2007

The Economic Torts and English Law: An Uncertain Future

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I. INTRODUCTION

A. The Economic Torts Outlined

There is no over-arching tort of unfair competition or misappropriation in English common law. Rather, when excessive competitive practices are alleged, the aggrieved party must identify a specific tort (or torts) that cover the harm done to them. The causes of action most appropriate where unfair trading is the issue are the so-called "economic torts." These causes of action comprise the torts of simple conspiracy, unlawful conspiracy, inducing breach of contract, intimidation, unlawful interference with trade, and malicious falsehood. The list also includes the important tort of passing off which, unlike the others, is not a tort of intention. The prime reason for the existence of these torts is the protection of economic interests, particularly in a three-party setting, for as Weir cleverly remarks: "while you can take direct action against a person's body or property . . . to ruin a person financially the action you must take must be indirect, through another person, the source of his earnings or profits." This Article aims to present the Eng-
lish common law on the economic torts and analyse the uncertainties and tension within their development.

For the sake of easier exposition these torts can be divided into those economic torts that require a misrepresentation—namely, passing off and malicious falsehood—and those that do not, which I have termed the "general" economic torts. Some commentators have distinguished the two categories by observing that in the misrepresentation torts the defendant seeks to make a profit that "properly" belongs to the claimant, while in the general economic torts the defendant seeks to attack the claimant. Certainly the misrepresentation economic torts seem to be more appropriate for "unfair competition" type claims, while the general economic torts (as we shall see) were commonly used against the emerging trade unions—and that fact has distorted their development.

Yet a caveat must be entered into this neat division; there are important interconnections between the general and misrepresentation economic torts. The general economic torts can indeed be significant in a "misappropriation" grievance, as three important general economic tort cases which were appealed from the Court of Appeal to the House of Lords in late 2006 bear witness. In *Douglas v. Hello!, Ltd.*, unlawful interference with trade was alleged, in what was essentially a dispute between rival celebrity magazines over the publication of unauthorised photographs of a celebrity event (the claimant magazine having "exclusive" photographic rights over that event). In *Mainstream Properties v. Young*, the claimant used the tort of inducing breach of contract to attack the defendant for financing the exploitation by the claimant's employees of a business opportunity that "belonged" to the claimant. Finally, in *OBG, Ltd. v. Allan*, the claimant company sought to use the hybrid tort of interference with contractual relations to object to the handling of the company's assets by the defendant receivers. As will be seen, these three cases encapsulate the uncertainty and "mess" of the general economic torts. The House of Lords had the opportunity in 2007 to resolve the key issues present in the area of general economic torts, while simultaneously setting their modern agenda.

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5 The common law has not imposed liability for harmful representations that are truthful but developments towards privacy protection may see a change in this attitude.
B. Abstentionism v. Interventionism

Overall, the best approach to understanding all the economic torts, as well as rationalising their development, is to view them as protecting against the infliction of economic harm against a background of competition. This is because they all set limits on the defendant’s commercial behaviour. Indeed, competitive activity is involved even in cases involving trade union activity and industrial action in the sense that “the aim of the action is to achieve a redistribution of wealth from the employer to the employees, just as traders seek to divert wealth from their competitors to themselves.”\(^\text{10}\) That being so, the development of the economic torts in English common law must be understood by reference to the following inter-dependent factors.

First, English tort law on the whole does not have as its primary function the protection of economic interests. Though torts often indirectly offer such protection, tort law focuses on the protection of physical integrity, property rights and enjoyment and reputation. Lord Oliver in \textit{Murphy v. Brentwood DC}\(^\text{11}\) noted “[t]he infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not.”\(^\text{12}\) In English common law this is particularly highlighted in the tort of negligence, but does also colour the approach to liability for the intentional infliction of economic loss.

Second, traditionally the common law has not been seen by the judiciary as a legitimate way of controlling aspects of the economy. Letwin notes that this applied both to any assumption of an anti-trust function\(^\text{13}\) as much as to the curbing of aggressive competition.\(^\text{14}\) There are indeed famous judicial \textit{dicta} which underline the unwillingness to shape economic policy. Lord Davey, for example, asserted in 1902 that “[p]ublic policy is always an unsafe and treacherous ground for legal decision,”\(^\text{15}\) while Lord Fry (in

\(\text{10}\) Peter Cane, \textit{Tort Law and Economic Interests} 472 n.72 (2d ed, 1996). Indeed, in \textit{Allen v. Flood}, a key trade dispute claim, Lord Shand noted that the issue before the court was “one of competition in labour, which . . . is in all essentials analogous to competition in trade, and to which the same principles must apply.” \textit{Allen v. Flood}, [1898] A.C. 1, 164.


\(\text{12}\) \textit{Id.} at 487.

\(\text{13}\) This trend is particularly apparent in relation to the restraint of trade doctrine where the courts accepted the notion of a reasonable restraint. \textit{See, e.g.}, Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt, (1893) 1 Ch. 630, 673. In \textit{Mogul Steamship Co. v. McGregor, Gow \\& Co.}, (1889) 23 Q.B.D. 598, 615, 625–26, the House of Lords, in an action brought against a cartel, refused to distinguish between fair and unfair competition.


\(\text{15}\) Janson v. Driefontein Consolidated Mines, (1902) A.C. 484, 500.
1889) asserted that "[t]o draw a line between fair and unfair competition... passes the power of the courts." 16

Third, the common law does not favour acceptance of either "generalised" rights or a general theory of tort liability. The traditional mistrust of such rights ties in with the structural features of the common law involving a cautious case-by-case approach, based on the doctrine of precedent.17 Thus the natural tendency of the common law is to develop slowly by analogy. Smith and Burns note "in regard to the nominate torts [i.e., as distinguished from the tort of negligence], the advantages of the simplicity achievable by working under a single general principle would be far outweighed by the complexity and variety of exceptions that would be necessary to accommodate the various relevant policy considerations at stake." 18

The factors outlined above explain the "abstentionist" approach of English common law to liability in the area of competing activity. English tort law does not acknowledge a tort of intentionally causing economic harm, and there is no unfair competition action. The abstentionist policy was dominant in the Victorian decision of the House of Lords in Allen v Flood (discussed below), setting the agenda (in theory) for the development of the general economic torts. However, even in the tort of passing off, which lacks many of the limiting characteristics of the other economic torts, most notably because it is a tort of strict liability rather than intention, the "abstentionist" trend of the common law where economic activity regulation is concerned is apparent. Thus, in theory there are parameters set to this tort which limit it to the regulation of certain material misrepresentations.

However, the abstentionist approach has not been consistently applied where the general economic torts are concerned. Over the years, beginning in the Victorian era but extending into the latter part of the twentieth century, some judges adopted a more interventionist strategy in situations involving commercial bodies using these torts against trade unions rather


17 Most recently this tendency has been apparent in the reaction of the appellate courts to pressure by claimants to develop an action for privacy, free-standing from the action for breach of confidence. See, e.g., Douglas v. Hello!, Ltd., [2005] EWCA (Civ) 595, 2005 762 Q.B. 125 (CA(Civ. Div.)). So far, the courts have been cautious, developing aspects of privacy protection within the action for breach of confidence rather than creating a "blockbusting" privacy tort. See Campbell v. Mirror Group Newspapers, (2004) 2 A.C. 457. However, it may be that the common law will be pushed into a privacy tort by the application of Article 8 of the European Convention on Human Rights, as applied by the European Court of Human Rights. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 8.

18 J.C. Smith & Peter Burns, Donoghue v. Stevenson—The Not So Golden Anniversary, 46 MOD. L. REV. 147, 149 (1983). There are commentators, however, who are critical of this mindset. See, e.g., Philip Sales & Daniel Stilitz, Intentional Infliction of Harm by Unlawful Means, 115 L.Q.R. 411, 436 (1999) (authors argue there is "scope for development of general principles of liability in respect of harm inflicted intentionally").
than trade rivals. So, the development of these torts has become linked to the influential decisions of some members of the judiciary, hostile to the trade unions either as bodies in themselves (in the Victorian period) or as powerful organisations wielding "uncontrolled power" (for part of the second half of the twentieth century). Where judicial hostility was present an "interventionist" approach determined the outcome of the cases. Though the interventionist approach may have been stimulated by judicial concerns over trade union activities, the resultant inconsistent and uncertain scope of these torts is also present in their application in contexts other than the industrial action sphere. Thus, even where these torts are pleaded in strictly commercial or competition cases the interventionist "baggage" remains. As a result, the development of the general economic torts has been muddied, with such key issues as the intention required in the torts, the nature of the "unlawful means" required, and the relationship of the torts to each other all still a matter for debate in the three key cases which went on appeal to the House of Lords in 2006.

But what of the misrepresentation economic torts? They typically apply in a trade competition setting so that all the above factors (and the absence of a trade union dimension) should have led the courts to develop definite parameters for these torts, taking into account the public interest in supporting even aggressive competition. This has certainly been the case with the tort of malicious falsehood, a tort that normally applies in cases of false trade disparagement. Victorian litigation of this tort indicated the sympathy of the House of Lords with defendants in their endeavours in the "hard world of competition for customers" leading to the "scrupulous limitation of liability for mis-statements and for unfair advertising practices." Moreover, the courts made it clear that they did not want to be dragged too far into the competitive process. In 1895, therefore, liability for untrue self-commendation was rejected by the highest court as this would lead to the tort of malicious falsehood being used by claimants to employing the courts "in trying the relative merits of rival productions."

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19 See generally Quinn v. Leathem [1901] A.C. 495; Torquay Hotel Co. v. Cousins, (1968) 2 Ch. 106.
20 See supra notes 7–9 and accompanying text. Douglas involves, inter alia, a dispute as to the nature of the intention required for the tort of unlawful interference with trade; Mainstream Properties centres on the intention and knowledge required for the tort of inducing breach of contract; OBG highlights the messy interface between the torts of unlawful interference with trade and inducing breach of contract. These are all discussed in greater detail below in the text.
21 In fact, as the text below indicates, the tort covers a wider field than that, but the need to show "malice" limits the usefulness of this tort.
22 So the same abstentionist approach can be seen in the tort of deceit.
However, the tort of passing off has attracted interventionist/expansionist sympathies. In the quest for more protection in competition claimants are increasingly attempting to extend the reach of this tort—in recent years this has particularly been the case where "image rights" are in issue (there being no publicity right as such in English common law) and unfair internet or electronic practices are involved (such as cyber-squatting or phishing). Though the reaction of the courts is still unpredictable, some judges have stressed that this is a cause of action still evolving "to meet changes in methods of trade and communication"\(^5\) and indeed it has on occasion been referred to as a tort of unfair competition.

It is hard not to believe that this is a key era in the development of this tort. Thus, the time is ripe for an assessment of the current English law on the economic torts and predictions for the future. What will be argued below is that the historical baggage should be viewed with caution and the courts required to formulate a clear liability with a clear rationale. A rigorous analysis of the economic torts is required, and the three appeals to the House of Lords provide the opportunity to start this process, at least where the general economic torts are concerned.

II. THE GENERAL ECONOMIC TORTS

A. The Importance of Allen v. Flood

The general economic torts are the torts of conspiracy (simple and unlawful), inducing breach of contract, intimidation and the "genus" tort of unlawful interference with trade. Most of these torts have their origins in early common law development. Unlawful conspiracy can be traced back to the writ of conspiracy in the reign of Edward I, the tort of inducing breach of contract arose from the action for enticement of a servant contained in the Statute of Labourers of 1349, and the tort of intimidation (in theory) dates from cases in the seventeenth and eighteenth centuries.\(^6\) However their real development took place in the late Victorian era and early twentieth century. The agenda for these torts in the modern era should have been finally set by the important House of Lords decision in Allen v. Flood\(^7\) but, as is revealed in the 2006 House of Lords’ cases,\(^8\) uncertainty has dogged their application even into the twenty-first century.


\(^{26}\) See, e.g., Garret v. Taylor (1620) Cro Jac 567; Tarleton v. M’Gawley, (1793) Peake NP 270 (in both cases violence was threatened to plaintiff’s customers)


\(^{28}\) See supra notes 7–9.
In 1853 the modern development of the general economic torts began in English law. In that year *Lumley v. Gye*\(^{29}\) recognised the tort of inducing breach of contract. There, a singer who had an exclusive performing contract with the plaintiff\(^{30}\) was persuaded by the defendant to break this contract and perform for him instead. Though the common law had protected interference with the master-servant relationship since medieval times,\(^{31}\) this decision "freed the old enticement action from its roots in status relations."\(^{32}\) However it took some thirty years for it to become established that the tort applied to all contracts and not just contracts of service. Indeed, even some forty years later, uncertainty as to what principle it formulated\(^{33}\) meant that Lord Esher in *Temperton v. Russell*\(^{34}\) was unable to see the distinction between inducing breach of contract and inducing people not to deal with the plaintiff.\(^{35}\) This uncertainty developed out of a variety of concerns, as there was judicial hostility to the perceived erosion of the privity principle, and a conflict between those judges who preferred firm rules in the development of economic tort liability and those who were happy to focus on a subjective notion of "malice," a tendency still apparent in some of the judgments in *Lumley v. Gye*.\(^{36}\) But in this era there was also conflict within the judiciary as to the correct level of judicial control over trade competition and, more controversially, of trade union power and collective pressure. In essence, the judges needed to decide between an abstentionist or interventionist role for the common law in the area of intentionally inflicted economic harm. In 1898 the chance to make this choice once and for all arose in *Allen v. Flood*.\(^{37}\)

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\(^{29}\) *Lumley v. Gye*, (1853) 2 EL. & BL. 216, 216.

