Unlawful Means Unchained: Causing Loss by Unlawful Means and the Problematic Dealing Requirement

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Abstract—This article considers the decisions in *OBG v Allan* and *Health Secretary v Servier Laboratories Ltd*. It argues the law should not require the defendant to have interfered with third parties' freedom to do business (the 'dealing requirement') with the claimant for the defendant to be held liable for the tort of causing loss by unlawful means. This leads to a more detailed consideration of the gist and the importance of the tort; the two, it is contended, must be kept carefully separate. The gist of the tort is said to be the intentional causation of economic damage to another through a third party functioning as an instrument. The importance lies instead in defending a fair market. The dealing requirement is needed neither to fulfil the tort's principled purpose, of protecting against this intentional damage, nor for it to better achieve its practical goals. It is therefore contended that

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the requirement should be removed, though the law should still require *Sorrell v Smith* intention to find a defendant liable.

Introduction

The decision in *OBG v Allan* (‘*OBG*’)[1] left the tort of causing loss by unlawful means in a far clearer state than it had been, particularly given the confusion that had previously surrounded the economic torts. Several questions, however, remain following that decision. For example, Lord Nicholls dissented on what should count as unlawful means,[2] and the term has since taken different meanings in the separate torts of unlawful means conspiracy and causing loss by unlawful means.[3] This article will focus on one such point of contention: whether the ‘dealing requirement’ should be a necessary element of the tort. The issue arose after Lord Hoffmann defined the tort as occurring when X intentionally causes Y damage through unlawful means *by interfering with Y’s liberty to deal with a third party*, Z. This final part, relating to interference, is the ‘dealing requirement’ and the focus of this article. Whether the dealing requirement was an element of the tort was questioned at the Supreme Court level in *Health Secretary v Servier Laboratories Ltd* (‘*Servier*’),[4] where the court sat as a panel of seven. Lord Hamblen affirmed that the requirement is a part of the tort. All of their Lordships agreed with his judgment bar Lord Sales, who nevertheless offered a very brief concurring

[1] *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1.
[2] ibid. cf [49] (Lord Hoffmann) to [162] (Lord Nicholls).
[3] See *JSC BTA Bank v Ablyazov (No.14)* [2018] UKSC 19, [2020] AC 727.
[4] *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24, [2022] AC 959.

judgment. The issue thus appears to be settled, at least for the time being.[5]

Nevertheless, this article argues that the Supreme Court took a misstep in *Servier* in three ways. First, in both *Servier* and *OBG*, the analysis of the relevant authorities was dissatisfactory. Second, both judgments failed to explain convincingly why the dealing requirement should, in principle, be an element of the tort (i.e. why it is part of the wrong). Third, insofar as the requirement was considered a welcome limiting mechanism, the necessity of such a limiting mechanism was underanalysed.

It is therefore submitted that the dealing requirement is an undesirable limit on the scope of the tort. Limiting mechanisms should also, as a whole, be avoided. Priority should be given to granting remedies for the underlying wrong – *intentional* causation of economic loss through unlawful means. Such restriction is not justifiable simply by reference to a need to keep the tort within narrow boundaries – the tort performs an important role in regulating economic behaviour. This also explains why the arguments for the narrowest view of intention in the tort should be rejected.[6] Instead, the tort should be allowed to protect a wider range of claimants than more conservative definitions allow.

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[5] ibid. See, however, [97] (Lord Hamblen), and [103] (Lord Sales), both noting that this case *was not the right one to consider* an alternative to the requirement – thus leaving the door open for future appellants. See also the conclusion to this article.

[6] E.g. the Sales/Stilitz argument in: Philip Sales and David Stilitz, 'Intentional Infliction of Harm by Unlawful Means' (1999) 115 LQR 411. On their definition, intention is established where the defendant intended to inflict such harm as they did onto the claimant.

1. The basis of *Servier*

In *Servier,* Lord Hamblen's judgment considered two issues. The first issue was whether the dealing requirement was a part of the ratio in *OBG*. His Lordship identified eight reasons as to why it was,[7] and decided the case on this basis. However, this article focuses on the second issue raised in Lord Hamblen's judgement: whether the dealing requirement in *OBG* should be departed from. His Lordship answered this question in the negative, accepting much of the reasoning offered in *OBG*. He thought that, in light of the 1966 Practice Statement on precedent,[8] there was no evidence 'of it causing difficulties, creating uncertainty or impeding the development of the law'.[9] In determining this, his Lordship addressed relevant authorities and considerations of principle, dismissing possible alternatives and remaining faithful to the argument put forward in *OBG*.[10] Thus, the reasoning in both *OBG* and *Servier* should be considered in parallel when analysing the justifications for the dealing requirement.

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[7] *Servier* (n 4) [64]-[71]. John Murphy argues persuasively that the dealing requirement was not part of the ratio in *OBG*: John Murphy, 'Floodgates fears and the unlawful means tort' (2021) 80 CLJ 436.
[8] *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. The Supreme Court is entitled to depart from precedent if it 'is the safe and appropriate way of remedying the injustice and developing the law', per Lord Scarman in *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74 (HL), 106.
[9] *Servier* (n 4) [83].
[10] Lord Sales, in his brief judgment in *Servier*, also paid lip-service to these principles. However, his Lordship's judgment was in some ways hesitant, as will be noted.

