{Com. 13.3.1979, D.1980.1, n.Y.Serra.} Yet, the collusion between the defendant and the contract-breaker is not essential for they commit different wrongs. So, certain sellers were held severally and jointly liable to their buyers for breaking the (spatially and temporarily limited) non-compete covenant, the court treating this act as unfair competition even though there was no complicity between the defendants.\footnote{Com. 8.6.1993, Bull.civ.IV.No.228.} Indeed, it suffices that the defendant poses a material or juridical obstacle to performance. As Palmer suggests, a mental element more stringent than bad faith, such as the intention to cause the breach of another’s contract incorporated into inducement, can best balance the liberty to compete against the sanctity of contract. However, bad faith at least excludes liability for simple fault.\footnote{Palmer (1992) 323, 334-335; VanGerven/Lever/Larouche (2000) 237-238, 248.} In fact, as Whittaker indicates, commercial certainty would be undermined if outsiders were liable for carelessly failing to find out whether the contract-breaker had already contracted with the claimant so the subsequent agreement with the contract-breaker infringed the first covenant.\footnote{Whittaker (2008a) 336, 367ff. There is no duty to investigate about third parties’ contracts: Leitch v. Leydon (1931) A.C. 90, HL.}\footnote{pérez (2005) passim.}

Spanish law also restrains tortious liability for interference through the defendant’s knowledge of the contract. To promote business stability and legal certainty third parties are presumed to act in good faith: they owe no duty to search for contracts alien to them. Liability can thus be imposed upon he who prevents performance or facilitates the breach of contract, for example, interfering with non-compete covenants or purchasing assets from the contract-breaker who had already sold them to the claimant.\footnote{This action aims to rescind contracts concluded between a debtor and a third party to the creditor’s prejudice subject to proof of the claimant’s damage and the debtor’s and third party’s knowledge about the debtor’s insolvency (article 2468 CCRC). Their contract cannot be opposed to the claimant. Under article 1167 of the Code Napoléon acción pauliana serves to declare the illegality of agreements designed to break prior contracts: Lauterpacht (1936) 526. See below n.1454.}

Chilean case-law is conspicuously missing. I can only mention a dispute where the defendant had promised to sell her real estate to the claimant (who paid the price beforehand) but finally sold it to third parties who knew this transaction implied the breach of the claimant’s option. The claimant brought the acción pauliana\footnote{This action aims to rescind contracts concluded between a debtor and a third party to the creditor’s prejudice subject to proof of the claimant’s damage and the debtor’s and third party’s knowledge about the debtor’s insolvency (article 2468 CCRC). Their contract cannot be opposed to the claimant. Under article 1167 of the Code Napoléon acción pauliana serves to declare the illegality of agreements designed to break prior contracts: Lauterpacht (1936) 526. See below n.1454.} to annul the sale and cancel the registration of the property under the purchasers’ name, alternatively alleging tort damages. The Supreme Court allowed the tort action: the defendant had acted unlawfully and negligently in knowingly depriving the claimant of the property for which the latter had paid in advance even though the claimant failed to show the defendant’s dolo.\footnote{González (1995) passim.} This suggests that the purchasers might have been liable if the claimant had established that they had carelessly and knowingly bought the real state from the defendant. So, Chilean courts are likely to base liability for contract interference in simple fault, denying it if the harm is unproven or remote. Yet, as González proposed, in cases other than those involving the accomplices of breaches of contract, courts should, as in Anglo-American and German laws, demand the defendant’s intention to harm the claimant or recklessness.\footnote{This action aims to rescind contracts concluded between a debtor and a third party to the creditor’s prejudice subject to proof of the claimant’s damage and the debtor’s and third party’s knowledge about the debtor’s insolvency (article 2468 CCRC). Their contract cannot be opposed to the claimant. Under article 1167 of the Code Napoléon acción pauliana serves to declare the illegality of agreements designed to break prior contracts: Lauterpacht (1936) 526. See below n.1454.}

This seems a sound way of balancing the binding force of contract against competition freedom. However, Chilean courts should distinguish three different situations. First, in inducing breach of contract the defendant must have intended to cause the claimant’s contract to be broken by the defaulting promisor. Secondly, in interference with contract performance without causing breach the defendant must have intentionally or grossly negligently injured the claimant. Thirdly, the accomplice in the breach of another’s contract is jointly and severally liable if he intended to harm the claimant or acted with gross negligence. The different intention in inducement as compared with the last two cases flows from the causal link between the defendant’s conduct and its effect: the inducer wishes and provokes the breach of contract; he who prevents performance seeks and causes the claimant’s harm. But the different state of mind also implies that
contractual rights enjoy stronger protection than economic interests in business at large.

2. Justifying tort protection of contractual rights

Although contracts bind their parties exclusively, thus producing relative effects, they constitute a social fact to be respected by anyone who actually or presumably knows of them. These "absolute effects" are regulated by the law of delict. Likewise, personal rights (including contractual rights) are protected by the right of property recognised in the Constitution and in the CHCC. It is true that real rights (as property itself) confer upon holders an immediate and absolute power over assets, producing *erga omnes* effects, whereas personal rights can only be exercised against those who undertook the correlative obligation. However, personal rights equally belong to a person's patrimony, so they can be transferred and encumbered. The creditor/promissee "owns" her contractual right because she is entitled to performance from the debtor/promisor excluding third parties, just like the owner of a corporeal thing excludes everybody else. Thus, the notion of "patrimony" sheds light on that obligations are assets within it and have value.

In my view tort liability can reinforce the protection of contractual rights as in America and France. Thus, Palmer suggests, American law safeguards the proprietary dimension of contractual rights through the *Lumley* and interference torts, thus filling the gap left by privity of contract. French courts have developed the tort of interference to protect the rights (personal or real) created or transferred by contract as they form part of a person's patrimony and must not be invaded by those who know about them. By allowing creditors to recover damages from third parties both jurisdictions shield the security in transactions and diminish the risk of debtors' insolvency. However, American law limits full compensation to *Lumley* and interference torts whereas compensation in contract is confined to foreseeable harm. Thus, promises have stronger incentive to sue inducers than defaulting promisors. Additionally, the disparate measure of damages between tort and contract can undermine efficient breach. Conversely, French law offers full compensation for deliberate (or grossly negligent) breach of contract and in delict, and the third party and the contract-breaker can be held joint tortfeasors.

Spanish courts also hold the contract-breaker and the accomplice as jointly and severally liable even without a rule on solidarity as article 2317 CHCC. A classic case, remarkably similar to *Lumley*, involved an opera-singer who, after breaking an exclusivity covenant with the claimant, agreed to sing for the defendant. The latter was aware that this contract put her in breach of the former covenant, thereby injuring the claimant. The *Tribunal Supremo* declared void the second contract, forcing the contract-breaker and the defendant to pay damages. French and Spanish regimes show that tort law can help to preserve contractual rights making contract-breakers and third parties, typically buyers under subsequent sales agreements, liable for conspiring to injure the claimant.

In Chile, the promisee can sue for breach the defaulting promisor and in tort the accomplice. Although technically they are not joint tortfeasors but commit separate wrongs, in practice each must answer for all the harm caused to the claimant without leaving the latter unjustly enriched. Even so, promises have not brought tort claims against the accomplices in the breach of their contracts. In a recent case, the defendant had unilaterally terminated a construction contract preventing the builder/claimant from continuing the works by entrusting them to a third party who knew of that agreement. The claimant sought the termination of the contract and damages for deliberate breach. The action was rejected: he failed to prove the defendant's intention to harm. As Pizarro noted, a tort claim against the accomplice might have succeeded. Moreover, tort can supplement

---

1440 Personal rights or credits are those which can only be claimed from certain persons who, by their own deed or the sole mandate of the law, have assumed the correlative obligations (article 578 CHCC); "Every contract legally concluded is a law for the contracting parties and cannot be voided but by their mutual consent or for legal causes" (article 1545 CHCC). The latter rule, which encloses *pacta sunt servanda*, is traditionally grounded on private autonomy, following Aristotelian corrective justice and Kant's idea of reciprocity, i.e., individuals being empowered to govern and enforce their relations through the law. Lira (1944) 260ff; (1956) 71; Tapia (2005) 211ff. Cf: Pizarro (2004) *passim* (arguing that article 1543 CHCC is non-partisan, thus compelling contracting parties to honour their promises without expressing why). Yet, I do believe in the ethical root of private autonomy, appreciable in Domat's work, which directly influenced article 1134 Code Napoleon, the immediate background of article 1545 CHCC.