\(^{30}\) In recent years the term "plaintiff" has been replaced by the term "claimant" in English civil litigation, hence the date of the litigation described determines which of these two terms is used in the discussion.

\(^{31}\) There were torts of abducting a servant and harbouring a servant. Parliament indeed intervened in 1349 in the Statute of Labourers to deal with the problem of labour shortage following the Black Death. David Partlett notes that *Lumley v. Gye* was "an equally well-suited solution to the farm labor shortage that troubled the American South during the Reconstruction." David F. Partlett, *From Victorian Operas to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 Tul. L. Rev. 771, 784-85 (1992).


\(^{33}\) For a review of this process see Charles E. Carpenter, *Interference with Contractual Relations*, 41 Harv. L. Rev. 728, 730-32 (1928).

\(^{34}\) *Temperton v. Russell*, (1893) 1 Q.B. 715.

\(^{35}\) *Id.* at 728. Though this distinction was reaffirmed in *Allen v. Flood*, [898] A.C. 1, 21, *Temperton* had a profound effect on the development of the tort in America, leading to the protection of commercial expectations generally.

\(^{36}\) Malice appeared to be an important issue in the judgments in *Lumley v. Gye*, (1853) EL. & BL. 216, 216-30, and subsequently in *Bowen v. Hall* (1881) 6 Q.B.D. 333—which stressed that malicious interference was the basis of the tort. See *Bowen*, (1881) 6 Q.B.D., at 338.
In *Allen v. Flood* the defendant was a trade union official who informed an employer that his workers would cease to work (though not in breach of contract) unless the plaintiffs were dismissed. The dismissal (as with the cessation of work) would be lawful. There was no factual evidence of conspiracy, intimidation, or breach of contract. No unlawful acts as such were involved, but the defendant was motivated by malice. The aim of the action was to punish the plaintiffs for previous "misconduct" in relation to a demarcation dispute. Thus, the central policy issue for the House of Lords to determine was whether, in the absence of unlawful means, English common law should impose economic tort liability simply on the presence of malice and intentional harm.

The decision could have gone either way. For the interventionist judge, intentional injury causing economic loss should be actionable unless public policy (by means of a defence of justification) ruled otherwise. This was clearly a possible way forward for the House of Lords in *Allen*. Some three years earlier, Lord Field agreed wholeheartedly with the interventionist view in *Mogul Steamship Co. v. McGregor*, as indeed had the Court of Appeal in *Allen*. Centering on the "right to trade," the court held the defendant liable on the basis that they had "maliciously procured the lawful dismissal of the plaintiff." Furthermore, even within the House of Lords in *Allen*, Lords Halsbury and Morris favoured this refined interventionist argument. Indeed, all of the judges who had been called on to advise the House of Lords were in favour of the proposition that "every man has a right to pursue his trade or calling without molestation or obstruction and that anyone who by any act, though be not otherwise unlawful, molest or obstruct him is guilty of a wrong unless he can show lawful justification or excuse for so doing," influenced by early cases that indicated wide liability for competitive practices. For example, *dicta* can be found in the 1707 case

38 *Id.* at 2.
39 *Id.* at 3.
40 *Id.* at 2.
41 *Id.* at 12.
42 *Id.* at 1.
44 Indeed the *absolute* interventionist argument was unlikely to hold sway. Decisions such as *Bradford v. Pickles*, [1895] A.C. 587 and *Stevenson v. Newnham*, 13 CB 285 ("An act which does not amount to a legal injury cannot be actionable because it is done with a bad motive," Parke B) indicated that there was no such general common law doctrine.
46 Indeed, he asserted that the overwhelming judicial opinion of England concurred with it.
of *Keeble v. Hickeringill*\(^7\) that "he that hinders another in his trade or livelihood is liable to an action for so hindering him."\(^8\)

However, the majority of the House of Lords decided in favour of an abstentionist approach for economic tort liability. *Keeble v. Hickeringill* was held to be of doubtful authority, with the cases referred to in that decision in fact involving the use of unlawful means or conspiracy to injure. The notion of the "right to trade" was rejected, while for the majority of the House, motive of itself was not a permissible mechanism for imposing economic tort liability. Lord Watson observed that the law of England does not take into account motive as constituting an element of civil wrong; the existence of a bad motive, in the case of an act which is not of itself illegal, will not convert that act into a civil wrong.\(^9\) After *Allen v. Flood*, therefore, a general tort of unjustifiable interference with trade was untenable. To allege intentional economic harm, even where "malice" was present, would not suffice. No notion of *prima facie* tort liability was to be accepted.\(^50\) Where trade was intentionally harmed, the added ingredient would be intrinsic unlawfulness or violation of a legal (and absolute) right. Essentially, the key ingredient for liability would be the presence of unlawful means, used against the claimant (either by the defendant or through a third party).\(^51\) The court accepted that there was a "chasm" between intentional harm done by lawful means and harm resulting from a legal right being violated.

This policy was in keeping with the emergence of the tort of inducing breach of contract and the existence of the tort of unlawful conspiracy. Though the tort of unlawful conspiracy appeared to have been around since the development of the action on the case, as an economic tort it adds little to the arsenal of the claimant because it requires an unlawful act—in essence another tort—to be involved. In fact the tort is largely unnecessary: the claimant can rest liability on the unlawful act itself and attack those who "conspire" in that unlawfulness by using the doctrine of joint tortfeasance.\(^52\) By this doctrine, where primary liability results from a tort,
those liable through their secondary involvement become principals in the
commission of the tortious act.

The abstentionist policy did not, however, gain support from all mem-
bers of the House of Lords; there were dissenting judgments. Furthermore,
even the majority opinions in Allen v. Flood reveal uncertainty about the
implications of this decision. While Lord Watson underlines the need for
unlawfulness to create economic tort liability, Lords Herschell, Shand, and
Davey simply reject "malice" as a basis of common law liability; they do
not even go so far as to give Lumley v. Gye wholehearted support. This
resulted in an open door for interventionist members of the House of Lords
to reject the true implications of Allen v. Flood in the subsequent case of
Quinn v. Leathem.53

B. Uncertainty in the Development after Allen v Flood

Quinn v. Leathem was a case with similar facts to Allen v. Flood, distinguished
on the basis that there was a combination. The case was a dispute between
the defendant trade union officials and the plaintiff who employed non-
union labour. As part of this dispute the defendants approached the main
customer of the plaintiff and threatened that the customer's workers would
leave his employ (lawfully) unless he ceased trading with the plaintiff (law-
fully). The additional factor of combination allowed the House of Lords to
impose liability, even though no unlawful means or unlawful result were
involved. The justification for this was the oppressive nature of conspira-
cies. Lord Lindley noted in Quinn that "numbers may annoy or coerce
where one may not."54 This case nurtured the economic tort of "simple
conspiracy," where the "magic of plurality" renders a combination to injure
tortious, despite the lack of unlawful means. This anomalous tort, which
can render combined action tortious where the act of a single defendant
would be lawful, is subject to a defence of justification, which includes self-
interest. As such, then, this tort will only cover combined action that causes
economic harm out of spite and will rarely be of practical use.55

As an anomalous economic tort, at variance with the policy of Allen v.
Flood, simple conspiracy offers no clues as to the true potential of the other
economic torts. However, its existence reveals the tension within the com-
mon law and a clear deviation (within three years) from the abstentionist
path set out in Allen. Its existence was due to the legalisation of the trade
unions in 1871–1875. By the Trade Union Act of 1871, the purposes of trade
unions were no longer automatically criminal conspiracies, simply because

54 Id. at 538.
55 Lord Diplock commented that it has attracted more academic controversy than
success in its practical application and, given it makes motive the key factor in liability, it
cannot be squared with the basic rule contained in Allen v. Flood.
they were in restraint of trade, while the Conspiracy and Protection of Property Act 1875 provided that agreements in contemplation or furtherance of a trade dispute were not *per se* criminal conspiracies. However, just as Parliament withdrew the threat of the criminal law to the emerging trade unions, the courts developed the civil law threat of simple conspiracy.

This development denied a smooth transition into an abstentionist foundation for the economic torts. The result was an economic tort ("a modern invention altogether" according to Lord Denning) that posed particular problems for trade unions, ran counter to the policy of *Allen v. Flood*, and left the basis of general economic tort liability in a state of contradiction and uncertainty. So in 1903, in the case of *Giblan v NALUGBI*, the Court of Appeal was still debating whether there was a possible tort of violation of a right to trade, and even as late as 1964 in *Rookes v. Barnard*, Lord Devlin noted that it was not necessary for the House of Lords to decide "whether or not malicious interference by a single person with trade, business or employment is or is not a tort known to the law." As for *Lumley v. Gye*, though decided in the middle of the nineteenth century, it was still being described in 1923 as an "ingénue" in the law.

This uncertainty surrounding the scope of the *Lumley v. Gye* tort and the precise reach of the policy in *Allen v. Flood* allowed other varieties of economic tort to flourish, often as a means of preventing "aggressive" trade union pressure. So, having accepted the tort of inducing breach of contract, species of that tort developed. The most cited summary of these varieties is contained in the judgment of Lord Justice Jenkins in *D.C. Thomson & Co. v. Deakin*. This case identified two other species of the tort, in addition to the established form of the tort, direct persuasion to contact breach applied by the defendant to the contract breaker (as was the case in *Lumley v. Gye* itself). These were direct intervention in the contract by an unlawful—

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56 For example, if they only involved acts which if committed by one alone would not involve crime.

57 The court in *Mogul Steamship v. McGregor, Gow & Co.*, (1889) L.R. 23 Q.B.D. 598, had applied this tort when deciding on the lawfulness of the activities of an aggressive cartel which sought to rid itself of competition from the plaintiff. However, trade competition was held always to be justifiable in such circumstances.

58 Midland Bank Trust Co. v. Green, (No. 3) (1982) 1 Ch. 529, 539.


63 *Lumley v. Gye*, (1953) 2 E & E 216; Lord Justice Jenkins suggested a further species of the tort—that of "inconsistent dealings." He stated: "if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference." *Id.* He drew support from the earlier decision in *British Motor Trade
ful act\textsuperscript{64} (for example by using trespass to goods to prevent a contact from being performed)\textsuperscript{65} and indirect intervention in the contract by means of an unlawful act (often on the facts of leading cases, this would be secondary industrial action where the claimants' commercial partners would be targeted through their workforce). For indirect breach liability, the ultimate breach must be a necessary consequence of the unlawful act, rather than a mere consequence. These extensions have attracted controversy, refocusing the tort on interference rather than persuasion/inducement and failing to note the presence of an unlawful act at the heart of these so-called "varieties." But that did not prevent Lord Denning suggesting a further extension in \textit{Torquay Hotel Co. Ltd. v. Cousins},\textsuperscript{66} where he concluded that the tort of inducing breach could extend to deliberately preventing or hindering one party from performing the contract.\textsuperscript{67} This tort—unlawful interference with contract performance—was approved by Lord Diplock in \textit{Merkur Island Shipping Corp. v. Laughton}.\textsuperscript{68} Thus, although the \textit{Lumley v. Gye} tort was established in 1853, judicial confusion stemming from its varieties led Lord Justice Ralph Gibson to refer to it in \textit{Millar v. Bassey}\textsuperscript{69} as a "comparatively new tort of which the precise boundaries should be established from case to case."

The modern economic tort of intimidation was created in 1964, again as a direct response to "aggressive" trade union pressure. This had been an obscure tort, presumed to be limited to threats of physical harm which

\textsuperscript{64} In fact, in the case \textit{Lord Justice and Lord Evershed M.R. appear to adopt different views on this point. See supra note 63.}

\textsuperscript{65} See G.W.K. v. Dunlop [1926] 42 T.L.R. 376. Here, a car manufacturer had contracted with the plaintiffs to display the plaintiffs' tyres on their cars, when they were exhibited at a motor show. The defendants were held liable when they removed the plaintiffs' tyres (a trespass to the manufacturer's goods) and replaced them with their own.

\textsuperscript{66} \textit{Torquay Hotel Co. v. Cousins}, [1969] 2 Ch. 106, 140-41 (Court of Appeal) (part of Lord Denning's general attack on the use by trade unions of industrial power).

\textsuperscript{67} \textit{Id.} at 138. In the case itself, the claimant's contract was deliberately, though indirectly, targeted by the defendant, but no actionable breach of the claimant's contract resulted due to the presence of an exclusion clause excluding liability for the relevant breach.

\textsuperscript{68} See \textit{Merkur Island Shipping Corp. v. Laughton}, (1983) 2 AC 570, 578 (another claim based on an indirect attack by the defendant (using another's workforce) on the claimant's contract, where a \textit{force majeure} clause meant that no actionable breach of the claimant's contract resulted from the defendant's actions).


\textsuperscript{70} \textit{Id.} at 72.
caused economic harm. So, in *Garret v. Taylor*, the plaintiff was held to have a cause of action against the defendant who threatened violence against the plaintiff's customers. However, in *Rookes v. Barnard*, the House of Lords in a revolutionary decision held that a threat to break a contract was sufficient unlawful means for liability. Lord Reid held that "threatening a breach of contract may be a much more coercive weapon than threatening a tort." This meant that in the case itself the defendants (including a trade union official) were liable for the tort of intimidation when they threatened the employer with breaches of their contracts of employment unless he agreed to terminate the plaintiff's contract (by lawful means). By alleging the tort of intimidation (not thought at the time to be a significant economic tort) the plaintiff circumvented the then-extensive statutory immunity from specific economic torts for those engaged in trade disputes. The court acknowledged that this economic tort, therefore, arose in its modern form "out of the circumstances of modern industrial relations." Indeed, the Court of Appeal had rejected this version of the tort, unhappy to create a tort that would be central to the lawfulness or otherwise of trade disputes, driving as it did a "coach and four" through the then statutory immunities and rendering statutory protection against liability largely illusory.