2. The dealing requirement: justified by the authorities?

In *OBG,* Lord Hoffmann argued that the unlawful means tort did 'not… include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.' His Lordship began his justification of the dealing requirement by analysing authorities with potentially relevant facts.[11] However, his Lordship's analysis was not convincing. A good starting point is to divide the cases Lord Hoffmann relied on into two categories: (1) cases that explicitly discuss interference with liberty of dealing; and (2) cases that Lord Hoffmann considered relevant despite there being no explicit discussion of such interference.

Cases that explicitly discuss interference with liberty of dealing

There is only one case that fits into the first category[12] – *Quinn v Leathem*.[13] In that case, to punish Mr. Leathem for refusing to employ union labour, a union persuaded a client of Mr. Leathem's to stop dealing with him. The House of Lords found such interference to be unlawful. In reaching this conclusion, Lord Lindley emphasised the importance of 'a person's liberty or right to deal with others'.[14] In *OBG,* Lord Hoffmann described this as the 'rationale of the tort'.[15] This draws us to the first issue with

[11] See *Servier* (n 4) [52]-[55].
[12] Murphy (n 7) 438.
[13] *Quinn v Leathem* [1901] AC 495 (HL), see 534-535 for discussion on liberty in dealings.
[14] ibid 534.
[15] *OBG* (n 1) [46].

his Lordship's analysis of this case: the tort involved was not that of causing loss by unlawful means.[16] As argued by Murphy, 'what was said there was said *obiter*: *Quinn* was a lawful means conspiracy case'.[17] It is unwise to try to extract a theoretical framework for the unlawful means tort from a conspiracy case. Secondly, however, even if Lord Lindley did identify an important principled consideration for the unlawful means tort, it is unclear why this can *only* be protected by the dealing requirement. Lord Lindley identified that this interference with dealing contributed to the action's wrongfulness; yet, this does not necessarily mean that it is part of the gist of the tort.[18] Their Lordships' consideration of the gist was too brief, and thus doubt remains as to whether the dealing requirement is a fundamental part of the wrong underpinning the unlawful means tort. Importantly, going forward, a proper analysis of the tort's basis and what it *should* prima facie protect is necessary. This is not the same as delineating what the tort *should not* protect for a supervening reason (i.e. emphasising its need to be narrow as a reason to exclude liability in some instances).

Relevant cases without explicit discussion of liberty of dealing

Lord Hoffmann discussed three cases in the second category: *Isaac Oren v Red Box Toy Factory Ltd*[19] ('*Isaac Oren*'), *RCA Corpn v*

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[16] Murphy (n 7) 438.
[17] ibid.
[18] i.e. the basic object of the action.
[19] *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785 (Pat).

Pollard [20] ('*RCA*'), and *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)*[21] ('*Lonrho*'). These cases will be discussed in more detail.

Isaac Oren

First, in *Isaac Oren* the defendant illegally sold articles, thereby infringing a design right. The exclusive licensee to that design right sued the defendant for this infringement on the grounds of tortious interference with contractual relations.[22] Jacob J found against the claimants, noting that 'the contractual relations and their performance remain completely unaffected'.[23] Lord Hoffmann reframed this observation as there being no interference with the claimants' freedom of dealing. However, in doing so, his Lordship failed to consider the legal context of that decision, one that *OBG* was in fact unravelling. Following *DC Thompson v Deakin*[24] (though it was a gradual process), the torts of inducing a breach of contract and unlawful means were somewhat subsumed into the tort of interference with contractual relations. There was no recognition of a separate unlawful means tort until *Merkur Island Shipping Corp. v Laughton (The Hogeh Apapa)*,[25] and no detailed consideration of what it entailed until *OBG.*[26] Therefore, Lord Hoffmann's analysis respectfully starts from an undesirable starting point. It is commonly accepted that the torts identified in

[20] *RCA Corporation v Pollard* [1983] Ch 135 (CA).
[21] *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 (HL).
[22] *Isaac Oren* (n 19) [29].
[23] ibid [33].
[24] *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 (CA).
[25] *Merkur Island Shipping Corp. v Laughton (The Hogeh Apapa)* [1983] 2 AC 570 (HL).
[26] Hazel Carty, *An Analysis of the Economic Torts* (2nd edn, Oxford University Press 2010) 74-76.

DC Thompson v Deakin caused a 'terrible mess' in the law.[27] There should therefore be no reason to insist that the modern form of the unlawful means tort conform with *Isaac Oren*. This is an important point in the context of the English precedent-based legal system; it provides strong justification for not placing too much weight on the cases that came before *OBG*, and instead seeing it as a chance significantly to clarify the law.