1442 Article 196/No.24 CHC; articles 565ff/578/583/1437 CHCC. See: Claro (1979) 327.

1443 Article 582 CHCC.


1445 Palme (1992) *passim*.


1449 STS, 2002/231, 324; Pérez (2005) *passim*.


1451 CS/6.5.2004/LegalPublishing/27568.
contractual remedies, particularly if the contract-breaker is insolvent.\footnote{Pizarro: (2005) passim, (2007) 559.} Additionally, the claimant could have taken advantage of the fact that courts award tort compensation for all direct (including unforeseeable) losses even if the defendant acted with simple fault as opposed to intention or gross negligence. Nevertheless, tort law is not indispensable to protect contractual rights from third parties' interference.

3. Protecting contractual rights

Leaving aside criminal actions and recurso de protección,\footnote{Recurso de protección has proved useful to protect promisees' contractual rights against illegal and/or arbitrary acts of promisors or third parties whereby these rights are threatened or interfered and to prevent promisees from taking justice on their own hands. Yet, it is in ordinary (contractual or tort) proceedings where the substantial issues, including the interpretation of such rights, are discussed: Jana/Marin (1996) 19ff; Ortízar (2000) 206ff; Tapia (2005) 563ff; Barros (2006) 249-250.} Chinese private law offers a range of remedies to safeguard contractual rights, for instance, reivindicatio,\footnote{Yet, whether credits can be possessed is all dubious.} actions to rescind contracts with restitutionary effect or acción pauliana.\footnote{If a person sells the same thing to different persons through separate contracts, the purchaser who commenced (or first started) to possess that good or who had the older title is given priority (article 1817 CHCC). Sale contracts entitle purchasers to acquire the asset but property is transferred through traditio (the actual or symbolic delivery of the movable asset or the registration of the real estate in the corresponding Registry of Property). Sales agreements concerning things not owned by sellers are valid but their owners can recover such goods within the limitation period (article 1815 CHCC); CS, 11.4.2007, 1226-2005/2LegalPublishing/563ff; Alessandri (11/17/2003) 1/19, Il/passim; Pefialillo (2006) 122. The purchaser of a good must respect the tenancy agreement encumbering the asset if the tenancy was formalized by public deed (and it must be registered in the Registry of Commerce to be opposable to mortgagees): article 1962 CHCC.} Likewise, publicly registered contracts, such as tenancy or sales agreements and options to purchase real estates, are deemed known by and opposable to third parties. Thus, the claimant/first buyer's right is protected by preventing the third party/second purchaser from acquiring the good from the contract-breaker or by obliging the third party to make restitution of the assets acquired in breach of the former contract. Tort action is not essential.\footnote{If, however, the defendant is in a position to make restitution to the claimant, the latter can seek such damages: this is true in the private law of the courts or in the public law of the claimant's country. This is possible for example in the French legal system: Article 1611 of the Napoleonic Code, and Article 582 of the Code of Civil Procedure.}

Further, if the defaulting promisor concludes a contract with a third party which is inconsistent with her previous agreement with the promisee, the latter can claim (as in France) the nullity of the second covenant for illicit object/cause

(prohibited by the law or contrary to good commercial customs).\footnote{Articles 1461/1467 CHCC.} English law achieves similar results through other means: injunctions preventing the breach of the first contract, actions for damages against contract-breakers and tort claims against inducers.\footnote{Lauterpacht (1956) 525-526.}

Ultimately, contracting parties should in principle overcome their vicissitudes through contractual remedies, the first and most obvious way of defending their rights. In Chile, promisees can, inter alia, request precautionary measures in urgent cases,\footnote{Articles 290ff CPC.} specific performance and damage for breach. Theoretically, as in France, specific performance is the paramount remedy without requiring the defendant's fault, which is anyhow presumed from the breach,\footnote{Article 547 CHCC; Barros (2006) 986-987, (2008a) 412; Pizarro (2008) 398-399.} save for obligations of means. Specific performance is available as of right for the breach of bilateral contracts alongside compensation for damages;\footnote{Article 1489 CHCC.} vis-à-vis obligations to do and not to do; and whenever the debtor possesses the thing owed to the claimant. Defaulting promisors can be forced by courts to perform or allow a third party to fulfil at their expense.\footnote{Articles 1553/1555 CHCC; articles 438/543 CPC.} Nevertheless, in practice (as in France) specific performance is rarely granted as opposed to damages. This leaves room for the efficient-breach.

4. Limiting liability

Tort liability is to supplement the contractual gaps, deterring outsiders from inducing or participating in the breach of contracts alien to them. A moderate tort can be useful if promisors are insolvent and/or promisees averse to the risk of revealing confidential information or deteriorating their contractual relationships.

Consequently, Chile should follow the English rather than the French paradigm. Liability for knowingly interfering with another's contract seems excessively broad as opposed to inducing breach of contract which demands the defendant's intention to cause the breach. This is now backed by article 4(f) of the UCA: the defendant must "seek" to persuade a contracting party into breaking her obligations towards the defendant's competitor. Moreover, as Barros indicates,
confining liability to inducing breach of contract is consistent with the fact that contracts bind their parties exclusively and with competition freedom. It is for courts and jurists, he says, to refine the criteria whereby distinguishing fair from unfair competition. For instance, interfering with non-compete covenants should exceptionally trigger liability; interfering with contracts protecting IPRs is more clearly wrongful if the defendant sought to profit from exclusive information for which the claimant paid high sums.

So, there is need for differentiating which fact-situations involve wrongful behaviour. Not every contract interfered with justifies the imposition of liability. The contract can be illegal (for example, anticompetitive) or unstable. To take an example, case-law declared the employee liable for seriously breaking her employment contract by constituting a commercial company to compete against the employer’s firm in the same market. Surely, the third party who induced the employee to break the (lawful) non-compete clause could have been held tortiously liable to the employer.

5. Assessing liability for preventing the formation of contracts

Although Chilean case-law has not overtly discarded liability for impeding prospective agreements from being made, a negative reaction can be inferred from the courts’ disinclination to assert pre-contractual liability which is governed by tort rules. Courts are reluctant to hold liable the negotiating party who suddenly withdraws from preliminary dealings, thereby injuring the other party who expected the projected contract to be concluded. So, it seems even less likely that the third party who caused the break-off of negotiations could be tortiously liable.

In Chile, as in various legal systems, contracts come into existence when offer and acceptance meet. Consequently, the negotiating parties can freely discuss the terms of the envisaged agreement and, as part of the strategy to obtain advantages from one another, unilaterally retreat from preliminary dealings. Unless the negotiating parties enter into a promise to conclude another contract they are not bound with each other. However, the right to break-off negotiations can neither be abused nor violate the duty to behave in good faith.

Legal scholars concur that this duty applies to the pre-contractual stage: negotiating parties must neither contradict their past conduct (which created in the other party a reasonable degree of confidence that the contract would be concluded) nor withdraw from dealings merely to take advantage of parallel negotiations with third parties. In these cases, it is claimed, the defaulting negotiating party ought to be tortiously liable if her fault directly harmed the claimant who may nonetheless strip the defendant of his illicit gains without proving fault.

