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CORRECTIVE JUSTICE AND THE UNLAWFUL MEANS TORT: IS THERE A RIGHT TO TRADE?

Kerry Sun*

ABSTRACT

This paper investigates the extent to which the theory of corrective justice can account for the purpose, structure, and elements of the tort of unlawful interference with economic relations. It considers various proposed accounts of the tort, contending that the tort cannot be justified as an exception to the privity doctrine, a response to the defendant's attempts to assert indirect control over the plaintiff, or a form of liability stretching. Extending a proposed account of the tort based on the theory of abuse of rights, this paper develops the idea of a "right to trade" that is founded on the conception of rights, remedies, and the systematicity of the legal order underlying corrective justice. The right to trade expresses each person's equal opportunity to transact with others as abstract, self-determining beings in an omnilateral structure of relations—a juridical conception of the market. The paper argues that the unlawful means tort serves to protect this right, which is correlative to a duty on everyone not to interfere with the plaintiff's equal status as a participant in the market. This conception of the tort provides a coherent account of its main features and situates it within the overall theory of corrective justice.

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INTRODUCTION

Since the trilogy of cases launched by *Mogul Steamship*, a coherent, principled theory of the economic torts has eluded courts and commentators alike.¹ In recent years, these torts have attracted critical attention due to their increasing use by litigants, especially in the context of market competition.² The theoretical controversy surrounding this genus of torts has persisted alongside influential articulations of what is perhaps the most illuminating standpoint on private law—the theory of corrective justice.³ The goal of this paper is to investigate the extent to which this theory can account for one such tort, specifically the tort of unlawful interference with economic relations. I argue that despite its apparent inconsistencies with the bilateral, correlative framework that the theory posits, the tort can be justified as an expression of the idea of systematicity immanent in corrective justice. This conception of the tort provides a coherent account of its main features and situates it within the overall theory of corrective justice.

Section I of this paper describes the tort of unlawful interference with economic relations, also known as the “unlawful means” tort, and the difficulties it raises for the corrective justice approach. Section II canvasses proposed justifications of the purpose, structure, and elements of this tort. From a corrective justice perspective, I argue, the tort cannot be explained as (1) an exception to the privity doctrine, (2) a response to the defendant’s attempts to assert ‘indirect control’ over the plaintiff, or (3) a form of ‘liability stretching’. Section III considers another compelling proposal: that the tort is a manifestation of the doctrine of abuse of rights. I contend that this proposal is incomplete in an important respect. It casts the right protected by the unlawful means tort as a premise to practical reasoning, rather than as a conclusion. What is needed is a specification of the form and content of the right-duty relationship that inheres in the tort.

¹ *Mogul Steamship Co Ltd v McGregor, Gow & Co*, [1892] AC 25 (HL (Eng)) [*Mogul Steamship*]; *Allen v Flood*, [1898] AC 1 (HL (Eng)); *Quinn v Leathem*, [1901] AC 495 (HL (Eng)). See Peter T Burns & Joost Blom, *Economic Torts in Canada*, 2nd ed (Canada: LexisNexis Canada Inc, 2016) at §1.89; Hazel Carty, *An Analysis of the Economic Torts*, 2nd ed (Oxford: Oxford University Press, 2010) [*Analysis*].

² Hazel Carty, “The Modern Functions of the Economic Torts: Reviewing the English, Canadian, Australian, and New Zealand Positions” (2015) 74:2 Camb LJ 261 at 264 [“Modern Functions”].

³ Christopher Essert, “Thinking Like a Private Lawyer” (2018) 68:1 UTLJ 166 at 185.

In Section IV, I elaborate on the “abuse of right” proposal by drawing on the notion of “public right” as developed by theorists of corrective justice. Within the condition of public right, the norms of corrective justice are secured through public institutions that relate persons to each other under a system of laws. I argue that the form of the right protected by the unlawful means tort is the plaintiff’s “right to trade,” which is correlative to a duty on everyone not to infringe a status conferred upon the plaintiff. The content of the right to trade, I claim, is each person’s equal opportunity to transact with others as abstract, self-determining beings in an omnilateral structure of relations—a juridical conception of the market. Section V applies this theory to the unlawful means tort and discusses its implications for the elements of the tort. The paper concludes that the unlawful means tort can, in fact, be reconciled with the corrective justice approach to private law.

CORRECTIVE JUSTICE AND THE ECONOMIC TORTS

The Framework of Corrective Justice

Corrective justice is arguably the most prominent non-instrumentalist approach to the understanding of Anglo-American private law today. As described by some of its leading proponents, the theory of corrective justice is an account of “the relational structure of reasoning in private law.”⁴ In contrast to instrumentalist or policy-based accounts, the central claim of the theory is that the Aristotelian ideal of corrective justice, along with a conception of abstract right as the normative basis of relations between persons, provides a coherent explanation for the features of private law.⁵ As the Supreme Court of Canada has recognized, corrective justice is an underlying idea that animates private law.⁶ In

⁴ Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 2 [CJ]; Ernest J Weinrib, *The Idea of Private Law*, revised ed (Oxford: Oxford University Press, 2012) at ch 3 [IPL]; Arthur Ripstein, *Private Wrongs* (Cambridge: Harvard University Press, 2016) at 4 [PW]. See also Ernest J Weinrib, “Corrective Justice in a Nutshell” (2002) 52 UTLJ 349 at 351 [“Nutshell”].