RCA

Second, in *RCA,* the defendant had been selling bootlegged Elvis Presley concert recordings after his death. Although Presley himself would have been able to sue under the Dramatic and Musical Performers' Protection Act 1958, his estate (and the exclusive licensee who owned the licence to his work) was not so entitled.[28] The estate therefore sued the bootlegger, claiming that it was nevertheless entitled to the damage suffered in tort. The claimants' case was dismissed as having no reasonable cause of action. Lawton LJ decided this on the basis that (i) no property right of the claimants had been breached; and (ii) the true construction of the Act did not create the desired cause of action.[29]

However, even if it is held that it is important that prior cases such as *RCA* fit the definition of the tort, the decision in this case can be explained without reference to a dealing requirement. In *OBG*, Lord Hoffmann conceded that there 'was no allegation that the defendant intended to cause loss to the

[27] See e.g. Lord Nicholls in *OBG* (n 1) [139].
[28] *RCA* (n 20) 142-44.
[29] ibid 148.

plaintiff'.[30] If congruence with the authorities is seen as important, despite the argument above, this case does not cause problems even without a dealing requirement. Liability under the unlawful means tort could be avoided by denying the requisite intention. This would even be the case with the '*Sorrell v Smith*' view of intention[31] – that is, intention to cause loss only as a means to an end. The intention in *RCA* was not to cause loss to the licensee as a means to make money, only for the bootleggers to make a profit. Bootleg recordings are generally of performances that were never originally intended to be sold as recordings. The bootleggers, hence, likely did not indirectly intend to eat into RCA's share of the market for sales of individual records and thus did not intend to cause loss. Importantly, Lord Hamblen failed to consider this in his judgment in *Servier*. Instead, his Lordship only briefly quoted and accepted Lord Hoffmann's commentary in *OBG*.[32]

Lonrho

Third, *Lonrho* was a case where the claimants, Lonrho, argued that the defendants, Shell, had unlawfully helped to prolong the Rhodesian independence regime that started in 1965 by supplying it with petroleum products in breach of sanctions.[33] These sanctions meant that a pipeline owned by Lonrho, as well as a refinery, were unused for a period. Prolonging this regime extended the duration of the sanctions which increased Lonrho's loss due to their being unable to use their property. Lord

[30] *OBG* (n 1) [53].
[31] More extensively discussed below.
[32] *Servier* (n 4) [40].
[33] *Lonrho* (n 21) 182.

Diplock's judgment focused on the possibility of a cause of action due to Shell's breach of statutory duty, regardless of intention,[34] or of a conspiracy[35] rather than on the unlawful means tort, however. Applying the proposed version of the unlawful means tort, as will be outlined below, it is a good example of a case that should have been decided the other way if, on all the facts, Shell met the requisite intention. A tort where loss was intentionally caused through the use of unlawful means towards a third party was not, however, before the court.

Broader discussion

The first generalised statement of the tort of unlawful means, by Lord Watson in *Allen v Flood*, noted that a person would be 'held liable if he can be shewn to have procured his object [of "detriment" to another] by the use of illegal means directed against that third party'.[36] The root of the tort does not here appear to include any interference with dealing – it was a later addition. Lord Hoffmann, in *OBG*, never truly answered the following question: why did the lack of interference with a party's freedom to deal with another mean that liability should not be found in tort?

This issue was identified by Lord Hamblen in *Servier*. Whilst outlining Lord Hoffmann's speech, his Lordship noted that: 'neither *Allen v Flood* nor any other pre-*OBG* authority holds that the dealing requirement is an essential element of the

[34] ibid 187.
[35] ibid 188.
[36] *Allen v Flood* [1898] AC 1 (HL) 96.

unlawful means tort'.[37] Hence, Lord Hamblen subtly undermined the role of these authorities in forming the basis of the decision. His Lordship said:

> 'The House of Lords in *OBG* were … deciding what the essential elements of a tort of previously uncertain ambit should be. Their policy decision was that it should include the dealing requirement.'[38]

Lord Hamblen hence implicitly rejected Lord Hoffmann's analysis of the authorities as a *foundation* for the dealing requirement. Under this reading, the cases discussed by Lord Hoffmann should therefore not be treated as being more authoritative than a court's discussion of how a tort would apply to a hypothetical set of facts.[39]

The essential point of this section, is, therefore, that Lord Hoffmann's discussion of authorities in *OBG* is a red herring. They do not offer a useful guide to the question of whether there should be a dealing requirement. Rather, they are mere *examples* of the *application* of the requirement to the facts of previous cases. Furthermore, if one is to argue that precedent should carry more value than a mere hypothetical,[40] most of these cases (i.e. *Lonrho* and *RCA*) are not inconsistent with a tort free of the dealing requirement. However, given the lack of structure, clarity, and detailed discussion of the law on the requirement prior to *OBG*,

[37] *Servier* (n 4) [89].
[38] ibid (emphasis added).
[39] ibid, as happened in *Servier* itself. See [84]-[87] for a discussion of hypothetical cases raised in the appellants' written submissions.
[40] For example those referred to in the footnote above.

an analysis based on considerations of policy and principle far outweighs a precedent-based approach.