C. The Emergence of a Genus Economic Tort

What such developments did, however, was to mask the important fact that a genus economic tort had emerged, a tort which had a radically different structure to that of the classic tort of inducing breach of contract. That genus tort—unlawful interference with trade—was expressly acknowledged by the House of Lords in 1983. There were modern indications of its existence in 1960s, championed by Lord Denning when he seemed ea-

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72 See Rookes v. Barnard, [1964] A.C. 1129 (the House of Lords however made it clear that this form of the tort of intimidation—where a breach of contract was the unlawful means—would only apply in a three-party setting. To threaten to break your own contract in order to harm the claimant, your co-contractor, would not be tortious, though it might give rise to contractual or restitutionary remedies).
73 Id. at 1185 (Lord Evershed).
74 Id. at 1157.
75 In fact, Parliament reacted by granting immunity from this "new" economic tort in the Trade Disputes Act of 1965. Since the legalisation of the trade unions this had been the leitmotif of the law's development in this area. Parliament would provide legality for the unions and their activities and the courts would try to circumvent this by creating new economic torts. However, this pattern was ruptured by the Thatcher administration in its quest for decollectivisation; strict rules were placed on the taking of industrial action.
76 See Merkur Island Shipping Corp. v. Laughton, (1983) 2 A.C. 570, 578. Lord Diplock referred to it as the "genus" economic tort, the other economic tort being but species of this tort. *Id.* at 571–72.
77 Lord Reid in both *Rookes* and *Stratford & Son v. Lindley,* [1965] AC 269, 318 indicated
ger to extend economic tort liability generally as part of his crusade in the 1960s and 1970s to protect the little man against the battalions of the trade unions. He made reference to it in *Daily Mirror Newspapers, Ltd. v. Gardner*\(^{78}\) and then forcefully argued for its existence in *Torquay Hotel Co. v. Cousins*,\(^{79}\) asserting "I have always understood that if one person deliberately interferes with the trade or business of another, and does so by unlawful means . . . then he is acting unlawfully . . ."\(^{80}\) However, there are in fact indications of its existence in much earlier cases.\(^{81}\) Indeed, in *Allen v. Flood*, Lord Watson came close to a general formulation of a tort of unlawful and intentional harm.

However, the uncertainties surrounding the economic torts generally led, as has been seen, to specific torts being developed at the expense of overall coherence. When the tort of intimidation is analysed it is seen to have as its essence the use of unlawful means, though the ingredient of threats gives the tort its name.\(^{82}\) As Lord Reid noted in *Rookes*, "[s]o long as the defendant only threatens to do what he has a legal right to do he is on safe ground."\(^{83}\) However, the House of Lords in *Rookes* rejected the arguments of appellants’ counsel that a genus tort should be recognised,\(^{84}\) preferring to create another specific economic tort. Thus the coherent development of unlawful interference with trade and the exploration of its relationship to the tort of inducing breach of contract have been undermined by the "baggage" of judicial hostility to trade union power that has, in part, shaped the species economic torts. Interestingly, the acceptance of the tort came in an era when the traditional statutory immunity that covered nearly

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\(^{79}\) Torquay Hotel Co. v. Cousins, (1969) 2 Ch. 106 (Court of Appeal).

\(^{80}\) *Id.* at 139. In the case itself the defendant deliberately caused the contract between the supplier and the plaintiff to be "breached" but the contact itself contained a force majeure clause so that the supplier could not be sued. The other two members of the Court of Appeal saw this as an orthodox application of the tort of inducing breach. However Lord Denning chose to interpret the force majeure clause as meaning there was no breach. Hence he suggested this new tort.

\(^{81}\) In 1918, Justice McCardie commented, "[t]his element of combination . . . has tended perhaps to obscure the true basis of the rules of law which render actionable an unlawful interference with a man’s calling." *Pratt v. British Med. Ass’n*, (1919) 1 K.B. 244, 255 (the case dealt with simple conspiracy).

\(^{82}\) Though of course the tort of intimidation adds an important gloss to the tort of unlawful interference with trade, threatened unlawful acts are equated to the unlawful acts themselves.


\(^{84}\) *See id.* The appellant’s counsel urged the House of Lords to create a general principle of liability based on intentional employment of unlawful means to injure the plaintiff’s business. *See id.*
all forms of industrial action was severely reduced;\textsuperscript{85} trade unions were increasingly being sued for economic tort liability now that their shield of statutory protection had been shrunk.

\textbf{D. The Task for the House of Lords in the Twenty-first Century: Key Issues to be Resolved}

Now that the tort of unlawful interference with trade has been acknowledged and is being increasingly pleaded in its own right, the task of the English common law is to distinguish its application from the \textit{Lumley v. Gye} tort and define its parameters (given as a genus tort it must include the torts of unlawful conspiracy and intimidation). In sum, the key issues in English common law that must be resolved to enable a coherent development of the general economic torts are:

- Defining the key ingredients of the tort of unlawful interference;
- Defining the key ingredients of the tort of inducing breach of contract;
- Determining the relationship between these two causes of action.

In essence these are, as will be seen, the key issues raised in \textit{Douglas v. Hello! (no6), Mainstream Properties v. Young}, and \textit{OBG v. Allen}, which all went on appeal from the Court of Appeal to the House of Lords in late 2006.

1. \textit{Defining the key ingredients of the tort of unlawful interference with trade.}—This is not an easy task. Though acknowledged to exist in \textit{Merkur}, Lord Diplock did little more than note its existence; in 1989 the Court of Appeal noted its “precise limits and characteristics” were “uncertain,”\textsuperscript{86} while one year later the Court of Appeal in \textit{Lonrho v. Fayed} described it as a comparatively new tort “of uncertain ambit,” the precise boundaries of which have to be established “from case to case.”\textsuperscript{87} Indeed this tort was categorised as a difficult “not to say obscure” branch of the law of tort, referred to by one commentator as “embryonic.”\textsuperscript{88} This is partly explained by the fact that the majority of cases where the tort is pleaded are at an interim stage only, a stage at which “the courts should not attempt finally to resolve difficult questions of law.”\textsuperscript{89} That said, the \textit{outline} of the tort is now established. In \textit{Barretts & Baird (Wholesale), Ltd. v. Institute of Professional Civil Servants},\textsuperscript{90}

\textsuperscript{85} This was the result of the Employment Acts of 1980 and 1982, enacted during the Thatcher administration.


\textsuperscript{90} \textit{Barretts & Baird (Wholesale), Ltd. v. Inst. of Prof’l Civil Servants}, [1987] I.R.L.R. 3.
Justice Henry stated that it involved "interference with the plaintiffs' trade or business ... [by] unlawful means ... with the intention to injure the plaintiffs." In essence, the tort enables the claimant to protest against the harm intentionally done to him where the defendant's unlawful means are used against a third party, not directly against the claimant himself. Here, the use by the defendant himself of unlawful means to intentionally harm the claimant justifies the imposition of liability.

In order to allow the tort to take shape, the correct definitions of "intentional harm" and "unlawful means" need to be authoritatively established.

How, then, have the courts defined intentional harm with respect to this tort? Motive as such is not important in this analysis. Indeed, Lord Justice Dillon in Lonrho v. Fayed rejected the view that this tort required the predominant intent of the defendant be to injure the claimant rather than further his own advantage (as of course is the case with simple conspiracy). However, even with motivation discarded there remain competing views as to the correct definition of intention for this tort. The "wide" view defines intention as including foresight of inevitable or even probable consequences. The "narrow" view would require deliberate harm, with proof that the defendant "targeted" the claimant (for whatever reason).

The majority view of both commentators and the judiciary has been that the narrow view is the correct one. So in Lonrho v. Fayed, Lord Justice Dillon asserted that liability could arise where the fraud on a third party was "aimed specifically at the plaintiff." While in Associated British Ports v. Transport and General Worker's Union, Lord Justice Stuart-Smith contended that the essence of the tort of unlawful interference with trade was "deliberate and intended damage," and Lord Justice Butler-Sloss agreed that

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91 Id. at 6. There is also the need to establish harm.
93 That said, however, some judges do slip into a discussion of motivation when considering the defendant's intention in this tort. See, e.g., Barretts & Baird (Wholesale) v. Inst. Of Prof'l Civil Servants, [1987] I.R.L.R. 3. In that decision, Henry, J. appears to favour a narrow view of intention at times, "although he also, inconsistently, advocates a 'predominant purpose' test" according to Daniel Stilitz & Philip Sales, Intentional Infliction of Harm by Unlawful Means, 115 L.Q.R. 411, 437 n.72 (1999). And the problem is such imprecision is often picked up by fellow judges, even outside the jurisdiction. See, e.g., Pinky's Pizza Ribs Pty. v. Pinky's Seymour Pizza & Pasta Pty. SC Victoria, CA (June 30, 1999) (Justice Henry's predominant purpose test is cited by Tadgell J.A. in this Australian case).
94 See, e.g., Tony Weir, Chaos or Cosmos: Rookes, Stratford and the Economic Torts, CAMBRIDGE L.J. 230; Stilitz & Sales, supra note 93.
95 Lonrho v. Fayed, (1990) 2 Q.B. 479, 489. It should be noted that in that case it was conceded by the plaintiff that he must prove that the unlawful act was "in some sense directed against him" or intended to harm him. Id.
97 Id. at 966.
the defendant's "object and intention" must be to injure. Again, in *Indata Equipment Supplies v. ACL, Ltd.*, Lord Justice Otten defined the tort as "one person using unlawful means with the object and effect of causing damage to another." Many Commonwealth decisions mirror this narrow view. Cases pre-dating the acceptance of this genus tort also support a narrow view of intention where the general economic torts are concerned. So, Lord Watson in *Allen v. Flood* noted that liability would follow where the defendant had used illegal means "directed against the plaintiff," a phrase subsequently adopted by the Court of Appeal in *National Phonographic, Ltd. v. Edison-Bell*. In *Quinn v. Leatham* Lord Lindley referred to liability where the plaintiff is wrongfully and intentionally "struck at through others," while in *Rookes v. Barnard* Lord Devlin (referring to intimidation but logically applying a test that would also apply to the genus tort) asserted "it must be proved that [the defendant's] object is to injure [the plaintiff] . . . ." Given this tort (as with intimidation) will almost invariably occur in a three-party setting, the policy of these cases is that there needs to be a necessary nexus between the defendant and claimant, and that necessary nexus is intended harm. Probable consequences and even inevitable consequences would not be sufficient.

Despite this weight of opinion, the definition of "intention" for this tort remained unsettled. So in 1995 Lord Justice Woolf (in *Lonrho v. Fayed*) favoured the wide view of intention, asserting that the plaintiff should be compensated "if a defendant has deliberately embarked upon a course of conduct, the probable consequence of which to the plaintiff he appreciated." Such a formulation, in addition to being incongruous with the majority view, would catch a wide range of competitive activity and would prove a major problem for those who take industrial action, given that whenever a trade dispute employer is attacked there is an inevitable impact on customers and commercial partners of the claimant under attack. It was this view that was relied upon by the claimants in *Douglas v. Hello!*. In *Douglas v. Hello!*, the celebrity couple, Michael Douglas and Catherine Zeta-Jones and the celebrity magazine OK! objected to the defendant's publication of unauthorised photographs of the celebrity couple's wedding reception. The appellants, OK!, were the exclusive authorised

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98 Id. at 960.
100 Id. at 259.
102 *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.*, (1908) 1 Ch 335, 361.
publisher of the celebrity couple’s wedding photographs. The action was in part based on breach of confidence, given the photographs were taken on a private occasion where there had been an express prohibition on unauthorised photography by the celebrity couple. However, the Court of Appeal found that no breach of confidence arose in relation to OK! magazine, nor could that magazine claim the benefit of the confidence owed to the celebrity couple (although on appeal the House of Lords overturned this, see later in text). As a result, OK! also relied on the economic tort of unlawful interference with trade. In essence they were attempting to extend the “unlawfulness” of the breach of confidence affecting the couple to themselves by relying on the tort of unlawful interference with trade.

The questioned remained: Could the appellant establish intentional harm? The Court considered the possible definitions of the intention required for the tort. The spectrum of possible definitions ranged from intention to harm as an end in itself; as necessary for some ulterior motive; as an inevitable consequence; as a possible consequence and as reckless indifference. The court categorised the first two of these possibilities as “targeted” or “aimed at” or “directed” harm. Unlike the other three possibilities they involve harm as a specific object rather than incidental consequence. The trial judge found as a fact that the intention in procuring and publishing the unauthorised photographs was not to “spoil” OK!’s exclusive deal but rather not to disappoint the Hello! readership, given the high profile nature of the event. There was no specific object to cause harm to the claimant, having been determined as a fact by the trial judge, the claimant asked the Court of Appeal to widen this definition of the requisite intention, based on conflicting judicial dicta, so that possible or reckless consequences would suffice. However, the court refused to accept this (and also rejected “inevitable” consequences) as to so extend the mental element in this tort would “transform the nature of this tort.”