In a recent judgment, the defendant was held liable for having acted in bad faith by unilaterally and culpably retracting from dealings, thereby injuring the claimant who had incurred expenses oriented to the prospective contract. Yet, the leading case-law considered that the defendant in good faith exercises her right not to contract if she desists from signing the public deed necessary for perfecting a sales agreement concerning a real estate (a solemn contract). Not having the parties concluded any (written) promise to sale but merely verbally consented to contract, the defendant cannot be said to have caused the claimant's harm (the expenses incurred in the expectation of concluding the proposed agreement). In another case, the defendant had agreed to sell her real estate to the claimant who paid the price ahead and heavily invested in the property. The defendant later refused to sign the public deed, thus preventing the asset from being transferred to the claimant. On appeal the defendant was held tortiously liable for abusing her right to break-off preliminary negotiations even though the

---

1468 Alessandri (1940) 156; León (1979) 45; López (1998) 261.
1469 Promises to conclude another contract must be in writing and comply with other formal requirements: article 1554 CHCC.
1470 "Contracts shall be performed in good faith, thereby binding not only to what is expressed in them, but to all things which precisely emanate from the nature of the obligation or that by law or custom belong to it" (article 1546 CHCC).
claimant had pleaded damages for breach of contract.\textsuperscript{1475} The Supreme Court quashed this finding for \textit{ultra petita}: the claimant failed to show any contract with the defendant, so he could not be awarded damages for breach of contract; and no tort action had been brought.\textsuperscript{1476} It is objected that the defendant did act in bad faith, if not maliciously.\textsuperscript{1477}

In an extraordinary case, two corporations held protracted negotiations to conclude a sales agreement regarding several forest lands in the South of Chile, thus exchanging property titles, relevant studies, drafts of the contract of promise to sale and powers of attorney. The very day agreed for signing the contract of promise the defendants informed the claimant they had sold the properties to a third party who paid a higher sum than the price offered by the claimant. The defendants were found liable for suddenly retreating from negotiations, thereby abusing their right, as they failed to communicate opportunely the claimant about their parallel dealings with the third party. The claimant was awarded the expenses incurred.\textsuperscript{1478} Commentators saluted the judgment and its basis: the defendants abused their right not to contract acting in bad faith.\textsuperscript{1479} Liability was subsequently imposed for the abrupt and unjustified breaking-off of preliminary negotiations which harmed the claimant.\textsuperscript{1480} Similarly, French case-law declares tortiously liable those who abruptly and without legitimate reason retreat from lengthy negotiations. This conduct entails the abuse of the right not to contract and contradicts the loyalty or good faith which must be observed when negotiating a contract. The right to withdraw from preliminary dealings forms part of the liberty to compete, so it must be exercised abusively to be deemed tortious, albeit without need to show the defendant’s intention to harm the claimant.\textsuperscript{1481}

Yet, some perceive ambiguity in the use of the abstract notion of abuse of rights without specifying what actually renders the exercise of the right not to contract abusive and culpable.\textsuperscript{1482} Additionally, compensation is limited to \textit{damnum emergens}. The law provides that the party who withdraws her offer before being accepted by the addressee must pay the latter’s expenses.\textsuperscript{1483} The profits that the disappointed party expected to obtain from the prospective contract are implicitly excluded by reason of being hypothetical and for the offeror has the right to revoke offers not yet accepted.\textsuperscript{1484} It is nevertheless missed the compensation for the opportunity costs incurred by claimants as a result of discarding better dealings.\textsuperscript{1485} Conversely, French courts not only award compensation for the costs incurred during the negotiations but are also prepared to award the loss of chance and the profits which the claimant could likely have obtained from the frustrated contract (or from the contract broken by the defendant’s fault).\textsuperscript{1486}

The denial of pre-contractual liability in Chile somehow mirrors the English general rejection of liability for even malicious breaking-off of negotiations (leaving apart deceit, negligent misstatements, contract breach, unjust enrichment and breach of confidence) which entails pure economic loss. The common law recognises the freedom not to contract and questions the principle of good faith in view of the antagonism and the uncertainties inherent to the bargaining process.\textsuperscript{1487} This position seems coherent with the fact that the exercise of the right to break-off negotiations cannot be unlawful however evil its underlying motive.\textsuperscript{1488} But since Chilean law acknowledges the abuse of rights one would expect a more generous use of tort liability, as in Germany where negotiating parties can be tortiously liable for intentionally and immorally harming the other party (§826 BGB). An additional problem is the employment of abstract concepts as the abuse of rights and good faith without identifying the underlying fact-situations.

If Chilean courts continue rejecting liability between negotiating parties it appears logical that they refused making third parties liable for preventing contracts from being concluded. Conversely, the enhancement of pre-contractual liability through the application of the principle of good faith and the abuse of rights might foster the bringing of tort suits against those who provoke

negligently, while intentionally (or grossly negligently) caused economic harm reveals abusive and wrongful behaviour beyond allowable competition.

I showed that, in relation to unfair practices, the principle of culpa ought to be qualified through the said mental element to become compatible with freedom to compete, as confirmed by the UCA. In particular, I argued that the defendant’s bad faith along with intention to harm the claimant or to procure the breach of another’s contract is a sound control device vis-à-vis interference with business interests at large or contracts specifically. In turn, negligently or knowingly interfering with another’s existing or prospective agreement is within legitimate competition.

More contentiously, I have argued that tort liability for anticompetitive conduct conclusively declared by the competition authority should be interpreted as based on intentional conduct but triggering outcome-based strict liability. The fact that article 30 CHCA does not demand proof of the defendant’s intention to harm the claimant (or gross negligence) is not an indication and could not mean that this regime of liability is rooted in presumed fault, let alone in bare causation of harm. Competitors owe no duty of care to one another. And suffering harm, even due to another’s negligence, is intrinsic to legitimate rivalry. The true reason, I think, is that tort actions supplement the public enforcement of competition law by offering individual competitors compensation for damages without need of proving antitrust conduct and the mental element. There is an incentive for competitors to bring tort claims once the competition authority conclusively stated antitrust conduct. Likewise, claimants are heavily burdened with proof of individual harm and causation, so if they had additionally to give evidence of the defendant’s mental element follow-on actions would be no longer attractive. Moreover, although the purpose or effect of antitrust conduct is to harm the market, consumers and competitors at large, once the claimant proves that such conduct specifically affected her interest it is reasonable to presume the defendant’s intention to harm the concrete claimant from the antitrust conduct. Indeed, as the still modest Chilean case-law illustrates, the intention to harm the particular claimant can more clearly be surmised from predatory pricing which typically targets identifiable competitors. Although the practical result may not differ from understanding that antitrust tort liability revolves around the defendant’s fault inferred from antitrust conduct or from conceiving of it as strict
liability, I think this argument ignores that carelessly caused economic harm is a side-effect of legitimate competition and that applying culpa without any qualifications undermines freedom to compete and poses the risk of endless liability.

Finally, I have demonstrated that anticompetitive behaviour and delict differ in their mental elements and damage, thus reflecting the contrast between (public) competition law and (private) tort law. Conversely, unfair practices and torts involve similar kinds of intention and harm since both fall in the private-law sphere. Yet, whereas tort compensation is the greatest private-law remedy for antitrust harm, thus supplementing the public enforcement of competition law, unfair practices are mainly remedied through preventive actions. All the same, tort law fulfils a circumscribed role both in antitrust and unfair conduct.

CHAPTER VIII
CONCLUSIONS

This thesis has evaluated the role played by tort liability in business competition. It has focused on the methods and criteria whereby English tort law tackles this phenomenon, endeavouring to draw useful lessons for the future judicial and academic development of this still incipient field in Chile. It has argued that in both jurisdictions tort law is made by courts in response to specific problems. In particular, it has claimed that if the law of delict is to regulate business competition consistently with the liberty to compete the broad principle of culpa should be qualified through the demand of a mental element rather than simple fault. This intentional component should not be uniform but reflect the different sorts of fact-situations out of which competitors harm each other. The thesis has taken the English economic torts as an example of a sound manner of tackling this problem-area.

The thesis fundamentally proposes that tort liability for business misconduct ought to express a compromise arrangement between victims' proprietary, contractual and economic interests and wrongdoers' freedom to compete. It shows that accidentally or intentionally defeating the expectations of adversaries is a normal and foreseeable side-effect of lawful competition. It claims that the regulation of competition is essentially a matter for regulatory legislation, in respect of which tort law should perform a modest function. It argues for treating wide-ranging tort liability regimes with scepticism. Neither simple negligence nor strict liability is adequate to regulate the conflicting interests of commercial competitors who harm each other. Rather, tort liability must be moderated in a way that reflects the gist of competition, namely, as the English economic torts illustrate, through intention and wrongfulness.