3. Alternative justifications for the dealing requirement?

Relevant considerations of principle

Since the dealing requirement cannot be justified by authority, it must instead be justified on the basis of policy or principle. So far, the courts have raised several potential justifications. Such justifications have often been vague, underdeveloped, and imprecise. They can roughly be summarised as follows: (1) as a way to limit indeterminate liability;[41] (2) as a broader 'way to keep the tort within reasonable bounds';[42] (3) to aid the tort's role in protecting the bare minimum standards of behaviour in business;[43] and (4) as a restrictive measure in the field of economic torts, an area of tort that has been argued should remain limited given that it is an exception to the normal rule that pure economic

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[41] See e.g. *Servier* (n 4) [95].

[42] *OBG* (n 1) [135]. Lord Walker similarly recognised the requirement's role as a 'control mechanism' at [266], though he was more hesitant as to whether the dealing requirement is the appropriate method. Lord Brown was in closer agreement with Lord Hoffmann that the requirement should 'confine … [the tort] to manageable and readily comprehensible limits' at [320]. It is here especially regrettable that their Lordships opted for subtly different descriptions of their reasoning, further limiting the clarity of already vague statements (e.g. 'reasonable bounds' compared to 'manageable and readily comprehensible limits').

[43] ibid [56].

loss is irrecoverable.[44] First, the third justification will be considered in more detail. Whilst a helpful starting point, such an observation does not go far enough. It will be shown that the proper role of the unlawful means tort is to influence the behaviour of market actors so as to protect a fair and competitive marketplace. Such protection is stronger without the dealing requirement. In contrast, it will be maintained that the other justifications for the dealing requirement are of considerably less importance.

Practical concern: limiting the tort

A key concern with the unlawful means tort has been to keep it within 'reasonable bounds'.[45] However, the courts have failed to justify the necessity of a strong control mechanism to this end. Let us consider the facts of *Servier* itself. The case involved respondents (Servier, the defendants) who had allegedly lied to the European Patent Office ('EPO') to obtain a patent for a new drug. The patent was later revoked, and the appellants (the NHS) suffered loss as cheaper, generic versions of the drug entered the market far later than they otherwise would have. Hence, the appellants had needed to pay inflated prices for the defendant's version. The appellants claimed under the unlawful means tort. The case and its appeal were struck out due to a lack of interference with freedom to do business – the dealing

[44] *Servier* (n 4) [62] and [94]. See also *JSC BTA Bank* (n 3) [6]. This may appear very similar to reason (2). However, it is kept distinct because the general exclusionary rule on pure economic loss *can* be justified in other ways. For a brief summary, see Robert Stevens, *Torts and Rights* (Oxford University Press 2007) 21 (though he rejects the existence of such a general exclusionary rule).

[45] See *Servier* (n 4) [59]-[62].

requirement. At trial, Roth J noted that if the case were not rejected due to the dealing requirement, floodgates concerns would arise as *Servier* could face claims from a large number of parties, including:

> 'all potential generic competitors who suffered loss through their inability to supply a generic version …; any private medical expenses insurer who paid higher …; and, subject to any issues of jurisdiction, all foreign health authorities and insurers in each of the various other states in Europe [could have brought a claim against the defendants].'[46]

The response to this is to bite the bullet. Indeed, there could be extremely wide-ranging liability for the defendants. However, that would be a result of their conscious wrongful action. In torts with laxer fault requirements, such as the tort of negligence, there *is* an argument to be made for limiting the extent of a defendant's liability. However, this argument does not hold true for the unlawful means tort due to a higher necessary level of wrongdoing. Instead, the defendant should compensate all affected, given that they *intended*, by definition, to cause them some harm.[47] This becomes all the more persuasive when one considers the issue as one of deciding who bears the cost of damage. Given that someone will need to bear the cost of the

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[46] *Secretary of State for Health v Servier Laboratories Ltd* [2017] EWHC 2006 (Ch); [2017] 5 CMLR 17 [34].

[47] cf liability in negligence, where such a powerful moral intuition does not often exist. See, for example: James Goudkamp, 'The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence' (2004) 28(2) Melbourne University Law Review 343.

loss, it is difficult to accept that that burden should fall to an intentionally harmed claimant. Insofar as causation requirements can be met, it should be the party who sought to make a profit wrongfully. The practical importance of holding a claimant responsible will be addressed in more detail below.