Of course the tort of unlawful interference with trade also requires an “unlawful act.” The need for “unlawful means” in the general economic torts was the policy decision taken by the House of Lords in Allen v. Flood, a rejection of a tort of unjustifiable interference or any prima facie tort theory arising in America. The presence of unlawful means justifies the intervention of the court, though the magic of this tort is that the defendant will be liable to the claimant for these unlawful acts even though the claimant

105 Douglas v. Hello! (No.6), [2006] Q.B. 125. Given the misappropriation feel of this action the economic torts may yet encompass the commercial side of the action for breach of confidence.

106 Id. at 175. The notion that reasonable foresight was sufficient was dismissed.

107 Id. Though the perceived likelihood of harm could provide evidence that the harm was indeed targeted.

108 Id. at 195. However, the court did accept that knowledge of inevitable harm could be evidence of targeted harm.
is not the direct victim of the wrong effected by the defendant. As Bagshaw notes, the tort of unlawful interference "is parasitic on means that are defined as unlawful otherwise than because they amount to torts to the plaintiff." 109 Intentional harm may provide the link between the defendant's acts and the claimant's harm, but the presence of the defendant's unlawful means justifies the intervention of the common law.

But what constitutes "unlawful means"? Despite this being a key concept in the tort the matter is unresolved, with the definition of this concept largely passed over in case law with little analysis. As with the concept of "intentional harm" there are two schools of thought. One school (and this writer falls into this category) would demand that the unlawful means which justify the imposition of tort liability in favour of the claimant be independently unlawful activities in civil law in their own right. There is a second school of thought that would see a much vaguer test; under the test a means "the defendant is not at liberty to commit" would be sufficient. 110 As the court in Douglas v. Hello! (no6) held that the requisite intention was missing on the facts, no in-depth analysis was offered on this ingredient of the tort. What the court did seem to accept was that unlawful means encompass all civil wrongs, including breach of confidence. We await (and need) further guidance in this critical area.

2. The scope of the tort of inducing breach of contract.—The true nature of the action for inducing breach of contract—what intention is required and what knowledge of the claimant's contract is necessary—was at the heart of Mainstream Properties. The claimant in this case was a property development company. The defendant had provided financing to two employees of the claimant company, to allow them to exploit an opportunity to develop a site that had first been offered to their employer. In so doing, the employees were acting in breach of their contracts of employment. The defendant knew of the claimant company's business, knew of the employees' position in that business, and factually agreed that in providing the finance as he did he had "interfered" with the contracts of employment between the employees and the claimant. As Lord Justice Arden noted, "he had provided finance to enable [the employees] ... to appropriate for themselves an opportunity which belonged to their employer." 111 However, when sued for inducing breach of contract he claimed that he lacked the necessary intention for that tort. The trial judge found as a fact that the defendant genu-

110 Proposed by various leading commentators such as Weir, Sales, and Stiltiz, and by Lord Denning (the modern architect of the tort of unlawful interference with trade). These suggest that "impermissible," "illegitimate," or "acts the defendant is not at liberty to commit" could be possible definitions of "unlawful means."
111 Mainstream Prop. v. Young, [2005] EWCA (Civ) 861, [2]. The employees themselves were successfully sued for their breach of contract.
inely believed (prior to the commitment to finance) that there would be no breach by the employees as they had assured him there was "no conflict of interest". Though the defendant had "spotted a potential conflict" he had relied on the reassuring lies of the employees.

The issue became the nature of the "intention" required for this tort and, indeed, the nature of the knowledge of the contract required for the tort. Both ingredients were uncertain, primarily because of case law concerning industrial disputes where wide definitions had been accepted, at odds with the previous judicial approach. So, for example, Lord Denning in *Emerald Construction v Lowthian* asserted that a deliberate indifference to the plaintiff's rights could be sufficient and suggested that liability would ensue where the defendant had the means of knowledge which they had deliberately disregarded.

As far as the intention was concerned, the Court of Appeal, having heard the submissions of the parties following the *Hello!* decision, decided that a strict definition should be applied to all the general economic torts. Lady Justice Arden noted that the Court of Appeal in *Hello!* provided a "panoramic overview of the case law on intention in all economic torts," providing an "holistic approach to intention in all economic torts." Probable or reckless harm was not sufficient. The claimant must show that the harm was the aim of the defendant (for whatever reason). This required the definition of intention to involve subjective intention and the rejection of any definition that allowed for "constructive" intention (i.e., deemed intention, based on the reasonable man).

Similarly, a strict view of the defendant's requisite knowledge of the claimant's contract was adopted by the Court of Appeal. Constructive knowledge, or a situation in which reasonable man should have realised that the contract would be breached, was rejected. Nor was a mistaken view of the legal effect of the employees' contract relevant. The defendant was not liable, as he did not know that the employees were acting in breach of their contractual obligations and clearly, therefore, did not intend to cause such a breach.

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112 Id. at [7]. In part this was because there had been an earlier deal that the claimant had not shown any interest in. This made it more feasible to accept that the defendant believed that the claimant had also rejected this second development deal.

113 Id.


116 Id.

117 Id. at [11]. Lady Justice Arden developed the policy agenda already sketched out in *Hello!*. So the tort should not become virtually equivalent to the enforcement of a contract against third parties; the courts should be reluctant to award damages for purely economic loss and an overbroad tort would discourage competition and inhibit entrepreneurialism.
3. The relationship of the torts of unlawful interference with trade and inducing breach of contract.—The relationship of this "genus" tort to the tort of inducing breach of contract is unclear. We have seen that the courts have (without adequate debate, I would contend) allowed the *Lumley v. Gye* tort, based on a direct inducement to breach of contract, to develop wider varieties. The varieties identified by Lord Justice Jenkins in *Thomson* (in what was it should be emphasised an *ex tempore* judgment), direct intervention and indirect intervention in the contract, have been accepted by courts and commentators alike. A moment's reflection, however, reveals that these "varieties" are in fact misplaced as varieties of the *Lumley v. Gye* tort. Rather, it becomes clear that both are in fact varieties of the "genus" economic tort unlawful interference with trade.

This grey area between the torts of inducing breach and unlawful interference was in reality at the heart of the third economic tort case to go from the Court of Appeal to the House of Lords in 2006: *OBG, Ltd. v. Allan.*

Yet, as will be seen, the Court of Appeal refused to acknowledge this.

Here the claimant companies sued the receivers who had been invalidly appointed over them. The claimants alleged that the receivers' handling of the "run off" of the claimants' contracts led to less satisfactory outcomes than the claimants (through their liquidators) would otherwise have achieved. It was accepted that the company would have received more in its negotiations with contract partners had the receivers not been involved. In reality, the claim was, if anything, a negligence claim based on the claimants' grievances as to the defendants' management of their contract claims. Because no fault was alleged, this claim would have been hopeless. So, the action focused on the receivers' invalid assumption of control over the claimants' contracts. As there is no tort of "wrongfully taking control of a business" the claimants sought to rely on the tort they identified as "interference" with the claimants' contract rights. The allegation was that the invalid assumption of control over the outstanding contracts was covered by such a tort. One view of this claim would be that the claimants were attempting to extract and merge the most favourable ingredients from the two most important general economic torts, inducing breach and unlawful interference with trade, in order to come up with an extended form of economic tort liability. They could not show an unlawful act and could not show targeted harm, thereby ruling out a claim based on unlawful interference with trade; nor could they pursue a claim based on "pure" *Lumley v. Gye* because no contract had been breached. Their solution was to graft *Lumley v. Gye* "intention" (reworked as intention to cause not breach of contract but rather "interference with contractual relations") onto the pro-

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119 *Id.* at 66. Indeed, as Lord Justices Peter Gibson and Carnwath noted, no performance had been hindered. In fact quite the opposite had occurred: the performance had been continued.
tected interest (trade/economic relations) of the tort of unlawful interference with trade.\textsuperscript{120}

Quite rightly, the majority of the Court of Appeal—Peter Gibson and Carnwath, L.JJ.—rejected this claim. Peter Gibson and Carnwath LJJ refused to extend the tort beyond cases where the defendant's action resulted in breach, prevention, or hindrance of the claimant's contract rights. The tort was limited to interference "aimed at procuring a failure to comply with some obligation imposed by a term of the contract,"\textsuperscript{121} and did not extend to "interference" by a defendant in the sense of taking over the performance of the claimant's contracts.\textsuperscript{122}

However, overall, the analysis in the Court of Appeal was disappointing. There was a strong dissenting view from Lord Justice Mance (whose arguments on this point, according to Lord Justice Carnwath, had "considerable theoretical force") who found in favour of the claimants. To do so, he was willing to accept that this tort now extended to "interference with a pre-existing contractual or legal position,"\textsuperscript{123} seemingly an attempt to refocus the tort from protecting contract rights to protection of "business interests."\textsuperscript{124} In his view, in the direct form of this tort no unlawful means needed to have been used for liability to be imposed.\textsuperscript{125} If right this would be a radical extension of economic tort liability, but it is unlikely to be accepted by the House of Lords.

More worrisome, however, was the approach of the majority of the Court of Appeal, despite their rejection of the claim. On the facts of \textit{OBG} it should have been clear that there was no viable claim for inducing breach of contract or any other variety of that or any other economic tort. The Court of Appeal approached the claimants' case by accepting certain truths. These were: that the economic tort relied upon by the claimants, "wrongful inter-

\textsuperscript{120} \textit{Id.} at 1. In effect they combined the most advantageous features of each action while discarding the key limiting features (procuring a breach or causing deliberate harm by means of an unlawful act).

\textsuperscript{121} \textit{Id.} at 47. In other words there must be a breach of contractual obligation—at least the prevention of the due performance of a primary obligation (even if no secondary obligation to pay damages comes into existence).

\textsuperscript{122} \textit{Id.} Although in this case the receivers clearly intended to "interfere" with the claimants' business by managing their contracts, to apply the tort to such a case (where after all the contracts were being performed) "would be to change the nature of the tort," for no good reason of policy, according to Lord Justice Carnwath. \textit{Id.}

\textsuperscript{123} \textit{Id.} at 79 (emphasis added).

\textsuperscript{124} For a better analysis of cases on this point, see \textit{Meade v. Haringey London Borough Council}, [1979] I.C.R. 494, and \textit{Prudential Assurance Co. v. Lorenz}, (1971) 11 K.I.R. 78. These cases indicate that the tort protects interference with legal rights, not simply a legal position.

\textsuperscript{125} \textit{See OBG, Ltd. v. Allan}, [2005] EWCA (Civ) 106, 85. Moreover, there was sufficient intention as the defendants had "aimed" to take over the claimants' contracts, even though no economic harm was intended. So Lord Justice Mance, by extending the interest being protected by this tort, and asserting that an intention to "meddle" in the business of the claimant was sufficient, would have allowed the claimants to succeed on this tort.
ference with contract relations," existed; that it was derived from *Lumley v. Gye,* and that liability for "wrongful interference with contractual relations" was fundamentally different from the tort of unlawful interference with trade.\(^{126}\) This builds on the tendency to accept the uncertainties and lack of coherence in the development of the tort of inducing breach of contract. Since the emergence of the economic tort of unlawful interference with trade, the need has arisen for a clear demarcation between the true scope of the tort of inducing breach of contract and that of the "genus" interference tort. Only such an enterprise will keep these torts on the straight and narrow in the face of claimants' insistence on ever-increasing protection of their economic interests.

### III. The General Economic Torts: The Purist Approach and the House of Lords' Agenda

From the above discussion, it is clear that the mess of the general economic torts needs to be sorted in English common law. This writer has consistently argued that only a "purist" approach to the general economic torts would provide coherence to this area of the law. In spring 2007, the House of Lords\(^ {127}\) handed down its decisions in the trilogy of economic tort cases (*Douglas v. Hello!; Mainstream Properties v Young; OBG v Allen*).\(^ {128}\) It is crucial therefore to explore what is in effect the twenty-first century agenda set by the House of Lords for these torts—for they clearly accepted that this trilogy of cases represented an opportunity "to give a coherent shape"—and to compare that to the purist solution.

#### A. The Purist Solution

The mess of the general economic torts needs to be sorted in English common law. The "purist" view of these torts would provide coherence in the following way.\(^ {130}\)

First, the tort of inducing breach of contract would be limited to its classic *Lumley v. Gye* setting and clearly distinguished from unlawful interfer-

\(^{126}\) *Id.* at 1.

\(^{127}\) The same panel—Lords Hoffmann, Nicholls, Walker, and Brown, and Baroness Hale—heard all three cases consecutively.


\(^{129}\) *Id.* at [320] (Lord Brown).

\(^{130}\) And in addition to what follows, which focuses on the issues before the House of Lords in 2006, simple conspiracy would be rejected as a tort and certainly not be used for any understanding of the role of the general economic torts. Though little used, it is a blot on the coherence of these torts, being a purely interventionist form of civil liability, requiring neither unlawful acts nor an attack on the rights of the claimant by participation in another's wrong.
ence with trade. In so distinguishing, the different rationales for these two areas of economic tort liability would be established.

_Lumley v. Gye_ gives us a tort focused on the claimant’s contract rights; it penalises a defendant who directly induces a breach of that contract. No unlawful means are necessary. Rather, the tort demands a knowledge of the contract, an intention that it should be breached and most importantly persuasion directed at the co-contractor. That persuasion or inducement is the necessary link between the broken contract and the defendant, a third party to that contract. Weir notes: “[i]f I persuade someone, whether by stick or carrot, to conduct himself at variance with his duties under a contract, I have altered his conduct, I have perverted him, or converted him to my use as a means of inflicting harm which otherwise would not occur.”