The thesis suggested that the principle of liability for carelessly or intentionally inflicted damage (neminem laedere), which informs the Chilean law of delict, should be tempered in commercial competition through the defendant's intention to injure the claimant or to cause another person to break her contractual obligations to the claimant. At the very least, the defendant should bring about these effects through gross negligence, to which Chilean law ascribes the same
English courts have approached commercial competition and labour competition from substantially different stances. In particular, the Appellate Committee of the House of Lords fulfilled a legislative role as regards labour competition, enforcing the economic torts against workers and trade unions. This development has constantly been counteracted through statutory immunities. However, the modern economic torts largely owe their inconsistencies to the political pressures which heavily influenced the leading cases. The Allen case required wrongful means, thereby extending the Mogul decision concerning business to labour competition. Yet, the importance of politics makes it plausible to speculate that, even if their Lordships would have chosen the prima facie tort theory instead of wrongful means, the claimants would have not succeeded in any event. However, the impact of politics is much clearer in the Quinn judgment which created the purely intentional tort of simple conspiracy.

Nevertheless, the thesis concentrated on commercial competition which English courts have consistently refrained from constraining since the very early Mogul case. Policy and practical reasons have persuaded judges into restricting liability to extreme and wrongful conduct, thus leaving to Parliament the regulation of commercial strife. Courts have rejected the prima facie tort theory, the abuse of rights and a generic unfair competition tort. Courts substitute the tort of unlawful means conspiracy for simple conspiracy which is complex to prove and easy to justify. They also refuse to impose liability upon third parties for preventing the conclusion of future contracts or for interfering with existing contracts even where there is no breach or use of wrongful means. English law only recognises specific torts whose salient features are intention and above all wrongfulness, giving rise to the infringement of the claimant’s proprietary, contractual or economic interests. Indeed, even the champions of the prima facie tort as a means of legal coherence valued wrongful means as a practical instrument to control liability, thus avoiding investigating the defendant’s motives around which justifications revolve.

Conversely, Chilean (and French) law accepts the abuse-of-rights doctrine which is virtually identified with the deliberate infliction of harm. The abuse of rights shapes wrongful conduct which negate the justification of damage arising from the exercise of a right. Indeed, competitors are entitled to harm each other except when they abuse the liberty to compete by acting with intention or gross
negligence. Likewise, the fact that wrongfulness is subsumed into \textit{culpa} is relatively immaterial: English, French and Chilean courts must always weigh litigants’ clashing interests against each other. Therefore, the formal difference between the wrongfulness requirement and the abuse of rights (or the prima facie tort) need not yield distinct results.

2. However, the economic torts are technically inconsistent despite of the scholarly efforts to systematise them. First, the mental element is ambiguous. It may mean the intention to harm the claimant (in three-party unlawful-interference), the intention to procure the breach of contract (in \textit{Lumley}) or simply deliberate conduct (in passing-off). Secondly, the scope of wrongfulness fluctuates from tort to tort. It can involve the violation of a proprietary interest in goodwill, contractual rights or mere economic expectations in business (the same examples applying, inversely). Further, only in the three-party unlawful-interference tort the wrongful means used by the defendant against a third party, thereby harming the claimant, must be independently actionable by the third party if she was injured. Likewise, there are contrasting judicial interpretations about the ambit of wrongful means in the latter tort, thus disclosing different views on the role that the unlawful-interference tort should accomplish in business competition. Moreover, it remains debatable whether the critical control device in three-party unlawful-interference tort should be a tightly defined intention (targeting at harming the claimant as an end) or strictly conceptualised wrongful means alongside a wider mental element. The first method excludes the damage intended as a means, which can effortlessly be confused with foreseeable and inevitable side-effects. Still, too narrow an intention (malice) can overly restrict liability: it is hard to prove but easily rebuttable if the defendant injured the claimant as a means to another end, normally to advance self-interest. The second technique seems preferable because it extends the notion of intention to the results sought instrumentally. But it is no solution to the subtleties between intentionally caused harm and unintended harm which is a by-product of legitimate competition.

Furthermore, English tort law protects economic interests unevenly. Corporeal property is accorded the strongest protection through the torts of negligence, subject to proof of damage, and trespass, which (together with injunctions) vindicates that right even though the claimant is unharmed. Intangible property in goodwill is shielded through passing-off (and accompanying injunctive relief), entailing outcome-based strict liability. But non-proprietary interests are protected only from third parties’ \textit{intentional} interference, thereby making it explicit the lower rank of these rights. Contractual interests are defended through the \textit{Lumley}–tort provided that the inducer intended to cause the breach of contract, as an end or as a means to another end. Economic interests in business/trade are protected through the three-party unlawful-interference tort inasmuch as the defendant intended to harm and did injure the claimant by using wrongful means against a third party independently actionable by the latter unless she was not injured.

The pre-eminence of contractual rights over other economic interests in business is mirrored in the intentional element and in the width of justifications. Proving the intention to cause the breach is easier than showing the intention to harm. Likewise, inducing breach of contract is justified to the limited extent that the contract affected is illegal or immoral, whereas interference with opponents’ expectations is generally within legitimate competition. Yet, the different type of intention also signals the causal link between the defendant’s conduct and its effect. Thus, to subject the tort at issue to a different mental element might leave the interests at stake unprotected, as if for instance \textit{Lumley} was further limited through requiring the inducer’s intention to injure the claimant. Moreover, \textit{OBG} dissociated \textit{Lumley} from the unlawful-interference tort. Thus, it is improbable that both torts will be reunited. Rather, case-law is likely to continue protecting property in goodwill more intensely than contractual rights and the latter more strongly than pure economic interests.

3. A cogent explanation for the lesser protection of pure economic interests is that the claimant’s loss (\textit{damnum}) does not usually flow from the defendant’s wrongful conduct (\textit{iniuria}) because no proprietary or contractual right of the claimant has been violated. This fact questions liability for negligently caused pure economic loss though it also undermines the three-party unlawful-interference tort because the only right infringed belongs to a third party rather than to the claimant. My argument is that proprietary and contractual rights have already been acquired or incorporated into the right-holder’s wealth (or
“patrimony”). These rights confer upon holders a sphere of exlusivity (monopoly) to the exclusion of third parties. Conversely, pure economic interests in trade are mere expectations unrelated to a tangible or incorporeal good owned by the claimant. Wrongful conduct is patent in the infringement of proprietary or contractual rights while it is indefinite in the violation of pure economic interests. Hence the imposition of liability under three-party unlawful-interference tort hinges on balancing the liberties to compete of claimants and defendants against each other. The defendant is liable if he abused his freedom to compete through using unlawful means against a third party, intending to injure and causing harm to the claimant.

Nevertheless, I see no conclusive reason justifying this imbalanced protection of economic interests. Although pure economic interests do not lie in any concrete asset but form mere expectations, they become a real and identifiable loss suffered by the claimant and for which she deserves to be compensated. Furthermore, although passing-off and Lumley attack proprietary and contractual rights respectively, both torts cause pure economic loss to the victims, just as in unlawful-interference. In all these situations the claimant is deprived of a future economic advantage which would have reasonably been obtained had the tort not been committed. Thus, in order to place the economic interests on a level playing field, these three torts should require proof of the corresponding intention: to cause the breach of contract (Lumley) or to harm the claimant (in unlawful-interference tort and in passing-off). This might relatively attenuate the inconsistency within the economic torts.

4. All the same, English courts have consistently limited liability to the economic harm flowing from wrongful and intentional behaviour. Additionally, the courts’ traditional reluctance to control business competition will surely affect the enforcement of the statutory competition torts regardless of their structural and functional differences vis-à-vis the economic torts. The lesson for Chile is the moderate ambition of tort law in the commercial arena. To impose liability, the claimant’s economic interests (in property, contract or trade) must outweigh the defendant’s liberty to compete. Only an intention-based liability fits in this scheme. Indeed, one major policy reason advanced in Anglo-American law against compensation for carelessly occasioned pure economic loss is the fear of liability becoming unmanageable. Policy argument, a diffuse though effective tool to cast simple fault as ground of liability, is explicit in English court decisions but concealed behind the notions of fault, causation and harm in French and Chilean case-law. Chilean courts should publicly state the policy arguments for restricting tort liability in commercial competition through a mental element stricter than ordinary negligence.

Tort law plays a limited function in commercial competition. Tort is not designed to circumvent privity of contract. Contracting parties are expected to take the initiative and tackle non-compliance through contractual remedies. Thus, in England the promisee cannot sue her promisor, who threatened to break the agreement, for the tort of intimidation. Similarly, in Chile (and France) the non-cumul rule prevents promisees from claiming in tort damages flowed from the breach of their contract.