In the context of *Servier*, it was argued that the unlawful means tort should not intrude on areas which have been subject to extensive legislation. Roth J noted that there were other means of redress in this case; there was also a claim in competition law for abuse of a dominant position, as well as claims under patent law.[48] It was further feared that a wider tort 'would circumvent the legislative balance' – that is, it would undermine Parliament's intention.[49]

This initially appears to be an attractive argument. There is a strong constitutional reason not to interfere with what Parliament has enacted. Nevertheless, some replies can be advanced that apply in any context – not just where patents are involved. First, as Deakin and Randall argue, the tort has a '<u>residual</u> market-protecting role which we are suggesting for the economic torts comes into play'.[50] The tort should exist in case a statutory scheme fails, even if other parts of the scheme had a delicate balance. This ties back to a purpose of tort law identified by Murphy: 'to move with the times and do 'justice' in novel

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[48] *Servier* (n 46) [44].
[49] ibid.
[50] Simon Deakin and John Randall, 'Rethinking the Economic Torts' (2009) 72 MLR 519, 534 (emphasis added).

scenarios as and when the need arises'.[51] A defendant should not be rewarded for coming up with a particularly creative way of causing damage that evades a statutory scheme. Secondly, as Carty notes, if the claimant is entitled to or has received statutory compensation, that would be relevant when calculating damages, thus ensuring that the tort does not offer a windfall payment.

Alternative methods of limiting the tort?

Other means of restricting the tort, beyond the dealing requirement, do exist. There has been plentiful academic discussion as to how the tort could be kept within reasonable bounds through such mechanisms. The claimants in *Servier* submitted three alternative potential control mechanisms. They were as follows:

1. The law would remain as outlined by Lord Hoffmann in *OBG*, but without a dealing requirement.[52] The intention required is that in *Sorrell v Smith*:[53] the tortfeasor need only intend to cause loss through the intermediate actor's

[51] John Murphy, *The Province and Politics of the Economic Torts* (Hart Publishing 2022) 89. See also: John Murphy, 'Contemporary Tort Theory and Tort Law's Evolution' (2019) 32 CJLJ 413. Carty has argued that the tort should instead be seen as a 'liability stretcher' instead of a 'gap filler' (see Hazel Carty, 'The modern functions of the economic torts' (2015) 74 CLJ 261). It is submitted that these two ideas are not mutually exclusive – gaps can be filled by stretching liability. Here, a reason *why liability should be stretched* is to ensure that there are not gaps in the law allowing for unfair competition. As noted below, recognising the importance of this does not mean this must be the tort's gist.
[52] *Servier* (n 4) [92].
[53] *Sorrell v Smith* [1925] AC 700 (HL).

unlawful actions *as a means to an end*, rather than directly to harm the claimant. Much of the control for the limits of the tort would depend on the instrumentality requirement: that is, the requirement that 'the defendant uses the third party as an instrument to strike at the claimant', 'so that the third party's conduct forms a necessary link in the causal chain between the defendant's conduct and the harm suffered by the claimant'.[54]

2. The tort should be extended in three senses, but the requisite intention restricted.[55] First, unlawful means should include criminal unlawful means (like in unlawful means conspiracy), not only civil unlawful means. Secondly, the tort should protect non-economic interests. Third, there should be no dealing requirement. *However*, the tort should be restricted through a narrow test of intention, where the defendant would specifically need to intend to harm the claimant.
3. The court should adopt the Canadian approach outlined in *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*[56] This would be similar to the first alternative. There would be no dealing requirement, and the intention should be the same *Sorrell v Smith* view of intention. *However*, this option would be without the instrumentality requirement in

[54] *Servier* (n 4) [77].
[55] ibid [96]. The claimants put forward the argument in Paul S Davies and Philip Sales, 'Intentional harm, accessories and conspiracies' (2018) 134 LQR 69. Elements of Lord Nicholls's dissent in *OBG* can also be seen in this argument.
[56] *A.I. Enterprises Ltd. v Bram Enterprises Ltd.* [2014] SCC 12, [2014] 1 SCR 177.

> *OBG*, thus leaving a broader tort than under the first alternative.[57]

The first alternative will be advocated for. Though, given that it overlaps with *A.I. Enterprises Ltd. v Bram Enterprises* on intention and the dealing requirement (the third requirement), *A.I. Enterprises Ltd. v Bram Enterprises* is, at times, used to argue those elements of the first alternative.

Removing the dealing requirement

The main challenge to the dealing requirement as a control mechanism follows the form of the second alternative put forward in *Servier*. This challenge is the suggestion that a narrow definition of intention should be used to limit the scope of the tort instead. The most influential account of this argument is Lord Sales' extra-judicial and pre-judicial writing.[58] His Lordship, with Davies, has argued that there should be no dealing requirement. Instead, the tort should require a "specific intention to use unlawful means to harm a particular person, using those means as the club to hit them".[59]

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[57] *Servier* (n 4) [99]. It must be questioned whether Lord Hamblen was right to make the distinction between 1 and 3 on instrumentality here. See *A.I. Enterprises Ltd.* (n 56) [78]: 'The gist of the tort is the targeting of the plaintiff by the defendant <u>through the instrumentality</u> of unlawful acts against a third party' (emphasis added).

[58] In *OBG*, Lord Hoffmann referred to Sales and Stilitz (n 6). In *Servier*, Lord Hamblen referred primarily to Lord Sales's more recent writing on the issue – see Davies and Sales (n 55).

[59] Davies and Sales (n 55) 77.