No “extra” unlawful means are necessary for liability since, as Lord Justice Jenkins noted in _Thomson v. Deakin_, direct persuasion, with the requisite knowledge and intention, “is clearly to be regarded as a wrongful act in itself.”

The tort established in _Lumley v. Gye_ in effect created a new form of secondary liability, following the same pattern for imposing liability as the doctrine of joint tortfeasance. The defendant is liable for inducing or procuring a civil wrong, though the tort allows that wrong to be a breach of contract rather than another tort. Simply to cause an “interference” with “contractual relations” cannot be sufficient; there must be a direct inducement and a breach of contract. If no such inducement or breach arises, the separate tort of unlawful interference with trade should be the only hope for the claimant. The “gospel-like” quality of Lord Justice Jenkins’ analysis of the “varieties” of the tort of _Lumley v. Gye_ should be rejected. The tort of unlawful interference with trade is a completely separate economic tort, with a different framework and different components.

In situations where the real issue is not that the defendant has persuaded another to break their contract with the claimant but, rather, that the defendant has prevented or interfered with the contract’s performance, in effect there is a different focal point for liability assessment. Aggressive (but acceptable) competitive practice may result in such interference. An example given in _Torquay Hotel v. Cousins_ is a deliberate cornering of the market in order to prevent a contract from being performed. However, ruthless competition will not justify the imposition of economic tort liability. For this reason, in the absence of persuasion or inducement, the defendant must be shown to have used unlawful means.

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Here it is the use by the defendant himself of unlawful means to intentionally harm the claimant that justifies the imposition of liability. Unlike *Lumley v. Gye* this is primary liability. The defendant having used unlawful means against a third party, the claimant is given a cause of action that is parasitic on those unlawful means used by the defendant. The rationale of this tort is not the protection of contract rights but rather to render unlawful economic harm aimed at the claimant and effected by means of unlawful acts by the defendant. Given the tort arises from directed harm and unlawful means, "trade" in a general sense can be protected.

This clear distinction between the rationales of inducing breach and interference with trade requires the courts to clearly distinguish between "procurement" of contract breach and mere "interference" with contract performance. The former is at the heart of *Lumley v. Gye* liability; the latter as such cannot in itself (i.e., in the absence of unlawful means) justify economic tort liability, given that it is in the nature of successful, aggressive competition. Nor is there a need for a separate tort of indirect interference with contract. All agree that where "indirect" interference with contract is involved, unlawful means have to be used, this being liability that arises not from *Lumley v. Gye* but from what is now recognised to be the tort of unlawful interference with trade. Liability in this context does not centre on the claimant's contract rights but rather on the presence of "unlawful" means used by the defendant to harm the claimant's business. There is thus no need for a tort of unlawful/wrongful interference with contractual relations.

This proposed "purist" realignment of the parameters of the general economic tort can be achieved by simply revisiting three key decisions: *Thomson v. Deakin*, *Torquay Hotel*, and *Merkur Island*, which chartered the so-called "extensions" to *Lumley v. Gye* tort. The *ex tempore* decision of Lord Justice Jenkins in *Thomson v. Deakin*, in which he sought to include direct and indirect interference with a contract, in the identification of the tort of inducing breach of contract led to what were in fact early cases of unlawful interference with trade being wrongly classified as *Lumley v. Gye* liability, where in effect it is the presence of unlawful means that is impor-

135 Though that may happen as a result.
136 So procurement of a civil wrong is tortious (both within the doctrine of joint tortfeasance and the tort of inducing breach of contract), but simple "interference" with a right is not. Interference forms the basis of economic tort liability where that interference is aimed at the claimant's economic interests ("trade") and achieved by means of the defendant's unlawful act.
137 D.C. Thomson & Co. v. Deakin, [1952] Ch. 646.
138 Torquay Hotel Co. v. Cousins, (1969) 2 Ch. 106.
139 Merkur Island Shipping Corp. v. Laughton, (1983) 2 A.C. 570 (H.L.)
140 Thomson v. Deakin, [1952] Ch. 646.
tant, not the ultimate contract breach.\footnote{So even in cases of "direct intervention" (as opposed to "direct procurement") cited by Lord Justice Jenkins, the better view is that unlawful means must be used by the defendant. \textit{See}, e.g., GWK, Ltd. v. Dunlop Rubber Co., (1926) 42 T.L.R. 376 (the trespass committed in the case is used by Lord Justice Jenkins). Otherwise, as Lord Evershed MR noted, in the case deliberately buying up all of a commodity in the market to undermine the claimant's contract involving that commodity would be actionable (which it is not).} It also led to the loose notion of "interference" creeping into the tort of inducement. This identification of varieties should be rejected. In \textit{Thomson v. Deakin} itself, where the Court of Appeal essentially decided that unlawful means had to be present where no direct procurement of the claimant's contract was involved. As for the decisions in \textit{Torquay Hotel} and \textit{Merkur Island}, they were both cases where the defendant did not directly attack the claimant's contract. They both involved indirect use of unlawful means (working through another party's workforce) to cause problems for the claimant's trade/contractual relations. In effect, it was a complete red herring for Lord Diplock in \textit{Merkur Island} to assert that there was a tort of unlawful interference with contract (accepting the views already maintained by Lord Denning in \textit{Torquay Hotel v. Cousins}). These cases constitute the modern acceptance of the tort of unlawful interference with trade. In fact, both Lord Diplock and Lord Denning touch on this in their judgments. So in \textit{Merkur Island}, Lord Diplock noted the existence of the unlawful means tort, highlighting the fact that "to fall within this genus of torts the unlawful act need not involve procuring another person to break a subsisting contract . . . ."\footnote{Merkur Island Shipping Corp. v. Laughton, (1983) 2 A.C. 570 (H.L.).}

Secondly, the key concepts of "unlawful means" in the tort of unlawful interference with trade, "knowledge" in the tort of inducing breach of contract, and "intention" in both torts, need to be strictly defined in accordance with the Court of Appeal decisions in \textit{Hello!} and \textit{Mainstream}. By so doing, the courts would finally reject the wide definitions that largely spring from judicial hostility to trade union activities. Of course, a clear separation of the tort of inducing breach of contract from the tort of unlawful interference with trade clarifies the intention required in these two torts. Where a procurement of breach is alleged, then an intention to procure that breach of contract must be established. Where the tort of unlawful interference with trade is alleged, the claimant must prove an intention to cause economic harm, in the sense that the defendant "aimed" at harming the claimant. Both have strict views of intention but what an individual intends is different in these two torts.

\section*{B. The House of Lords' Agenda for the Twenty-first Century}

In essence, these obstacles to understanding the modern role and coverage of the general economic torts are raised in the three House of Lords' ap-
peals heard at the end of 2006. These three decisions could provide the an-
swers to the uncertainties that have bedevilled these torts. Whether they
will or not is now discussed, taking the purist approach as the framework
for that discussion.

First, the House of Lords accepted the purist approach as to the ra-
tionale and role of the torts of inducing breach of contract and unlawful
interference with trade. The Court of Appeal in these three cases had gone
some way towards this. But the major stumbling block for this writer was
the lack of clear water they put between these two torts. This has now
been achieved. So the House of Lords accepted that these two key torts,
each have their own structure and a fundamentally different pattern of li-
ability. Inducing breach of contract is accepted to be a form of secondary
or accessory liability, requiring a breach by the claimant’s contract partner,
procured by the defendant. The tort therefore provides a claimant with an
additional cause of action to the action in contract. Indeed it is apparent that
Lords Hoffmann and Nicholls accept that the principle behind this tort is
the same as that behind the doctrine of joint tortfeasance. Inducement
therefore is an essential ingredient, mere interference being insufficient.
On the other hand, the tort of unlawful interference is a tort of primary
liability, allowing the claimant to sue a defendant who has used “unlawful
means” against a third party in order to harm the claimant. These two torts
are “essentially different,” therefore, whereas the rationale of the former
is to treat “contractual rights as a species of property which deserve special
protection,” the latter is concerned with intention and wrongfulness, being
“indifferent as to the nature of the interest which is damaged.”

The House of Lords correctly identified that the major uncertainty in
the scope of these two torts arose from the failure to identify the emer-
gence of the separate tort of unlawful interference (for which, see discus-
sion above). Thus the House reaffirmed the classic form of the Lumley tort
and expressly rejected the “direct” and “indirect” interference “varieties.”
These are now rightly accepted to be examples of the unlawful interfer-
ence tort, as is the most malign result of this confused analysis—the hybrid
or half-way tort of interference with contractual relations (which was in-
deed the “tort” relied upon by the claimants in OBG). In essence, therefore,
the House of Lords has rejected the legal analysis of Lord Justice Jenkins
in Thomson v Deakin, Lord Denning in Torquay Hotel Co., Ltd v Cousins, and
Lord Diplock in Merkur Island Shipping v Laughton.

The House is to be congratulated for boldly taking these torts back to
first principles. This return to basics accepts the philosophy of the deci-

143 Douglas v Hello!; Mainstream Properties v Young; OBG v Allen, [2007] U.K.H.L. 21, [36] (Lord Hoffman). For the views of Lord Nicholls see id. at [170], [172].
144 Id. at [264] (Lord Walker).
145 Id. at [32] (Lord Hoffman).
146 In particular the views of Lord Watson in Allen v Flood, [1898] AC 1, 96 who defined
sion in *Allen v Flood* viz. that the common law should be wary of judging the justification or otherwise of a defendant's competitive practices. So Lord Hoffmann notes: "it is commonplace that the law has always been very wary of imposing any kind of liability for purely economic loss. The economic torts . . . are highly restricted in their requirement of an intention to procure a breach of contract or to cause loss by unlawful means." As such the purist approach is mirrored in these decisions.

What, though, of the second aspect of the purist approach, namely the need for a narrow definition of the ingredients of these torts? Here the House of Lords proved less "purist" than the Court of Appeal. Though the House of Lords determined that the same definition of intention should be applied to the two key torts and that only a subjective intention was sufficient, Lords Hoffmann and Nicholls (unlike the Court of Appeal in *Hello!* and *Mainstream Properties*) rejected the test of "targeted harm." Rather they both required the court to identify "ends" and "means to ends" and distinguish them from mere "consequences." Intentional harm is thus defined as either a desired end or the means of achieving a desired end. The problem is that this test appears to create a wider definition of intention than "targeted harm." So, when applying the test of ends/means to the facts of *Hello!,* Lord Hoffmann stated that he would have found intentional harm to be present (the opposite view to the Court of Appeal, applying the "targeted" test). Their test, therefore, could conceivably encompass "inevitable harm." However, it may well be that future courts will still apply the traditional "targeted" definition of intention to these torts. Indeed, Baroness Hale referred to the defendant (in relation to both torts) "deliberately striking at his target through a third party" and continues in the same paragraph to label the claimant "the target." Uncertainty in the application of these torts will continue, therefore.

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the basis of liability for injuring a claimant through a third party thus: "In the first place, [the defendant] will incur liability if he knowingly and for his own ends induces [another] to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor . . . it may yet be to the detriment of a third party and in that case . . . the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party."

147 Douglas v Hello!; Mainstream Properties v Young; OBG v Allen, [2007] U.K.H.L. 21, [14] (Lord Hoffman, commenting that such a basis for liability "seems to have created a good deal of uncertainty in the countries which have adopted such a principle").

148 Id. at [99].

149 Though obviously the *Lumley* tort clearly requires an intention to cause contract breach rather than simply harm.


151 Id. at [130], [134].

152 Id. at [306].
As for the tort of unlawful interference with trade, though the House of Lords acknowledged that the concept of "unlawful means" is "the most important question concerning this tort" the House was not unanimous as to the correct scope to be given to this feature of the tort. On the one side, Lords Hoffmann, Walker, Brown, and Baroness Hale favoured the limited "purist" definition that unlawful means must involve those which are "actionable" by the third party. However, Lord Nicholls subscribed to a wider interpretation of unlawful means: for him all intentional economic harm caused by "unacceptable means" should be prohibited. This would mean that unlawful means embraces "all acts a defendant is not permitted to do whether by the civil or criminal law". Obviously, it is to be regretted that the House did not speak with one voice and resolve what has been a matter of uncertainty unsettling the application of this tort. It is hard not to disagree with Lord Walker's prediction that neither approach "is likely to be the last word." And there is further uncertainty attached to this tort, following the decision by Lord Hoffmann to add a "gloss" to the established ingredients. He contended that not simply any unlawful act (with an intention to cause loss to the claimant) would be sufficient, given: "there is obviously no reason why a claimant should be entitled to rely on the infringement of a third party's rights." Rather, he asserted that the intention to cause loss must be by "interfering with the freedom of a third party to deal with the claimant. The tort according to Lord Hoffmann, therefore, requires intentional harm to the claimant, the use by the defendant of unlawful means against a third party and, in addition, the claimant must have "an economic interest" in the third party who is the subject of the defendant's wrongful interference.