English law confines tort liability for interference with contract and business to Lumley and the unlawful-interference tort. Specifically, Lumley is limited in several ways. The inducer must knowingly and intentionally cause the breach of contract by the promisor to the promisee’s prejudice. But the contract must be licit and stable. Thus, inducing the breach of an anticompetitive or terminable at-will contract is not actionable. The breach should also be serious. Finally, Lumley fits only in agreements concerning exclusive goods or services which contain negative covenants, such as the obligation not to compete.

Moreover, the defendant’s mere knowledge (bad faith) of the contract or business relationship interfered with is unable to constrain liability congruently with competition freedom: it is required that the defendant intends to procure the breach or to harm the claimant. Although there cannot be intention without knowledge (the defendant’s honest belief in not causing breach of contract excludes liability) and although knowledge is the first evidence from which intention can be inferred, both are separate concepts. Commercial competitors cannot assume liability for interfering with their rivals’ contracts or economic interests merely because they foresaw doing so as a possible, probable or inevitable consequence of their activity. If the harm done to competitors is a side-effect of competition, and thus is unnecessary for attaining another goal such as furthering self-interest, the defendant should not be liable. In order to enforce liability without undermining freedom to compete the defendant ought to intend to
procure the breach or to injure the claimant, as an end or as a means to another end. Yet, I think that the defendant’s reckless indifference as to either consequence, if this consequence is certain to happen, can be equated to the intention to cause such result in order to achieve a further aim: deliberately turning “a blind eye” and acting nevertheless (or, in Chile, acting with gross negligence) is similar to intending an outcome as a means to another end.

Liability for knowingly interfering with contract becomes close to negligence or even strict liability which is incompatible with competitive freedom. Rivals necessarily injure each other by interfering with their contracts or business foreseeing this event as a likely result of their activity. Hence Australian and English courts reject a principle (as that advocated in Beaudesert)\textsuperscript{149} of liability for the foreseen and unintended damage flowed as an unavoidable result of unlawful, intentional and positive acts. Likewise, \textit{OBG} disapproved of \textit{Mills}\textsuperscript{150} which had held the defendant liable for deliberately breaking her contract foreseeing that the contractor would breach its own agreement with the claimants although the defendant had neither intended to harm the latter nor used wrongful means. Furthermore, English tort law does not recognise a principle of secondary liability for knowingly assisting in the commission of another’s civil wrong. Moreover, I think that liability for knowingly causing the breach of another’s contract without requiring inducement can approximate strict liability. Mere bad faith does not really add much to the causal link between the defendant’s act and its consequence. Take, for instance, Epstein’s theory aimed at protecting contractual rights as though they were property from outsiders who knowingly interfere with them. This conception ends up relying exclusively on the causal relationship between interference and breach of contract. Although this doctrine is in itself consistent with Epstein’s general theory of strict liability, it seems too wide a rule to fit competitive freedom. The expansive French tort of interference notoriously shows that a liability rooted in mere knowledge or “characterised fault” (as opposed to intention) hinders freedom to compete.

Thus, Chilean law would better restrain liability for unfair practices, including interference with contractual and business relationships, through intention or at any rate gross negligence, thereby following the more restrictive approach symbolised by the English economic torts. To achieve legal certainty, consistency and justice, at least in this terrain, undifferentiated categories such as \textit{culpa} should be replaced with specific types of intention illustrative of the factual background in which competitors harm one another as well as of the causal link between misconduct and damage, namely: the defendant’s intention to procure the breach of contract in inducement cases or to injure the claimant where contracts are prevented from being performed without causing their breach. Precluding the conclusion of prospective contracts should not attract liability; except when the defendant, acting in concert with the negotiating party who abused her right not to contract (by suddenly retreating from the preliminary dealings), intended to injure the claimant who is thereby injured. Likewise, the accomplices in the breach of another’s contract should also act with the intention of harming the claimant or at least with gross negligence.

A state of mind more severe than knowledge and (simple or characterised) fault respects competition and contracting parties’ autonomy to resolve contractual vicissitudes. Indeed, the dearth of Chilean reported tort claims against accomplices in breaches of contracts suggests that contracting parties rely on contractual remedies before resorting to tort.

5. English tort law deters and punishes unfair practices through passing-off and malicious falsehood. For courts, a comprehensive intentional tort of unfair competition has a deleterious impact on defendants’ liberty to compete. Courts leave to statutes the determination of fair and unfair conduct, and attempt to prevent passing-off from being used for anticompetitive purposes. The problem is that passing-off is tried in preliminary proceedings, so courts lack time to ponder whether the granting of injunctions will inhibit legitimate competition.

Passing-off is widely employed to restrain unfair practices partly because it does not require proof of the defendant’s fault or intention. However, the defendant can only pass his goods as if they were his rival’s wares deliberately, often intending to harm the claimant in her commercial prestige. Passing-off entails strict liability for outcomes as it vindicates the proprietary interest in goodwill. The superiority of goodwill over the other economic interests is mirrored in strict liability and in that the claimant need not prove actual but merely likely harm. Nevertheless, to protect all kinds of economic interests

\textsuperscript{149} (1966) 40 A.L.J.R. 211.
\textsuperscript{150} [1994] E.M.L.R. 44.
equivalently, passing-off should require proof of the defendant’s intention to injure the claimant even if this means no more than inferring this intention from the defendant’s act. Paradoxically, the same interest in business reputation protected through passing-off is also safeguarded through the intention-based tort of malicious falsehood. However, the complex proof of the mental element renders this tort as frivolous in commercial competition as simple conspiracy is.

In Chile, a special statute defines unfair practices in a general clause and gives various examples, including acts equivalent to passing-off and malicious falsehood. Unfair practices are per se wrongful. Thus, the main remedies aim at preventing these acts from occurring. The statute also provides for tort actions which are subject to the rules on delict enshrined in the civil code. Liability thus hinges on the traditional conditions of damage, causation and fault. Yet, the intention to harm the claimant or to cause the breach of contract, or at least gross negligence, should displace mere fault for competitive freedom to be preserved. This suggestion is supported by that statute as it requires unfair practices to encompass an intentional element, thus implicitly qualifying neminem laedere. The comments made earlier concerning liability for interference with contract or business apply here also.

6. The competition torts only indirectly help to deter and punish anticompetitive conduct. Competition law protects indeterminate consumers and competitors whereas tort law is concerned with known victims. Thus, antitrust conduct is relevant to tort to the limited extent that it injures recognisable persons.

The competition torts are rooted in antitrust conduct conclusively established by the competition authority. These torts exist to promote private enforcement by releasing claimants from proving antitrust conduct. The competition torts merely supplement competition law. Tort litigation is confined to the most serious offences prosecuted by the competition authority. Consequently, it seems unlikely that stand-alone tort actions will be brought since they demand proof of antitrust conduct unless the competition authority did not investigate the infringement or found it to be pro-competitive, in which case the claim could be framed as an economic tort.

Antitrust tort liability is composite. It derives from abusive conduct targeted at consumers and competitors generally in the relevant market although it usually aims at recognisable victims too. Yet, this is strict liability for the harm inflicted to identifiable competitors. The defendant’s intention to injure the claimant is presumed from the fact that antitrust conduct specifically harmed that claimant. However, proving the causal relationship between the defendant’s act and the claimant’s damage is harsh: antitrust conduct generates widespread effects. These difficulties reduce the range of prospective claimants to direct purchasers and competitors.

Similarly, in Chile antitrust conduct is prosecuted and punished by the competition authority because of its adverse impact upon the market, consumers and competitors. Tort actions assist the public enforcement of competition law insofar as antitrust conduct also affects individual victims. Antitrust conduct and delict involve different types of intention and of damage, thus reflecting the public law/private law divide. If the breach of competition law is not worth sanctioning tort liability becomes superfluous. Indeed, the fact that antitrust conduct is punished because of its inimical consequences determines tort’s fundamental compensatory role and justifies outcome-based strict liability.