This position stems from Lord Nicholls' understanding of the purpose of the tort in *OBG*. Lord Nicholls' conception, adopted by Davies and Sales,[60] was that the tort covered a set of situations (i.e. where unlawful means are used) where illegitimate action intended to harm another is made unlawful.[61] Under that approach, intending to harm another forms the requisite connection between the act and the damage for it to be made unlawful.[62] Since intention forms this nexus, it is claimed that it must be considered more stringently under this position. Intention as a means to an end is not enough to justify making such acts unlawful.

However, a narrow view of intention is not required to meet that threshold, even before one considers other purposes of the tort. The instrumentality requirement provides the sufficient connection, making an illegitimate action unlawful. The defendant is not causally separate from the harm caused because of their unlawful means, providing the justification for giving the claimant standing. Furthermore, there is still some intention to harm the other. Meanwhile, Davies and Sales themselves recognise that English law does not ground liability in bad

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[60] ibid 75.
[61] cf Lord Hoffmann's view that the tort serves as an exception to privity in tort. It allows a damaged third party to sue a defendant with whom they have not directly interacted but who still caused them damage. For more on this position, see also Stevens (n 44) 174 and 188-89. For Stevens, this presents a large problem for his bilateral structure of torts. This structure entails that a victim of a breach of their rights can only sue the party who breached their rights, but here they are a third party to the dispute.
[62] Davies and Sales (n 55) 76. This is persuasively compared to the nexus required in negligence.

motive.[63] Thus, intention to cause loss as a means to an end (i.e. regardless of the motive) should be sufficient intention to justify making the conduct tortious.[64] Their proposal otherwise pushes English law towards accepting bad motive as key to the grounds for liability.

The dealing requirement should instead be considered as mere *evidence* of instrumentality, which performs the important function just outlined.[65] Lord Nicholls recognised how critical instrumentality was to the tort, noting in *OBG* that 'the function of the tort is to provide a remedy where the claimant is harmed *through the instrumentality* of a third party'.[66] The dealing requirement provides one way in which the defendant, acting through the intermediary, can cause the claimant harm. In other words, the interference with the claimant's freedom to do business with others and consequent loss incurred fulfils the instrumentality requirement. The third party is an instrument which restricts that freedom.

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[63] ibid 76.

[64] Cf also Lord Hoffmann's assertion that, 'It is not, I think, sufficient to say that there must be a causal connection between the wrongful nature of the conduct and the loss which has been caused': *OBG* (n 1) [58].

[65] See figure 1.

[66] *OBG* (n 1) [159].

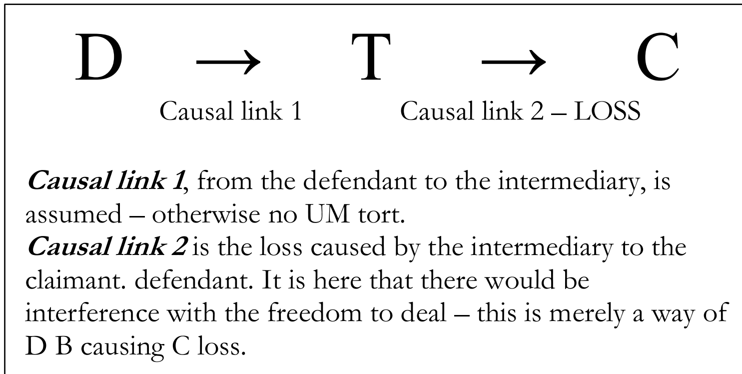

Figure 1 – a visual representation of when dealing and causation overlap

This can be understood more clearly by considering the facts in *Tarleton v M'Gawley*.[67] In that case, the master of the *Othello* (the defendant) fired cannons at Cameroonian natives' vessel (the third party), deterring them from trading with Mr Smith (the claimant's employee). The claimant lost money by missing out on that trade. Hence, Mr Smith's freedom to do business with the natives was interfered with by the unlawful cannon-fire. Framing the issue as an interference with the claimant's liberty to trade does not expose the underlying wrong. It merely describes *how* the intentional economic harm was caused (i.e. is evidence of instrumentality).

Consider, in comparison, a hypothetical situation in which the master of the *Othello* had sailed over to the Cameroonian natives and communicated effectively with them before they were to deliver palm oil to Mr Smith. The master

[67] *Tarleton v. M'Gawley* (1793) Peake 270, 170 ER 153.

promised the native Cameroonians five times the value of whatever was offered by Mr Smith at some point in the future if they left the area and thus did not trade with Mr Smith. The master, in this example, never intended to pay this amount, and knew that Mr Smith would miss the Cameroonians and thus not secure the business. In doing all this, the master would have committed the tort of deceit towards the natives.[68] There is a strong argument that the master never impeded any *freedom* of dealings. He simply stopped business dealings from happening. However, he nonetheless unlawfully and maliciously caused Mr Smith's employer damage.