With the Lumley tort, the House is happy to adopt the purist view that the defendant must have actual knowledge that the effect of the procurement will be a breach. Constructive knowledge is not sufficient and neither is an allegation that the defendant, in believing there will be no breach, has made a mistake of law (as was alleged in Mainstream). This is

153 Id. at [45] (Lord Hoffman).
154 Indeed they lacked unanimity as to the correct title of this tort: though Lord Nicholls adopts the standard nomenclature—"interference with trade or business by unlawful means"—id. at [141] and Baroness Hale adopts a similar title ("tort of causing economic loss by unlawful means"), id. at [302], the three remaining members of the House of Lords favour the more general title provided by Lord Hoffmann. He terms this tort that of "causing loss by unlawful means," id. at [6].
155 Id. at [270].
156 Id. at [162].
157 Id. at [269].
158 Id. at [60].
159 Id. at [51].
160 See id. at [201] (Lord Nicholls).
to be welcomed. However Lords Hoffmann\textsuperscript{161} and Nicholls\textsuperscript{162} also accepted that though negligence would not be sufficient, reckless indifference to the breach or making a conscious decision "not to enquire in case he discovered a disagreeable truth"\textsuperscript{163} would suffice. This accepts the view of Lord Denning in \textit{Emerald Construction Co., Ltd. v Lowthian}.\textsuperscript{164} This widens the tort and fails to follow the purist line.\textsuperscript{165}

Overall, therefore, though the House of Lords is to be commended for providing a coherent "purist" framework for these torts, the way the House of Lords—and individual members of the panel—dealt with the specific ingredients reveals some inconsistencies and a failure to adopt a fully purist approach. This writer remains unconvinced that the economic torts have been finally put on the straight and narrow.

IV. The Misrepresentation Economic Torts

A. The Contrast Between the Torts of Malicious Falsehood and Passing Off

There are two economic torts that focus liability on the defendant’s misrepresentation: the tort of malicious falsehood and the tort of passing off.\textsuperscript{166}

\textsuperscript{161} \textit{Id.} at [41].
\textsuperscript{162} \textit{Id.} at [192].
\textsuperscript{163} \textit{Id.} at [69] (Lord Hoffman).
\textsuperscript{164} \textit{Emerald Construction Co., Ltd. v Lowthian, [1966] 1 WLR 691.}
\textsuperscript{165} Overall in terms of the outcomes of the appeals: in \textit{Mainstream Properties}, the House were unanimously of the view that there was no inducement to contract breach by the defendant (given he genuinely if rather naively believed that the claimant’s contract partners would not be in breach; in \textit{OBG}, the House unanimously found that there was no hybrid economic tort of unlawful interference with contractual performance; in \textit{Hello!}, the claimant failed on the tort of unlawful interference. Essentially, only Lords Hoffmann and Nicholls dealt with this appeal in detail and both rejected the claim because they felt that there was no 3 party structure to the harm caused by the defendant. Lord Hoffmann determined that as \textit{Hello!} owed a duty of confidentiality to OK! the tort of unlawful interference did not apply; Lord Nicholls determined that as \textit{Hello!} did not owe a duty of confidentiality there were no unlawful means (!).
\textsuperscript{166} The tort of deceit could also be included here. Although originally tied in with the development of contract law (and useful in claims of false warranty) the action was clearly separated from contract law in the case of \textit{Pasley v. Freeman}, (1789) 3 Term. Rep. 51, where the court emphasised the defendant’s dishonesty and consequent deception of the plaintiff, even though the defendant did not himself gain from that deception. The tort was subsequently summed up by Parke B. in \textit{Langridge v. Levy}, [1837] All E.R. 586, as requiring "a falsehood told with an intention that it should be acted upon by the party injured" which causes damage to him. \textit{Id.} As it is the person intentionally deceived who can sue it, however, a tort of limited importance in the area of trade competition. To lie about your own goods to gain a competitive advantage is not per se the tort of deceit as Heydon notes, "it is of little use to a competitor of the liar; he has not acted to his detriment on a false statement but rather has been injured because others acted upon it.” J.D. \textit{HEYDON, ECONOMIC TORTS} 87 (2d ed. 1978). In England the regulation of “abusive” trading that acts to the detriment of consumers is done via specific
The former's development and application mirrors the abstentionist approach outlined above. So the tort of malicious falsehood has not been the subject of any important development, at least in its commercial application. However, the tort of passing off has been a dynamic action since the late Victorian era and at present stands at the edge of becoming a more general unfair competition action. Though many have pinpointed the uncertainty and lack of coherent analysis in the general economic torts, recent years have shown that courts are undecided as to the best approach in the application of the "protean" economic tort, passing off, and most recently in its correct application to concerns over domain name protection and image rights. As for the general economic torts, the courts need to address directly the modern value of this tort.

B. The Tort of Malicious Falsehood

The tort of malicious falsehood existed in an earlier form, the action for slander of title, from at least the end of the sixteenth century. In this guise it protected against falsehoods denigrating the plaintiff's title to land. However, the tort expanded in the nineteenth century to cover a wider variety of falsehoods, including slander of title to goods and disparagement as to the quality of the plaintiff's goods. In view of the incremental development of this tort it has attracted various names, including injurious falsehood, trade libel, and disparagement of goods. However on the whole it is now referred to as "malicious falsehood," a term that best fits the ingredients of the action. The essentials of the action are that the defendant has published "maliciously" about the claimant "words which are false" that
are "calculated to harm" the claimant (i.e., likely to harm) and cause him harm in the sense of economic harm. Though very commonly disparagement or denigration will be the essence of the falsehood, these elements are not necessary for the action to arise. In one of the leading cases, the tort applied to a claim based on the false statement that the plaintiff had ceased to carry on business.

The key constraint on the application of this tort is the necessity for the claimant to prove "malice" on the part of the defendant. Malice can, in theory, involve two very different allegations: malice in the sense of "spite" and malice in the sense of lies, i.e., knowledge of the falsity of the statement that is calculated to harm. Whereas spite malice will render the defendant liable, even if there is an honest belief in the truth of the statement, deceit malice requires no "malicious" intent or motivation; even indifference as to the effect of the lies on the claimant will not negate liability. Clearly, in a commercial setting it is deceit malice that is the most likely allegation.

It is the need to prove malice that severely limits the usefulness of this tort. Indeed, the policy of keeping the tort within strict bounds was reinforced by the fact that its modern development occurred at the early stage of the modern development of advertising. Where comparative advertising is concerned, the aim of the trader may well be to denigrate or disparage, but allegations of malicious falsehood has carried with it the danger that the courts may become too involved in arbitrating on the competitive process. In 1895 Lord Herschell underlined the lack of enthusiasm for applying the tort to such claims lest they be turned "into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better." So an allegation by the defendant of superiority over the claimant's product may not be covered by the tort, even though false, if the court believes it is merely an example of "self-commendation" or that

171 Damage has to be proved, though the task has been rendered easier by statutory intervention. Where the action arises in a commercial context the damage will be presumed from the making of the statement. See The Defamation Act, 1952, c.66, §3.

172 See Ratcliffe v. Evans, (1892) 2 Q.B. 524.

173 Stable, J. in Wilts United Dairies, LD v. Robinson, (1957) 57 R.P.C. 220 summarised the position thus: "if you publish a defamatory statement about a man's goods which is injurious to him, honestly believing that it is true, your object being your own advantage and no detriment to him, you obviously are not liable." Id. at 237.

174 White v. Mellin, [1895] A.C. 154 (H.L.). He continued: "consider what a door would be opened if this were permitted ... the Court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure—whether a particular article of food was in this respect or that better than another." Id.

175 Of course the RESTATEMENT (SECOND) OF TORTS provides for a "conditional privilege" allowing competitors to make unduly favourable comparison in which they do not believe "if the comparison does not contain false assertions of specific unfavorable facts." RESTATEMENT (SECOND) OF TORTS § 649 (1977).
the public are unlikely to be misled. The public are assumed to have com-
mon-sense and a certain amount of cynical scepticism where it comes to
advertising blurb. Courts will only want to get involved where "unac-
ceptable" disparagement is involved in such advertising, and specific, precise
allegations are made where "a reasonable man would take the claim being
made as being a serious claim."\textsuperscript{176} This policy is so well entrenched that it
has been applied to the comparative advertising provisions of the Trade
Marks Act of 1994 which allow "honest" comparative advertising using the
claimant's trade marks without permission.\textsuperscript{177}

All in all, the abstentionist policy of the common law has a tight strangle
hold on this tort. The rise of the distributive trades trade rivalry was to be
couraged, and the encouragement of even aggressive competition (and
the related unwillingness to become immersed in the disputes of trade ri-
vals) still holds back the courts.\textsuperscript{178} The tort has no likelihood of spawning an
unfair competition action as the courts have made it clear that lies as such
are not tortious, nor can claimants claim on the basis that the defendant has
gained an unfair competitive advantage by such lies. In \textit{Schulke \& Mayr UK, Ltd. v. Alkapharm UK, Ltd.}\textsuperscript{179} the claimant sought to argue that a false adver-
tisement commending the virtues of the defendant's rival product (without
any comparison with or naming of the claimant's product) was capable of
amounting to malicious falsehood, as there would be diversion of sales and
trade loss as a consequence of the lies. Justice Jacob viewed this claim as
a bold one, and held that any such radical extension would have to be left
to Parliament. In essence, therefore, the tort is no more than a safety net
for the most extreme forms of falsehood that directly affect the claimant's
economic interests.

\textbf{C. The Tort of Passing Off}

The contrast between the development of the tort of malicious falsehood
and the development of the tort of passing off could not be more stark.
The classic version of this tort involves a trader misrepresenting/"passing
off" his goods to third parties as the goods of the claimant. As a cause of
action, passing off proved attractive to commercial bodies because it pro-
vided relief not to those confused as a result of the misrepresentation (the
customers/consumers), but to the commercial party harmed by the misrep-
resentation. Moreover, the courts favoured this tort because it developed in
the early industrial period to meet the commercial need for the protection

\textsuperscript{177} \textit{See} \textit{The Trade Marks Act}, 1994, c.26, §10.
\textsuperscript{178} There is also a concern to preserve commercial free speech where there is a bona
fide reason for making the statements, a view strengthened by \textit{The European Convention on
of trade marks and names, a need which the judiciary accepted was in the public interest. And this was a development in which the courts of equity were to play a major role, given that injunctions were the most favoured remedy of plaintiffs relying on the tort. The tort was therefore unaffected by the restrictive common law approach apparent in the development of malicious falsehood liability. The combined effect of these two factors was that equity could refashion this tort from one based on deceit, with only a limited remit, to one of strict liability with assumed damage. The focal point of the tort became not the defendant’s intention but the misrepresentation, whether deliberate, careless, or innocent. A key stage in its development came in 1896 with the House of Lords’ decision in Reddaway v. Banham which accepted that even descriptive terms would be protected (provided they had attracted secondary meaning). This case was followed in 1915 by Spalding v. Gamage, which provided the twentieth century framework for the tort. This case identified “goodwill” or customer connection as the property right protected by the tort (emanating from the reputation of the claimant’s products/services), rather than the trade mark or name itself. The tort was acknowledged to protect “those indicators in the process of commercial competition by which one rival distinguishes his products or services from those of another.”

The modern emergence of this important tort indicated that it was an elastic weapon against certain sorts of unfair competition, preventing the defendant from reaping the benefit of the claimant’s “good name, reputation and connection.” Clearly, claimants were encouraged by judicial comments that it is a “protean” tort, the subject of a continued develop-

180 The major expansion of the tort of malicious falsehood took place at the very end of the nineteenth century so it did not develop parallel equitable protection, as the tort of passing off did.

181 The origins of the tort are unclear, there being an Elizabethan case that may have been its precursor—or that case might have involved defamation instead. See generally Frank I. Schechter, The Rational Basis of Trademark Protection, 40 Harv. L. Rev 813 (1927). The term “passing off” was first used in the headnote of Parry v. Truefitt (1842) 49 E.R. 749.

182 Of course, if the intention of the defendant is to deceive, then the court may be very willing to apply the tort even if it is not apparent that all the ingredients of the tort are present, a phenomenon aided by the fact that the vast majority of passing off cases begin and finish at the interim (preliminary) stage.

183 Reddaway v. Banham, [1896] A.C. 199 (H.L). Of course the fact that the other “trade competition” tort—malicious falsehood—had been stifled by the courts was also a stimulus to the development of the tort of passing off.


185 Id.


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ment "to meet changing conditions and practices in trade." Yet, in theory, the boundaries of the tort were clear. The tort requires a misrepresentation, goodwill, and harm to that goodwill (or potential harm): the so-called "classic trinity." All three ingredients link into each other, with customer confusion as its cement. Classic passing off, claiming that the goods you are selling emanate from the claimant when they do not, involves a source misrepresentation attacking the goodwill in that source. Such a misrepresentation attacks the customer connection, the value of the probability "that the old customers will resort to the old place." The rationale for this tort is to protect traders' interests where it is in the public interest to do so. It is a tort that protects the reliability of information passing between trader and customer, clearly an aim which is in the public interest. Misrepresentations that lead to confusion involve misdirected competitive effort. As Naresh notes, "misrepresentations provide false information and thereby distort the pattern of consumer choice, causing more of some products to be purchased and less of others than would be the case if consumers were accurately informed. This misallocation of resources is a social loss and its prevention is clearly desirable." The tort appeared justified on the basis that it helps to lower consumer search costs, while the fact of legal protection provides incentives for companies to make investments to gain consumer confidence in their products. The parallel with the classic rationale for registered trade mark protection is obvious.