As with criminal and administrative offences, the infringement of competition law is wrongful and culpable. The competition authority’s conclusive finding of antitrust conduct is res iudicata in subsequent tort proceedings: an irrefutable presumption of the defendant’s fault. Article 30 of the CHCA provides that the said judgment shall bind civil courts as to the facts and their legal characterisation. The still inchoate Chilean case-law infers fault from antitrust conduct, thus limiting the debate to damage and causation. However, I have argued that fault liability is inadequate to regiment an activity whose participants owe no duty of care to one another. Courts should not presume “negligence” from antitrust conduct but should conclude that the defendant intended to harm the claimant. Although the object or effect of antitrust conduct is to affect anonymous consumers and competitors, as opposed to the intention embedded in delict, once the claimant brings evidence that she was specifically injured by that conduct, the missing mental element can be taken for granted. The court can logically assume that the defendant also sought to harm the claimant as a recognisable competitor. This intention is conspicuously blatant in predatory pricing which by definition targets identifiable rivals. Although my interpretation may not change the result of antitrust tort cases it can influence the reasoning supporting court decisions. In
any event, as the incipient case-law already illustrates, the complexity of showing that individual harm directly stemmed from antitrust conduct suggests that tort litigation will remain exclusive.

7. The efficient-breach of contract is an obstacle to Lumley in Anglo-American contract law because breach of contract is not per se wrongful but an option open to defaulting promisors willing to pay damages instead. Likewise, specific performance is exceptional; compensation is confined to foreseeable harm even if the breach of contract is deliberate; and exemplary damages are foreclosed. Nevertheless, neither the fact that contracting parties must protect themselves against non-performance nor the efficient-breach is conclusive. Inducing breach of contract is unfair competition through which inducers profit from the performance owed to and owned by their rivals. Inducement jeopardises the public-interest in contractual stability. This tort is worth sanctioning in its own right. Although it requires that the breach of contract follows, Lumley is a different wrong which entails intention-based liability. Conversely, breach of contract usually triggers strict liability.

Chilean contract law, analogously to French law, has features which seem to go against the efficient-breach and favour tortious liability for knowingly interfering with contract: the overarching principles of pacta sunt servanda, good faith and the fact that contracts bind their parties exclusively; the pre-eminence of specific performance as contractual remedy; and the enhancement of compensation to all direct damage following intentional (or grossly negligent) breach of contract. This undermines the efficient-breach under which promisors necessarily intend to harm promisees as a means to secure better deals from third parties. Thus, the restriction of tort liability through a more rigid mental element looks at odds with the law’s position to sanction breaches of contract almost invariably. Nevertheless, the relationship between contracting parties themselves must be dissociated from outsiders who often interfere with their rivals’ contracts acting legitimately. Likewise, specific performance is in practice very exceptional as compared with compensation for damages, thus leaving room to the efficient-breach which usually originates in third parties exercising their competitive liberty. This confirms that tort liability for interference with contract should be narrowed through intention (or gross negligence) instead of bad faith or simple fault.

8. The economic and competition torts primarily serve compensation. They also prevent wrongdoing, specifically unfair practices, through injunctions, notably in passing-off. Further, they can fulfil punitive and even restitutionary goals through the award of exemplary damages, typically where the defendant intends to injure the claimant as a means to self-enrichment. As a private-law sanction, exemplary damages should not be precluded just because the defendant was punished for committing a criminal or administrative offence.

Comparably, the Chilean law of delict performs a mainly compensatory role alongside a preventive function which is crucial in the domain of unfair practices. My main contention here is that the extension of compensation for all direct damages flowing from the deliberate (or grossly negligent) breach of contract, which is similar to full recovery in deceit, should be applied to torts committed with the intention to harm or with extreme carelessness. Tortfeasors acting with ordinary fault should only answer for the harm that the reasonable person would have foreseen. The increase of compensation conceals a retributive goal which, I think, presupposes a more stringent mental element. There is no obvious reason for confining this punitive criterion to contract and to non-pecuniary damage caused in tort. Retribution concerns the defendant’s culpability rather than the nature of harm and the source from which it stems. Nonetheless, exemplary damages will not likely be awarded without a statute allowing them as they are customarily associated with criminal punishment and the principle of legality. Yet, this attitude overlooks the private-law nature of this remedy.

9. From a wider perspective, the thesis assumed that tort liability in commercial competition is an area where Chilean law is less developed than English law. The thesis proposed to take the English economic torts as a model in which Chilean courts and scholars can find a sensible method of handling the interests of trade rivals who injure one another. The thesis has demonstrated that the formal bridge between the common law and the civil law is no impediment to comparisons of both systems. Nor does it preclude the imitation of techniques through which a certain problem can be tackled more adequately than following those routes
conventionally associated with one's own legal system. Concretely, Chilean law can treat the harm flowing from commercial competition more consistently with the liberty to compete if it requires a mental element instead of applying *culpa* in an undifferentiated fashion. Ultimately, the thesis has argued for improving the law of delict by emulating a common-law style. The common law can help to reinterpret a principle as deeply ingrained in the civilian tradition as *neminem laedere*, at any rate when facing the phenomenon studied here, regardless of the dissimilar levels of legal, social and economic development separating England from Chile.

**BIBLIOGRAPHY**

**REFERENCES IN ENGLISH**

**Books**

• Pollock, Sir Frederick:  
• Rogers, W.V. Horton:  
• Salmond, John:  
• Staunton, Keith; Skidmore, Paul; Harris, Michael & Wright, Jane (2003). Statutory Tort. London: Sweet & Maxwell.  

• Wadlow, Christopher:  
• Weir, Tony:  
• Winfield, Percy:  

Contributions to Books:  
• Busnani, Mauro & Palmer, Vernon. - 'The Notion of Pure Economic Loss and its Setting', Ch.1, 3-24; - 'The Liability Regimes of Europe - their façades and interiors', Ch.3, 120-159; - 'General conclusions of the study', Ch.9, 530-536; - 'The Recoverability of Pure Economic Loss within the Perspective of a European Codification', Ch.10, 537-548.

in Busnani, Mauro & Palmer, Vernon (eds., 2003), Liability for Pure Financial Loss in Europe. Cambridge: CUP.


Callmann, Rudolf:
- "What is Unfair Competition?" (1940) 28 Georgetown Law Journal 585-607;
- "He who reaps where he has not sown: Unjust Enrichment in the Law of

Cane, Peter:
Studies 30-62;
- 'Tortious interference with contractual remedies' (1995) 111 Law Quarterly
Review 400-405 (case note);
556; [Cane (2000a)];
[Cane (2000b)]
- (2008) 71 Modern Law Review 641-647 (comment on Stevens's Tort and
Rights).

Carpenter, Charles: 'Interference with Contractual Relations' (1928) 41 Harvard Law
Review 728-768.

Carty, Hazel:
- 'Intentional violation of Economic Interests: The Limits of Common Law
- 'Character Merchandising and the Limits of Passing Off' (1993) 13 Legal
Studies 289-307;
- 'Passing Off at the Crossroads' [1996] 18 European Intellectual Property
Review 629-632; [Carty (1996a)];
- 'Dilution and Passing Off: cause for concern' (1996) 112 Law Quarterly
Review 632-666; [Carty (1996b)];
- 'Passing Off and Instruments of Deception: the need for clarity' (2003) 24
European Intellectual Property Review 188-193;
- 'The Need for Clarity in the Economic Torts' (2005) 16 King's College Law
Journal 165-173;
641-674.

Cartwright, John, 'Remoteness of Damage in Contract and Tort: A Reconsideration'

Catrall, Pierre & Weir, Tony, 'Delict and Torts: A Study in Parallel'; (1964) 38
Tulane Law Review 221-278 (Part II); (1965) 39 Tulane Law Review 701-783 (Part
IV).


Chalmers-Hunt, D.R., 'Labour Competition and the Law' (1903) 19 Law Quarterly
Review 37-54 (Part I), 182-202 (Part II).

Chan, Winnie & Simsett, Andrew, 'Inducing Breach of Contract: One Tort or

Chapman, Bruce & Trebilcock, Michael, 'Punitive Damages: Divergence in Search

Charlesworth, John, 'Conspiracy as a ground of Liability in Tort' (1920) 36 Law
Quarterly Review 38-52.