Such a scenario exposes the shortcomings of the dealing requirement as a fundamental element of the tort. First, the requirement itself can suffer from a lack of clarity. The extent to which freedom must be interfered with is up for question. It could equally be argued that, by getting the natives to leave, Mr Smith was no longer free to trade with them. As a criterion, 'freedom' offers little guidance. Secondly, the master's conduct seems equally wrong towards Mr Smith *regardless* of whether there is true interference with the 'freedom' to deal. Yet, Mr Smith's employer's entitlement to compensation for missing out on the trade would depend on proving such interference. Thus, we see that the dealing requirement is: (a) not a necessary theoretical part of the underlying wrong; (b) at best *evidence* of it; and (c) itself vulnerable to ambiguity. Hence, the dealing requirement is at best a *practically useful* limiting mechanism, rather than one which should be, in principle, part of the tort.

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[68] Applying the test laid out by Lord Clarke in *Hayward v Zurich Insurance Company plc* [2016] UKSC 48, [2017] AC 142 [18].

4. The way forward: a broad test of intention

A more radical alternative is therefore preferable. This would be to keep a broad test of intention (as it was in *OBG*), to dispense with the dealing requirement, and to keep the instrumentality requirement (i.e. the first alternative above). This would be in line with the Canadian position, barring instrumentality. Importantly, in *Clerk and Lindsell on Torts*, it is said that 'a narrow form of intention'[69] was clarified as the position in Canadian law in *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*[70] Whilst Cromwell J in that case *did* use that term,[71] it is slightly deceptive. As Lord Hamblen noted in *Servier*,[72] Cromwell J's description of 'narrow intention' is broader than that of David and Sales.[73] Narrow intention, for Cromwell J, included 'an intention to cause economic harm to the claimant because it is a necessary means of achieving an end that serves some ulterior motive'[74] – that is, *Sorrell v Smith* intention. Davies and Sales' intention, meanwhile, requires the defendant to intend to cause the other harm. Their view requires a 'specific intention to use unlawful means to harm a particular person

[69] Andrew Tettenborn (ed), *Clerk and Lindsell on Torts* (24th edn, Sweet & Maxwell 2023), ch 23, para 95.
[70] *A.I. Enterprises Ltd* (n 56).
[71] E.g. ibid [87], [95].
[72] *Servier* (n 46) [99].
[73] It is what has so far been described as the broad position.
[74] *A.I. Enterprises Ltd.* (n 56) [95] (emphasis added).

should be required, using those means as the club to hit them, in Lord Devlin's language'.[75]

It is worth noting that Cromwell J distinguishes the above intention from what he describes as a broader level of intention – 'knowledge that the course of conduct undertaken will have the inevitable consequence of causing the claimant economic harm'.[76] The distinction verges on non-existent and is regrettable. His definition of a broader level of intention appears simply to be wilful blindness, and should be considered as forming part of *Sorrell v Smith* intention.

Accepting the *Sorrell v Smith* view of intention would lead to a tort that is open to more claims. It is evident that this would be the case by comparing the broad view of intention to Hazel Carty's argument for a narrow view of intention. She has argued that the dealing requirement 'adds nothing to … [the Sales-like] 'targeted' requirement of intention'.[77] Cases excluded by the dealing requirement would also be excluded by a narrow definition of intention. This is likely correct. The outcome in *Servier*, for example, could instead be justified by saying that the defendants did not specifically intend to *harm* the NHS, but rather only to profit. Consider also, the oft-used example of a hypothetical pizza delivery company, X, whose drivers drive dangerously (using unlawful means) to deliver pizza more quickly.[78] Pizza delivery company Y thus suffers a loss as customers move to buy from X. Analysis following the dealing

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[75] Davies and Sales (n 55) 77.
[76] *A.I. Enterprises Ltd.* (n 56) [95].
[77] Carty (n 26) 98.
[78] See, for example, *OBG* (n 1) [266].

requirement (no interference here) and a narrow view of intention (no targeting of Y by X) lead to the same conclusion – no liability under the tort.

A broader view of intention would not necessarily exclude all such cases. This should not, however, be considered the terrifying prospect that the courts make it out to be for several reasons. First, the test of intention is still a relatively narrow fault element,[79] in line with Cromwell J's description of it. As noted in his judgment, knowledge of the *possibility* of harm would not be enough.[80] The defendant needs to act in full knowledge of the effect of their actions. Second, in cases where a wide number of actors are harmed and have a legitimate claim, one of two situations will likely materialise. One possibility is that although many are harmed, each party only suffers a small loss. In such a scenario, the defendant will not be liable for much; the expense and hassle of bringing a claim may not be worth it or a settlement could be readily reached. Another possibility is that there has been a large amount of harm to a great deal of actors. In this case, the defendant should live with the consequences of intentionally acting unlawfully, knowing that they would harm such actors yet still deciding to go ahead with their actions. This same principle applies even if many smaller claims are brought. Third, there is the requirement of unlawful means. This ensures that the tort does not intrude into areas that should be left to a market, where

[79] Cf mere recklessness as a requirement. For a scale of potential fault elements here, see *A.I. Enterprises Ltd* (n 56) [95].
[80] *A.I. Enterprises Ltd* (n 56) [95].

businesses are legitimately competing for an advantage, rather than breaking the rules for a competitive advantage.