In theory, the extensions that twentieth century case law made to this tort have complied with this trinity and its rationale. It soon became clear that as well as the classic "source" misrepresentation, a misrepresentation involving a misdescription of the claimant's goods might also be actionable. Indeed, this was the very allegation in the leading case of Spalding v. Gamage. Here the quality of the claimant's goods being sold by the defendant

189 Lord Elton in Crutwell v. Lye, (1810) 1 Rose 123; 34 E.R. 129.
190 And successful traders at that—only those traders with a customer connection or customer experience are entitled to such protection. As Slade, J. noted in My Kinda Bones, Ltd. v. Dr. Pepper's Stove Co.,[1984] F.S.R. 289, 299: "prima facie, it seems to me, a substantial number of customers or potential customers must at least have had the opportunity to assess the merits of those goods or services for themselves."
191 This rationale of the tort was underlined by Lord Diplock in one of the leading modern passing off cases, Erven Warnink Besloten Vennootschap v. J. Townend & Sons (Hull), Ltd., [1979] A.C. 731 (known as the Advocaat case): "in an economic system which has relied on competition to keep down prices and improve products there may be practical reasons why it should have been the policy of the common law not to run the risk of hampering competition by providing civil remedies to everyone competing in the market who has suffered damage to his business or goodwill in consequence of inaccurate statements of whatever kind that may be made by rival traders about their own wares." Id. at 742.
193 Spalding v. Gamage, (1915) 111 L.T. 829 (Ch. D)
was being misrepresented by the vendor. The public believed they were being offered the best quality product, whereas they were in fact being sold substandard examples of the claimant's produce, which should have been consigned to the scrap heap. This can still be seen as a species of source goodwill, focusing on harm to the claimant alone and attacking his goodwill, based on goods emanating from his control.

But the courts were willing to go further. In one of the most important decisions in passing off, Erven Warnink Besloten Vennootschap v. J. Townend & Sons (Hull), Ltd.194(known as the Advocaat case), the House of Lords agreed that the tort should be “extended” to include product misrepresentation, where source was not in issue but rather the consumer was being misled as to the type of product they were acquiring.

So, in Advocaat, a misrepresentation not affecting the plaintiff uniquely was recognised to be part of this tort. The plaintiffs (together with other traders) had for many years manufactured a liquor called Advocaat. The essential ingredients of this product—what in short made the product “Advocaat”—were a spirit, brandewijn, and egg yolks. Clearly anyone who produced authentic Advocaat would be entitled to call it by that name; customers would not associate the name with the plaintiffs alone. However, the plaintiffs objected to the defendants producing a rival product, which they termed Old English Advocaat, from dried egg powder and Cyprus sherry. Given the lower costs involved, the defendants were able to market their product at a lower price and captured a substantial part of the plaintiffs' English market. Wanting to cry “foul” the plaintiffs sought an extension of the tort of passing off. Although there was no source misrepresentation, they argued that “Advocaat” was a “product endowed with recognisable qualities”195 and that the defendants' product should not be described as Advocaat (but rather was a form of egg flip). This “product misrepresentation,” though not affecting the plaintiffs alone (but, in theory all genuine Advocaat producers), harmed the goodwill in the product. The plaintiffs (amongst others) had created a reputation for the product properly described as Advocaat. As a result, it was argued that as a legitimate producer of the product they had goodwill in that product, i.e., the customer connection they were seeking to protect attached to the reputation of the product rather than a single source. The plaintiffs' goodwill in the product was damaged both by reduced sales and by the reputation of the product being debased. The House of Lords agreed to this extension.

It is important to note, however, that in Advocaat the formula of the classic trinity was still followed. Here there was a misrepresentation (goodwill in the customer connection with the product and harm to that good-


will); mere false advertising or labelling would not have been sufficient.\footnote{196} Though some commentators predicted the potential for the development of an "unfair trading" tort, this did not happen in the aftermath of this important extension.

Yet on closer inspection it is clear that some judges are more than willing to expand the tort beyond the limits of the classic trinity, although admittedly paying lip service to the parameters set by that formula. So despite the concept of "goodwill" and its requirement of existing customer connection being the property protected at the heart of the tort, some courts have been willing to protect a product based simply on pre-launch publicity, rather than customer experience.\footnote{197} More importantly, because these extensions apply to a large number of modern cases, the acceptance of "connection" misrepresentation as a material misrepresentation and of "dilution" as a head of harm have played directly into the hands of those who seek to convert this from a misrepresentation tort into a tort of misappropriation. Both definitions of key aspects of the classic trinity add elements to the tort that are vague and badly defined. In other words, they add imprecision to the scope of the tort, and imprecision is the impetus to claimants’ ever more extravagant claims for the tort.

The notion of a "connection" misrepresentation if applied in a strict fashion clearly builds on the classic "source" misrepresentation. If the claimant must prove that the consumers will believe that the parties are connected (in the sense that they will believe that the claimants have somehow made themselves responsible for the quality of the defendants’ goods or services, a definition of connection suggested by Lord Millett in \textit{Harrods, Ltd. v. Harrodian School, Ltd.}\footnote{198}), then the tort has not been extended significantly. However, as is more common, if the court is willing to see an implied connection should the consumer get the impression that the claimant and defendant are "in some way connected," then clearly the tort has been extended by a significant amount. The allegation of "connection" misrepresentation becomes, in effect, a way around the need to show a misrepresentation.

\footnote{196} \textit{Id.} at 742. In fact, Lord Diplock provided a reworked definition of the characteristics of passing off. He identified five features required for the tort: a misrepresentation; made by a trader in the course of trade; to his prospective customers; calculated to injure the business or goodwill of another; and which does so injure or probably will do so. But he went on to acknowledge that these five features may not always be sufficient, that there may be factual situations that contain all five features but do not give rise to the tort. It is perhaps not surprising, therefore, that in subsequent passing off litigation the courts appear happier to apply the "classic trinity" test. \textit{Id.}

\footnote{197} See, e.g., Elida Gibbs, Ltd. v. Colgate-Palmolive, Ltd., [1983] F.S.R. 95, where an expensive new promotional campaign for the plaintiff's yet to be launched product was protected against the defendant's deliberate use of a similar advertising theme (designed to undermine the plaintiff's launch).

And as for the relevant heads of damage in this tort, the traditional heads of damage have been diversion of sales and injurious association. Diversion of sales is most likely where the parties are in competition, while injurious association can take a variety of forms, for example a false connection with a disreputable or down-market defendant. Both of these heads of damage clearly relate to the claimant's goodwill, his customer base. However, over the years claimants have sought to enlarge the list of heads of damage relevant to the tort of passing off, a quest rendered easier by the fact that the most common remedy sought in contested passing off actions is an interim (preliminary) injunction. Here a detailed discussion of the limits of legal liability will not take place and indeed the balance of convenience rather than legal definitions is likely to be the most important issue. So it is tempting for claimants to test the water by slipping in wide formulations of what constitutes damage for this tort. Though vague allegations such as "loss of expansion potential," or "loss of licensing opportunities" may be secondary to the main claim of diversion of sales or injurious association, the concern is that heads of damage that are speculative and unrelated to existing goodwill appear to be accepted and legitimised in this preliminary litigation. And the vaguest allegation of harm, "dilution," has become accepted by the courts as part of this process.

Dilution was a concept championed by the American academic, Schechter, in 1927. The theory behind the concept of dilution "is based on the fact that the more widely a symbol is used, the less effective it will be for any one user." Schechter believed that the law should protect marks against "blurring," "tarnishment," or "erosion" of their magnetism. In 1993, the Court of Appeal appeared to accept dilution as a legitimate head of damage in passing off. In Taittinger SA v. Allbev, Ltd., champagne producers attacked the use of the word "champagne" in the name of the defendants' non-alcoholic drink, "Elderflower Champagne." Rather surprisingly (at least to this writer) the court found there to be a connection misrepresentation, thus revealing how vague and protective of successful claimants this allegation of connection can be. It is clear that in this sort of case the real concern of those who own the prestige brand is that they wish to prevent free riding on the advertising and marketing "pull" of their brand name. That that is the real issue was underlined in this case; all three members of the Court of Appeal highlighted the threat of dilution that the defendants' activities posed. Thus Sir Thomas Bingham MR remarked: "[a]ny product which is not Champagne but is allowed to describe itself as such

200 Ralph S. Brown, Jr., Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 YALE L.J. 1165, 1191 (1948).
201 Taittinger SA v. Allbev, Ltd., (1994) 4 All E.R. 75 (CA (Civ Div)).
must inevitably . . . erode the singularity and exclusiveness of the description Champagne [and cause damage] of an insidious but serious kind.  

This acceptance of a vague connection misrepresentation and the equally vague concept of dilution, taken together, have the potential for taking the tort beyond its traditional field, into that of misappropriation. In effect claimants increasingly use allegations of "connection misrepresentation" to prevent free-riders on their success and if dilution is then the accepted head of damage then in reality the claimed "false" connection in itself appears to be sufficient to establish liability. The argument appears to be that such misrepresentations dilute the distinctiveness of the name or product involved, i.e., a false connection appears to be passing off per se. This leaves the classic trinity abandoned in favour of preventing free-riding or unjust enrichment. Protection focuses not on customer connection but in reality on the worth of the name itself, although that is what was rejected as a rationale for the tort way back in *Spalding v. Gamage.*

That some judges are willing to countenance such a seismic shift in the tort (though claiming to apply the classic trinity) is vividly demonstrated in the case of *Irvine v. Talksport, Ltd.* English law offers no particular protection to names or images. Merely using another's name is not a wrong in itself, and as for unauthorised images, in *Corelli v. Wall* the plaintiff, a famous novelist, was unable to prevent the defendants publishing coloured postcards showing imaginary incidents in her life. In the common law an identifiable harm must be shown. However, the celebrity image case of *Irvine* arose from the appreciation by the celebrity industry that the vagueness of a connection misrepresentation added to the vague allegation of dilution (and the knock on effect of what is the actual goodwill being protected in such a claim) meant that the tort promised to be useful to the industry in the twenty-first century.

The case involves the first judicial acknowledgement that the tort of passing off renders unlawful "false endorsement" involving a celebrity. Here the defendants as part of their campaign to rebrand their radio station into a sports-focused station sent promotional material to potential advertisers. Included was a brochure on the front page of which was a photograph of Eddie Irvine, the then successful Formula 1 driver. In fact, this photograph had been digitally altered to remove the mobile phone that

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202 *Id.* at 83.
204 *Irvine v. Talksport, Ltd.*, (2002) All E.R. 414 (Ch. D.), (opinion by Laddie, J.). The defendant appealed unsuccessfully to the Court of Appeal on the issue of liability, arguing inter alia that the use of Irvine’s image was analogous to that of a celebrity photograph on a magazine cover. *Irvine v. Talksport, Ltd.*, (2003) All E.R. 881 (CA (Ch. Div.)). The claimant’s appeal was successful, however, on the assessment of damages. *Id.*
205 *Corelli v. Wall*, (1906) 22 T.L.R. 532.
Irvine had actually been holding and replace it with a portable radio bearing the defendants' logo. Having not been paid for this use of his successful image, the claimant alleged passing off and claimed the fee he would normally charge for the authorised use of his image in advertising. The judge (and subsequently the Court of Appeal) found there to be a connection misrepresentation (the public would wrongly believe that the celebrity was "happy to be associated" with the defendants' service) and the harm to goodwill involved was loss of licensing opportunity and dilution.  

Rather than being a simple application of the classic trinity, on closer inspection the application of the tort in this way involves a radical departure. The decision can be interpreted as providing protection against misappropriation of fame. The trial judge noted that the celebrity's "fame and personality" were exploited, the defendants "squatting" on his magnetism with this unlicensed use likely to "reduce, blur or diminish" the exclusivity of Irvine's reputation. In order to prove misrepresentation, the claimant had relied on the rather tenuous "connection" misrepresentation. The harm was essentially dilution, and the property being protected was not goodwill in the traditional sense of source goodwill (or even the extended form of product goodwill), but rather the claimant's promotional goodwill. In essence, the defendants were found to have acted unfairly and were to pay for taking advantage of a reputation without paying for it.

V. THE MISREPRESENTATION ECONOMIC TORTS: SUMMARY AND SUGGESTIONS

Clearly the tort of malicious falsehood will not expand. It is apparent that its main use since Victorian times—namely to prevent comparative advertising that misleads the consumer—is now likely to be caught by the provisions of registered trade mark law. Indeed, Jacob, J. in *Cable & Wireless PLC v. British Telecommunications PLC*, considered that in comparative advertising disputes the additional claim based on malicious falsehood added nothing but simply increased costs. However, the tort of passing off is at a crossroads in its development in England. Pressure from amongst others, including the celebrity industry and commercial bodies concerned about such unfair practices on the inter-

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207 The judge, did however contrast endorsement from "mere" merchandising. The latter simply exploits images which have become famous without necessarily implying endorsement—the celebrity image on a T-shirt, for example. *Id.* at [9]. To underline the distinction he was making, Lord Laddie exampled the sale of memorabilia relating to the late Diana, Princess of Wales. He noted: "a porcelain plate bearing her image could hardly be thought of as being endorsed by her, but the enhanced sales which may be achieved by virtue of the presence of her image is a form of merchandising." *Id.*

208 *Id.* at [38].

209 *Id.* at [39].