Christie, Andrew, 'Of Passing Off and Plastic Lemons' (1990) 49 Cambridge Law
Journal 403-466.

Chutorian, Sandra, 'Tort Remedies for Breach of Contract' (1986) 86 Columbia Law
Review 377-406.

Claydon, Jeanne-Marie, 'Civil Actions under Articles 85 and 86 of the EEC Treaty:

Cough, Mark & Wilson, Adrienne, 'Current Developments in Member States
(United Kingdom)' (2007) 3 European Competition Journal 308-311.

Colby, Thomas:
- 'Beyond the Multiple Punishment Problem: Punitive Damages as Punishment
- 'Clearing the smoke from Philip Morris v. Williams: the Past, Present, and

Contiguglia, Louis, 'Malignant Breach of Contract as Constituting a Prima Facie

Cooter, Robert, 'Economic Analysis of Punitive Damages' (1982) 56 Southern

Danforth, John, 'Tortious Interference with Contract: A Reassertion of Society's
Interest in Commercial Stability and Contractual Integrity' (1981) 81 Columbia Law
Review 1491-1524.

Dawson, H., 'Is There or Should There Be a Prima Facie Tort in New Zealand?' (1972) 2 Auckland University Law Review 1-18.

Dekin, Simon & Randall, John, 'Rethinking the Economic Torts' (2009) 72 Modern
Law Review 519-553.

Dean, M., 'Recklessness and Inducing Breach of Contract' (1967) 30 Modern Law
Review 208-213.


Deneen, Walter, 'The influence of the French Code Civil on the Modern Law of
Unfair Competition' (1956) 4 American Journal of Comparative Law 1-34.

Dobbs, Dan:
- 'Tortious Interference with Contractual Relationships' (1980) 34 Arkansas Law
Review 335-376;
- 'An Introduction to Non-Statutory Economic Loss Claims' (2006) 48 Arizona
Law Review 713-731.

Drake, Sara, 'Scope of Courage and the Principle of Individual Liability' for
Damages: Further Development of the Principle of Effective Judicial Protection by

Torts and Rights and Beever's Rediscovering the Law of Negligence).


Dworkin, Gerald:
- 'Unfair Competition: is the Common Law developing a New Tort?' (1979) 1
European Intellectual Property Review 241-247;

Dworkin, Gerald & Harari, Abraham, 'The Beaudesert Decision -- Raising the Ghost
of the Action upon the Case' (1967) 40 The Australian Law Journal 396-406 (part I),
347-351 (part II).

University of Chicago Law Review 263-337.

Edelman, James & Olsufu, Olooghe, 'Compensatory Damages for Breach of


Eisenberg, Melvin, 'The role of fault in contract law: unconscionability, unexpected
circumstances, interpretation, mistake, and nonperformance' (2009) 107 Michigan

Eliss, Patrick & Ewing, Keith, 'Economic Torts and Labour Law: Old Principles and

Ellis, Dorey:
- 'Fairness and Efficiency in the Law of Punitive Damages' (1982) 56 Southern
California Law Review 1-78;
Review of Law and Economics 45-57.

Epstein, Richard:
• Pollock, Sir Frederick:
  - (1889) 5 Law Quarterly Review 104, 447 (case note); [Pollock(1889a)]
  - (1893) 5 Law Quarterly Review 447 (case note); [Pollock(1893a)]
  - (1890) 6 Law Quarterly Review 113 (case note);
  - (1892) 8 Law Quarterly Review 101 (case note);
  - (1893) 9 Law Quarterly Review 202 (case note);
  - (1895) 11 Law Quarterly Review 202 (case note);
  - 'Allen v Flood' (1898) 14 Law Quarterly Review 129-132
  - (1901) 18 Law Quarterly Review 344-345 (case note); [Pollock(1901b)]
  - (1921) 37 Law Quarterly Review 395, 398 (case note);
  - (1925) 41 Law Quarterly Review 369 (case note).
• Posner, Richard:
• Rabkin, Robert:

• Rodger, Barry:
• Rogers, Edward:
  - 'Predatory cutting price as unfair competition' (1913) 27 Harvard Law Review 139-158;
• Rotondi, Mario. 'Unfair Competition in Europe' (1958) 7 American Journal of Comparative Law 327-349.
• Rudden, Bernard. 'Tort' (1991) 6 Tulane Civil Law Forum 105-129.
• Schwartz, Gary:
• Sebok, Anthony:
  - 'Purpose, Belief, and Recklessness: Pruning the Restatement (Third)'s Definition of Intent' (2001) 54 Vanderbilt Law Review 1163-1186;
• Shavell, Steven. 'Why breach of contract may not be immoral given the incompleteness of contracts' (2009) 107 Michigan Law Review 1569-1581.
• Sheehan, Duncan. 'Competition law meets restitution for wrongs' (2009) 125 Law Quarterly Review 222-226.


Unpublished PhD theses

REFERENCES IN SPANISH

Books
- (1940). De los Contratos. Santiago (Chile): Editorial Jurídica de Chile.
- (1943). De la Responsabilidad Extracontractual en el Derecho Civil Chileno. Santiago (Chile): Imprenta Universitaria.

- - (trans. by Manuel Cancio M. & Enrique Peñaranda R.).
- Lira U., Pedro • - (1933). La Influencia de Bello y su Clasicismo en el Código Civil. Santiago (Chile): Walter Gnadt.
- - (1956). El Código Civil Chileno y su Época. Santiago (Chile): Editorial Jurídica de Chile.
...

Articles
• Bustamante G., José M. & Urquiza P., Enrique. ‘Competencia Desleal: Inducción al Incumplimiento de Contratos y Ejercicio Manifestamente Abusivo de Acciones Judiciales’ (2007) 14 Cuadernos de Extensión Jurídica (Universidad de los Andes) 7-83.
• Chadwick V., Tomás. ‘De la Naturaleza Jurídica del Dolo Civil’ (1938) 35 Revista de Derecho y Jurisprudencia 141-172; (1939) 36 Revista de Derecho y Jurisprudencia. 5-103.
• Díez-Picaio, Luís. ‘La Culpa en la Responsabilidad Civil Extracomunitarial’ (2001) 54 Anuario de Derecho Civil 1009-1027.
• Domínguez A., Ramón. ‘Aspectos Contemporáneos de la Responsabilidad Civil’ (1989) 185 Revista de Derecho de la Universidad de Concepción 107-139;
• - ‘Consideraciones en torno a la noción de daño en la responsabilidad civil. Una visión comparativa’ (1990) 188 Revista de Derecho de la Universidad de Concepción 125-168;
• - (1992) 192 Revista de Derecho Universidad de Concepción 214-216 (case note);
• - (1998) 204 Revista de Derecho Universidad de Concepción 187-188 (case note);
• - ‘Aspeos de la Relación de Causalidad en la Responsabilidad Civil con especial referencia al Derecho Chileno’ (2001) 209 Revista de Derecho de la Universidad de Concepción 7-27;
• ‘El Daño en el Derecho Civil Chileno’ (2006) 1 Revista Anales de Derecho UC 259-274;
• García P., Rafael. ‘La nueva Ley alemana contra la competencia desleal’ (2005) 258 Revista de Derecho Mercantil 1659-1674. [García (2005b)]

Ortúzar D., Santiago, ‘Competencia Desleal y Propiedad Intelectual’ (2007) 14 Cuadernos de Extensión Jurídica (Universidad de los Andes) 41-55.


Tapia R., Mauricio, ‘Responsabilidad civil por actos de competencia desleal en el derecho chileno’ (2007) 14 Cuadernos de Extensión Jurídica (Universidad de los Andes) 85-94.


Unpublished LL.B. Theses

REFERENCES IN FRENCH


Contributions to books

Articles

306
FRENCH, SPANISH & CHILEAN CASES

NB: French, Spanish and Chilean cases are not generally known by the name of the parties, and they are listed in chronological order. In Chilean cases, citations indicate court, date of the decision, law report, issue, section (in the case of “RDJ”) and page number. Cases not published on an established law reports series (e.g., FM, GJ, LegalPublishing, RDJ), yet available for consultation physically or online at www.poderjudicial.cl and www.tdlc.cl, are referred to by the date of the decision and the number of the case.