This final reason brings us to the critical importance of the unlawful means tort, one identified by Deakin and Randall.[81] That is, the tort serves an important function in ensuring *productive* competition in a capitalist society. One of the tensions inherent in this economic structure is that it is in the general interest to ensure that companies do not become *too* successful so that they *become* the market – it is for that reason that antitrust/competition rules exist. As Deakin and Randall argue, the tort should exist to protect the free market from itself.

It should be added that this protection is achieved through the tort's ability to influence the behaviour of actors, ensuring that they do not act unfairly in a market. It is important to protect the market *mechanism* by influencing the actions of its actors. A cartel, for example, is undesirable because it means that the very process of businesses competing on price, service and effectiveness has broken down. Such protections can operate either by forcing a company to act a certain way (e.g. requiring approval on mergers), or by creating disincentives to act unfairly. With the unlawful means tort, the 'penalty' for unfair behaviour is essentially of the profit made, given that the damage suffered by business rivals should be at least in a similar region to the gain of the tortfeasor. The tortfeasor thus has little or nothing to gain from acting unfairly. The unlawful means tort serves to maintain an effective process where companies do not try to 'cheat' by acting unlawfully to harm other actors. If they do, they open

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[81] Deakin and Randall (n 50); see especially 534-535.

themselves up to claims from those that they intended to harm thereby. Otherwise, committing the tort is a way in which a business could try to 'win' a market by damaging its competitors (results of higher prices, worse service, a business being made insolvent, etc.) The importance of a broader view of intention within the unlawful means tort is thus clear – it ensures that a larger proportion of those in a market damaged by another's attempt to 'cheat' get redress, and the market is restored closer to its prior, more procedurally functional state.

Nevertheless, it is important not to lose sight of the fundamental issue at hand. Deakin and Randall argue that if one considered the protection of competitive interests to be the gist of economic torts, this would replace the idea that the gist is intentionally causing economic damage.[82] This is not the case, however. The basic justification for a tort's existence must be kept separate from why a tort is thought important. The reasons for importance should perhaps influence how a tort is shaped, but they are not the gist of the action. These two things may be the same, but they need not necessarily be. Reasons for importance are perhaps better described as the good 'policy' reasons for a tort and its structure – utilitarian benefits from making unlawful the conduct that has been deemed wrong. Here, the basic principled justification for the existence of the tort is to remedy where

[82] ibid 532: 'If the economic torts are seen in this way, as regulating the competitive process, it becomes a distraction (at best) to try to fit them into a wider principle of liability for intentionally causing harm.'

someone has intentionally been harmed financially. It is important to protect this to ensure a functional market.

Conclusion

Was *Servier* a confusing decision by Lord Sales? Unlike Lord Hamblen, Lord Sales had written multiple articles arguing for an unlawful means tort shaped very differently to how it was in *Servier*. His Lordship is now sitting in the country's highest court, free to shape this economic tort, and yet nothing changed. To see the decision as a true surprise – one of a dramatic volte-face by Lord Sales, together with a now settled tort – ignores subtleties in the judgments in *Servier*. Lord Hamblen considered that *Servier* was 'not … an appropriate case to consider the possibility of adopting the Sales/Davies reformulation of the tort'.[83] Lord Sales himself thought 'the present appeal … in no way [to be] an appropriate vehicle for undertaking any such exercise'.[84] This perhaps leaves some room for the courts to conduct another set of radical reforms to the economic torts in line with Lord Sales' published views. It is nevertheless disappointing that the proposal to keep the tort as it was in *OBG,* yet without the dealing requirement, was dismissed in *Servier* in far more certain terms than the argument by Davies and Sales.

There is irony in the fact that Lord Hoffmann recognised that the tort is important in protecting standards of behaviour in business – the very reason that this article suggests that his

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[83] *Servier* (n 4) [97].

[84] ibid [103].

Lordship was wrong to push for a narrow tort[85]. Nevertheless, with fuller consideration of how standards in business are protected, it appears that the tort should have a wider scope than the courts have accepted thus far. Persuasive challenges have been mounted to the tort as one that only protects business interests and not personal ones,[86] to the definition of unlawful means,[87] and to the existence of the dealing requirement.[88] It can only be hoped that the courts will come to realise the true importance of this tort as a general protection of a *fair* free market, and reverse the course taken in *Servier*. This should be done whilst recognising that the gist of the tort is still to protect from intentional economic harm. Abandoning the dealing requirement and maintaining the current test of intention set out in *OBG* would be a positive step in the right direction.

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[85] *OBG* (n 1) [56].
[86] See Murphy (n 7).
[87] Lord Nicholls in *OBG* (n 1) [149]-[163]. See also Davies and Sales (n 55) 70-71. Note also Lord Sales recognising the potential for change in this, in *Servier* (n 4) [102].
[88] See Roderick Bagshaw, 'Lord Hoffmann and the Economic Torts' in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart 2015) 64-70.