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net as cyber-squatting and phishing, are determined to push the boundaries of this tort well beyond the confines of its misrepresentation roots into the area of protection against misappropriation. The judiciary seem divided on this. So while Irvine appears a major victory for the expansionists, Lightman, J. in an earlier "celebrity" case (Panini SpA v. Halliwell) asserted that the concept of "endorsement" (in the context of a fan magazine) required that "the public would believe, on seeing the defendants' publication, that it was published by the plaintiffs or that its quality was authorised by them." Again, while in 1981 the Privy Council (in effect the House of Lords sitting on Commonwealth appeals) in Cadbury Schweppes Pty. Ltd. v. Pub Squash Co. stressed that the tort centred on a misrepresentation not misappropriation, some twenty years later Aldous LJ, in the Court of Appeal decision Arsenal Football Club PLC v. Matthew Reed commented that the tort of passing off could "perhaps best [be] referred to as unfair competition" and that "[t]he traditional form of passing off... is no longer definitive of the ambit of the cause of action."
This conflict of judicial opinion is neatly exampled by the recent High Court case of L’Oreal SA v. Bellure NV.\textsuperscript{218} The claimants in a trade mark infringement case involving the defendants’ perfumes which though not counterfeits were allegedly “smell-alikes” (equivalents of the claimant’s famous perfumes) also claimed passing off. The claimants argued that the tort had developed to include dilution of the value of goodwill/exclusivity, rather than being dependent on deception. Relying on dicta by Lord Justice Aldous in Arsenal FC v. Reed,\textsuperscript{219} they argued that the tort had evolved so as to protect against “unfair competition.”\textsuperscript{219} The defendants’ original application to strike out this claim was originally refused by one High Court judge, presumably on the basis that the claim was at least arguable.\textsuperscript{220} However, subsequently a different High Court judge refused to accept this approach to the tort of passing off, holding that the tort of passing off required a deception or misrepresentation as “if it were not so, competition would be stifled.”\textsuperscript{221}

The likelihood is that the courts will be pressed to continue developing the tort of passing off. In essence, claimants seek to expand this from a misrepresentation tort with the public interest at its heart, to a nebulous tort protecting against “theft” of a market or commercial asset. For the courts the stark choice is between a tort of limited application, bounded by the certainty of the classic trinity and a wide tort based on misappropriation, with the attendant danger that it might constitute an undue constraint on the competitive process.\textsuperscript{222}

VI. Related Causes of Action Protecting Economic Interests

The above is a review of the torts which in English common law have their main purpose the protection of economic interests. However, for the sake of completeness, and to indicate the overall judicial policy on the protection of purely financial loss, two further causes of action need to be addressed.

A. The Role of the Tort of Negligence in the Protection of Economic Interests

The major tort of the twentieth century, and clearly remaining so in this century, the tort of negligence was freed from the confines of a specific range of instances of negligence liability by the “neighbour principle” es-

\textsuperscript{218} L’Oreal SA v. Bellure NV, [2003] EWCA (Civ) 696, [70] (CA).
\textsuperscript{219} Id.
\textsuperscript{221} Id. at [166].
\textsuperscript{222} L’Oreal v. Bellure, [2006] EWHC 2355, [163] (Ch. D.) (Lewison, J.).
posed by Lord Atkin in Donoghue v. Stevenson. By focusing the tort on the duty to take care not to harm your "neighbour", the action became "a fluid principle of civil liability." However, this fluidity only applied to the negligent infliction of physical harm, though for a time the courts appeared to lose sight of this. The general rule remains that this tort does not protect against the infliction of purely financial harm. So the recovery of what is termed "pure economic loss" in negligence is subject to a policy of limitation to prevent far-reaching and potentially limitless liability, and to prevent the tort from undermining any contractual framework that links the parties. Essentially, the tort protects pure economic interests where there is a negligent misstatement with a "special relationship" between the parties (requiring an assumption of responsibility or proximity) or the negligent performance of a beneficial service, usually performed under contract. Though some might argue that this also is an economic tort such a label would be misleading. There is no willingness to create a general principle of liability for negligently inflicted economic harm, nor can it be argued that the prime function of this tort is to protect economic interests. Rather, in exceptional circumstances the tort of negligence can perform the function of an economic tort and protect economic interests. Should the tort not continue to be constrained in this area and simply provide protection for the foreseeable infliction of economic harm, then clearly it could undermine the limits of the established economic torts and force the courts to consider what is appropriate competitive and economic practice (and indeed to provide protection for reasonable expectations of economic benefit).

B. The Action for Breach of Confidence and the Protection of Economic Interests

Though there is no property right in ideas or information as such, this action provides useful control over information that the claimant has sought to keep "under wraps" by granting protection against unauthorised use or disclosure. The obligation to maintain confidentiality might arise from a contractual relationship (such as employer/employee) but the obligation can arise in a non-contractual setting. The juridical basis of this action has been the subject of academic debate for some years, and indeed some

223 Commentators are divided on this issue. Compare Aidan Robertson & Audrey Horton, Does the United Kingdom or the European Community Need an Unfair Competition Law? 17 E.I.P.R. 568 (1995), with the views of this writer.
226 Between 1979 and 1984, it appeared that foresight of harm was the only real limit on the application of the tort, though policy considerations were acknowledged.
judges refer to the action as a tort. However, the better view is that the action is simply based on an equitable principle of good faith. For Lord Denning, "the law on this subject... depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it."227

In recent years, there have been major developments in the action for breach of confidence, an action that covers personal confidences, trade secrets, and commercially valuable information generally.228 Though the traditional view of this action's framework (based on a relationship between the claimant and the initial recipient of the information)229 has been growing, the need for a pre-existing relationship (out of which the obligation to maintain confidentiality would emerge) has now been jettisoned. It has become clear since the judgment of Lord Goff in Attorney-General v. Guardian Newspapers, Ltd. (No. 2)230 that a duty of confidentiality can arise independently of any such relationship.231 Though occasionally the courts may stress the wrongdoing of a defendant as the key to liability, in fact it has become evident that the duty can arise from the defendant's knowledge of the nature of the information itself. So Lord Nicholls in 2004232 summarised the law of confidence as the imposition of "a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential."233

Clearly, this heralds a wider remit for the action, and appellate judges have acknowledged that this action continues to develop "to reflect changes in society, technology and business practice."234 But, just as importantly, the courts have extended the type of "information" that is protected by

227 Thus, Weir, in his casebook on torts, stresses that tort law's protection of "neighbours" is very different to its protection of competitors: "while the rules of negligence just give people 'out', as it were, like an umpire in a cricket match, these decisions [in economic tort litigation] lay down the rules of the game, rules as a basis for action, determining what is permitted and what is not." TONY WEIR, A CASEBOOK ON TORT, 573 (10th ed. 2004).

228 Seager v. Copydex, Ltd. (No. 1), [1967] F.S.R. 211, 220 (CA (Civ. Div.).

229 It also covers state secrets. For the nineteenth century origins of the modern law, see Prince Albert v. Strange, (1849) 2 De G. & Sm 652.

230 This view is summarised in the often-cited judgment of Megarry, J. in Coco v. A.N. Clark (Engineers), Ltd., [1968] F.S.R. 415 (Ch. D.). The principles contained in this judgment have repeatedly been approved and will continue to apply in the standard commercial secrets case.


232 See Attorney General v. Guardian Newspapers, Ltd. (No. 2), (1990) 1 A.C. 109 (H.L.). Lord Goff gave as an example of potential liability under this action a party picking up an obviously private diary, dropped in a public space and attempting to use or disclose the contents. Id. at 332. Thus, although in some cases the courts highlight improper behaviour on the part of the defendant, the duty of confidence arises from the nature of the information itself.


234 Id. at 465.
this action. This is particularly important in the commercial setting (though there have been separate developments in the area of personal confidences where the courts appear to be edging towards some form of privacy right or rights).\textsuperscript{235} In recent years, the courts have allowed claimants to use the action for breach of confidence where information in the traditional sense (trade secrets, formulae, and customer lists) is not the issue but, rather, the issue is the commercial exploitation of a valuable image. So, in Shelley Films, Ltd v. Rex Features, Ltd\textsuperscript{236} and in Creation Records, Ltd. v. News Group Newspapers, Ltd.,\textsuperscript{237} a commercially valuable image which the claimants had clearly set to keep "under wraps" was held to be protectable under this action.\textsuperscript{238} Both of these decisions (though first instance only) were cited by the Court of Appeal in Douglas v. Hello! (No.6).\textsuperscript{239} Here, it will be recalled, both the tort of unlawful interference with trade and the action for breach of confidence were at issue. What the Court of Appeal recognised was that the celebrity couple were concerned both with the invasion of their privacy and the commercial exploitation of the must-have images of their wedding.\textsuperscript{240} Lord Phillips MR noted, "[w]e can see no reason in principle why equity should not protect the opportunity to profit from confidential information about oneself in the same circumstances that it protects the opportunity to profit from confidential information in the nature of a trade secret."\textsuperscript{241} Of course, in essence the "information" here was the photographic image. Presumably, the information as to what the bride wore, etc., could have been relayed by any guest (or indeed sketched).\textsuperscript{242} So it is not so much the information as the image that has been protected.


\textsuperscript{236} English common law does not, in theory, distinguish between the different categories of information that the claimant may seek to protect against unauthorised use or disclosure, but it is becoming apparent that the law is developing different strategies depending on whether the information at issue is personal or commercial (but that is a whole different Article!).

\textsuperscript{237} See Shelley Films, Ltd. v. Rex Features, Ltd., [1994] E.M.L.R. 134 (Ch. D.). The plaintiff in this case was a production company making a new Frankenstein film under conditions of secrecy. In particular, they sought to keep secret the image of the leading actor in the role of the monster until the release of the film. They successfully sought an interim injunction on the basis that the defendant's surreptitious photograph of this valuable marketing tool was in breach of confidence.

\textsuperscript{238} See Creation Records, Ltd. v. News Group Newspapers, Ltd., [1997] E.M.L.R. 444 (Ch. D.). In this case, the public was allowed to attend the photo shoot of the band's new album cover, but people were not allowed to photograph it. The defendant's surreptitious photograph was held to be taken in breach of confidence. \emph{Id.} at 456.

\textsuperscript{239} \emph{Id.}

\textsuperscript{240} Douglas v. Hello! (No.6), [2005] EWCA (Civ) 595 (CA (Civ. Div.)), 2005 4 All E.R. 128. As the number after the case reference indicates the dispute between the celebrity couple/OK! Magazine and Hello! magazine has spawned a web of litigation.

\textsuperscript{241} \emph{See id.} at [109]-[111].

\textsuperscript{242} \emph{Id.} at [113]. The principle was stated thus "[w]here an individual ("the owner") has at his disposal information which he has created or which is private or personal and to which
Clearly, this is a cause of action with potential for those who seek wider protection against “misappropriation” (though with the drawback that the claimant must identify some secret or confidential matter). Indeed, this potential within the action seemed to be at the heart of the majority view of the House of Lords in the Hello! decision. By the time this action reached the House of Lords, only the commercial claim for breach of confidence brought by OK! against Hello! was in issue, the privacy aspects of that action having been attached to the Douglases’ claim, from which there was no appeal. Though the House asserted that the action has not developed into an “image or publicity” right—Lord Walker noting that “under English law it is not possible for a celebrity to claim a monopoly in his or her image, as if it were a trade mark or brand”243—in essence the majority244 appeared to allow OK! magazine a form of right over the photographic spectacle of the celebrity wedding (something the Court of Appeal had not permitted). Lords Hoffmann and Brown seemed to be influenced by the fact that OK! had paid a lot of money for exclusivity,245 which Hello! had intentionally destroyed. Crucially, the majority of the House held that the benefit of confidentiality encompassed not just the authorised photographs (which were of course the heart of the exclusive deal) but in fact all the photographs of the entire wedding as an event. Overall, these liberal interpretations of the facts enabled the majority to impose an obligation of confidence in favour of the exclusive licensee who had paid a great deal of money for his scoop.246

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243 In Creation Records, it was specifically accepted that anyone could have sketched the scene: such a sketch would have had no commercial worth. It was the photographic image that was marketable. *Creation Records, Ltd.*, [1997] E.M.L.R. 444, 455.

244 *Id.* at [293].

245 Lords Hoffmann, Brown, and Baroness Hale.

246 So Lord Hoffmann notes in Douglas v Hello!; Mainstream Properties v Young; OBG v Allen, [2007] U.K.H.L. 21, [117] that OK! had paid £1 million for the exclusive photographs and he continues, the issue becomes simply keeping “one’s eye firmly on the money and why it was paid.” In the next paragraph he states “OK! was willing to pay for the right . . .” and *id.* at [120], “I see no reason why there should not be an obligation of confidence for the purpose of enabling someone to be the only source of publication if that is something worth paying for.” Lord Brown asserted, *id.* at [325], “having paid £1 m for an exclusive right it seems to me that OK! ought to be in a position to protect that right and to look to the law for redress where a third party intentionally destroys it.”
In the trilogy of general economic tort cases, the House of Lords has provided some clarity to the framework of the general economic torts. But, as has been shown, uncertainties remain.\textsuperscript{247} As for the tort of passing off, though still limited in scope to cases of misrepresentation, it is clear that there is some judicial sympathy for its de facto application in cases better interpreted as involving misappropriation than misrepresentation. However, its future development remains unclear. These are interesting days for anyone intrigued by this area of English common law. Baroness Hale in fact commented that there would be much to be said for having a single majority opinion as “there would be less grist to the advocates’ and academics’ mills . . . .”\textsuperscript{248}

\textsuperscript{247} Lord Walker (in the minority with Lord Nicholls) rejected this “misappropriation” sentiment, noting that “the confidentiality of any information must depend on its nature, not on its market value,” \textit{id.} at [296]. He concluded: “OK no more had a monopoly in any possible photo of the spectacle than it had in the spectacle itself . . . .”, \textit{id.} at [296].

\textsuperscript{248} \textit{Id.} at [303] (Baroness Hale).