FRENCH CASES

Soc 11.6.1953 D.1953.661...59
Com 18.4.1958 D.1959.87 n.F.Derrida...247
Com 3.10.1968 JCP.1969.II.15964 n.R.Pierre...252
Com 21.3.1989 Bull.civ.IV.No.97...252
Paris 6.11.1989 D.1990.504 n.D.Thouvenin...201
Com 8.6.1993 Bull.civ.IV.No.228...252
Com 11.7.1995 Bull.civ.IV.No.215...195
Civ(1) 19.11.1996 Bull.civ.LN.no.404...217
Com 18.11.1997 D.1998.260 n.R.Bout...246
Ch.Mixte 22.4.2005 JCP.2005.II.10086 n.P.Tosi...195
Com 21.2.2006 D.2006.AJ.717 obs.E.Chevrier...195

SPANISH CASES

STS 23.3.1921 Col.Leg.No.90...255
STS 14.2.1944 RJ/293...217, 247
STS 27.4.1973 RJ/1875...199
STS 12.12.1984 RJ/6039...223
STS 29.11.1986 RJ/6022...209
STS 22.1.1991 RJ/1587...193
STS 23.3.1993 RJ/2545...193
STS 28.2.1994 RJ/686...222
STS 4.2.1997 RJ/7464...255
STS 29.12.1997 RJ/9602...222
STS 31.12.1997 RJ/1955...223
STS 13.4.1998 RJ/3388...193

CHILEAN CASES

FRENCH, SPANISH & CHILEAN CASES

ST 21.1.2000 RJ/225...223
STS 30.3.2003 RJ/6312...194

Supreme Court

CS 24.7.1905 RDJ/3/1960...216
CS 16.9.1912 RDJ/11/197...217
CS 15.11.1919 RDJ/18/276164...207
CS 6.1.1920 RDJ/18/19353...198, 206, 208
CS 10.11.1920 RDJ/19/19415...195, 200
CS 3.3.1927 RDJ/25/117...198
CS 15.11.1927 RDJ/25/19501...198, 203, 216
CS 14.4.1928 RDJ/26/19141...203, 206
CS 7.5.1935 RDJ/31/19374...224
CS 8.7.1935 RDJ/32/19422...191
CS 26.8.1941 RDJ/39/19203...203
CS 24.9.1943 RDJ/17228...206
CS 19.10.1943 RDJ/41/19266...198
CS 9.8.1944 RDJ/42/19424...199
CS 27.3.1946 RDJ/43/19509...259
CS 3.7.1951 RDJ/44/19752...190
CS 13.6.1952 RDJ/49/19688...225
CS 14.4.1953 RDJ/50/404...195
CS 12.8.1953 RDJ/51/19588...194
CS 16.10.1954 RDJ/51/19488...206, 210, 221
CS 7.4.1955 RDJ/55/1935...193, 194
CS 21.4.1960 RDJ/57/1960...197
CS 29.3.1962 RDJ/58/19721...194
CS 24.10.1963 RDJ/60/4959...194
CS 4.11.1964 RDJ/61/19733...259
CS 5.7.1967 RDJ/64/174...203
CS 27.9.1968 RDJ/65/1021...209
CS 16.10.1970 RDJ/67/4242...203
CS 26.11.1970 RDJ/67/19553...191
CS 13.5.1971 RDJ/68/19728...242
CS 8.7.1971 RDJ/68/19711...225
CS 8.11.1971 RDJ/68/274...191
CS 17.10.1972 RDJ/69/1968...194
CS 6.11.1972 RDJ/60/1981...191, 206
CS 20.8.1973 RDJ/70/47288...203
CS 23.5.1977 RDJ/74/4781...209
CS 24.6.1980 FM/259/168...203
CS 12.8.1981 RDJ/78/9120...221
CS 19.8.1983 RDJ/80/7975...190
CS 27.10.1983 RDJ/80/4121...191
CS 19.4.1984 RDJ/81/4729...203
CS 14.9.1987 RDJ/84/1937...203
CS 20.7.1992 RDJ/89/1990...224
CS 6.1.1998 JD/211/113...224
CS 22.4.1998 JD/214/115...225
CS 28.5.1998 JD/95/1051...215-216
CS 2.7.1998 JD/538/199...203
CS 2.12.1998 FM/481/2737...203
CS 28.1.1999 JD/96/471...193
CS 19.5.1999 FM/486/730...203
CS 4.1.2000 FM/494/3148...243
CA Punta Arenas
7.4.1993 7263-93...209

CA Puerto Montt
15.7.2008 58-2008...259

CA Santiago
6.7.1925 RDJ/26/1/141...203
2.10.1939 RDJ/39/275...243
27.7.1943 RDJ/41/295...215
26.5.1944 RDJ/41/294...210
25.8.1948 RDJ/46/298...259
3.6.1973 RDJ/70/495...206
7.12.1984 RDJ/24/266...207
3.10.1989 RDJ/86/4/135...197
9.11.1992 JG/149/58...217
21.4.1993 RDJ/90/297...198
8.9.1993 2120-1993/Lega!Publishing/20205...231
27.12.1993 JG/162/58...195
1.6.1998 JG/216/195...199
14.10.2002 RDJ/99/29133...221
30.5.2003 RDJ/275/97...210
1.7.2003 JG/277/149...209
29.8.2003 JG/278/282...208
19.2003 JG/279/2003/115...203
14.7.2004 RDJ/101/295...243
7.12.2004 JG/294/43...187
6.7.2005 JG/301/149...224
16.4.2007 LexisNexis/36181...238

CA Talca
8.11.1999 JG/257/63...260

CA Temuco
5.8.1935 RDJ/34/2928...258

Courts of First Instance

4th Civil Court Santiago
22.6.2000 4831-97...243

13th Civil Court Santiago
24.4.2009 5057-2007...249

26th Civil Court Santiago
24.4.2009 13272-2007...244
15.6.2009 3266-2008...250
23.6.2009 2191-2007...244

Comisión Resolutoria (CR)
22.12.1988 DecisionNo.301...233
6.10.1992 DecisionNo.381...233
31.12.1996 DecisionNo.479...242

Courts of First Instance

4th Civil Court Santiago
22.6.2000 4831-97...243

13th Civil Court Santiago
24.4.2009 5057-2007...249

26th Civil Court Santiago
24.4.2009 13272-2007...244
15.6.2009 3266-2008...250
23.6.2009 2191-2007...244

Comisión Resolutoria (CR)
22.12.1988 DecisionNo.301...233
6.10.1992 DecisionNo.381...233
31.12.1996 DecisionNo.479...242
LIST OF STATUTES

UK
Administration of Justice Act 1982...108
Competition Act 1998...15, 58, 152-153, 156-161, 166, 171, 181, 188, 192, 241
Conspiracy and Protection of Property Act 1875...84-85
Courts and Legal Services Act 1990...165
Enterprise Act 2002...15, 152-153
Fair Trading Act 1973...159
Financial Services and Markets Act 2000...15, 156
Law Reform (Contributory Negligence) Act 1945...52
Law Reform (Miscellaneous Provisions) Act 1970...108
Monopolies and Restrictive Practices (Inquiry and Control) Act 1948...163
Restrictive Trade Practices Act 1968...159
Trade Descriptions Act 1968...15, 142, 156
Trade Disputes Act 1906...85
Trade Disputes Act 1965...86
Trade Union Act 1871...85
Trade Union and Labour Relations (Consolidation) Act 1992...114
Trademarks Act 1994...137, 142

U.S.
Clayton Act 1914...38
Sherman Act 1890...159-161, 166

SPANISH
Competition Act 2007 (Law 15/2007)...237

GERMAN
German Act against Unfair Competition (UWG/2004)...248

CHILEAN
Consumer Protection Act (Law 1949/1997)...234
Intellectual Property Act (Law 17336/1970)...234
Road Traffic Act 1984 (Law 18290/1984)...225

TREATIES AND CONVENTIONS
EC Treaty (Treaty of Rome) 1957...15, 158
Paris Convention for the Protection of Industrial Property 1883...131, 141

LEGISLATIVE REFORM PROPOSALS & OTHER INSTRUMENTS

UK
Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234...88

EU
Ashurst Report: Study on the Conditions of claims for damages in case of infringement of the EC Competition Rules (31.08.2004)...177
FRANCE