⁵ Ernest J Weinrib, *IPL*, *supra* note 4 at 18-19.

⁶ *Kingstreet Investments Ltd v New Brunswick (Department of Finance)*, 2007 SCC 1 at para 32; *Clements v Clements*, 2012 SCC 32 at para 7; *Rankin (Rankin’s Garage & Sales) v JJ*, 2018 SCC 19 at para 63. See also *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 152, *LeBel J*; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 189, *Abella J*.

this paper, I refer to corrective justice not simply in terms of the definition of the form of its relational structure, but also as encompassing the theory's account of the substantive content of this structure.⁷

The “paradigmatic and central form” of corrective justice’s reasoning has been described as the idea of “correlativity,” “bipolarity,” or “bilaterality.”⁸ This idea encapsulates the understanding of private law as embodying “a correlative or relational form of normativity,” in that the law conceptualizes the parties as doer and sufferer of the same injustice.⁹ Applied to tort law, a key normative claim flowing from this thesis is that liability responds to a private wrong, understood as the defendant’s infringement of the plaintiff’s right. That is, the plaintiff’s normative loss is matched by the defendant’s equivalent normative gain.¹⁰ Both sides of the transaction are related to each other on this account, such that the remedy provided by tort law “consists not in two independent operations . . . but in a single operation that joins the parties as obligee and obliger.”¹¹

Under the corrective justice framework, the concept of “personality” represents the “normative standpoint” that articulates the regime of rights and duties implicit in private law.¹² Private law conceptualizes persons as notionally equal in the sense that each possesses an abstract personality. The equality conferred by this juridical understanding of personality is the normative baseline that defines when an injustice has occurred.¹³ The most prominent accounts of this theory posit the Kantian¹⁴ and Hegelian¹⁵ conception of rights and juridical personality as substantiating the normative standpoint appropriate to corrective justice. On this view, a private law right is the “juridical manifestation of a person’s freedom with respect to the actions of another.”¹⁶ These rights outline

⁷ Cf. Stephen R. Perry, “Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice” in Ken Cooper-Stephenson & Elaine Gibson, eds, *Tort Theory* (North York: Captus Press Inc, 1993) 24 at 24-25, 30-31 [“Conceptions”]; John Gardner, “What is Tort Law for? Part 1: The Place of Corrective Justice” (2011) 30:1 *Law & Phil* 1 at 22-24.

⁸ Essert, *supra* note 3 at 167.

⁹ *Ibid* at 171; Weinrib, *CJ*, *supra* note 4 at 2.

¹⁰ Ripstein, *PW*, *supra* note 4 at 7.

¹¹ Weinrib, *IPL*, *supra* note 4 at 143.

¹² Weinrib, *CJ*, *supra* note 4 at 11-12.

¹³ *Ibid* at 16. See also Weinrib, “Nutshell,” *supra* note 4 at 349.

¹⁴ Weinrib, *IPL*, *supra* note 4 at ch 4.

¹⁵ See e.g. Peter Benson, “The Basis of Corrective Justice and Its Relation to Distributive Justice” (1992) 77:2 *Iowa L. Rev* 515.

¹⁶ Weinrib, *IPL*, *supra* note 4 at 124.

a particular conception of free and equal persons under private law, a feature of which is indifference to a person's internal "needs, wishes or advantage," as opposed to his or her "externally manifested choice."¹⁷ Thus, corrective justice is not merely the remedial idea that private law liability occurs when a right is violated and a duty breached. Its conception of juridical personality posits, at an abstract level, the content of those rights and duties.¹⁸ In what follows, I consider the unlawful means tort and the problems it poses for this theory of private law.

The Tort of Unlawful Interference

Having been neglected for a number of years, the economic torts have recently received high appellate treatment in England and Canada. In *OBG Ltd v Allan* ("OBG"),¹⁹ the House of Lords reorganized these torts.²⁰ Lord Hoffmann, delivering the leading judgment, conspicuously rejected the "unified theory" of the economic torts. Instead, he favoured a disaggregated approach that separated the causes of action of inducing breach of contract and of unlawful interference with economic relations.²¹ Unlike inducing breach of contract, the unlawful means tort "is a tort of primary liability" rather than accessory liability.²² The House of Lords later confirmed this approach in relation to unlawful means conspiracy in *Revenue and Customs Commissioners v Total Network SL*,²³ which clarified that the unlawful means tort and tort of conspiracy "are different in their nature, and the interests of justice may require their development on somewhat different bases."²⁴

This paper focuses on the "radically under-theorized" tort of unlawful interference with economic relations.²⁵ Limited to "a three-party setting," the tort

¹⁷ Peter Benson, "Equality of Opportunity and Private Law" in Dan Friedmann & Daphne Barak-Erez, eds, *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) 201 at 211 ["Equality of Opportunity"].

¹⁸ See Ripstein, *PW*, *supra* note 4 at 6-7.

¹⁹ [2007] UKHL 21, [2008] 1 AC 1 [OBG].

²⁰ Roderick Bagshaw, "Lord Hoffmann and the Economic Torts" in Paul S Davies & Justine Pila, eds, *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Oxford: Hart Publishing, 2015) 59 at 59. See also Edwin Peel & James Goudkamp, eds, *Winfield and Jolowicz on Tort*, 19th ed (London, UK: Sweet & Maxwell, 2014) at para 19-021 [*Winfield & Jolowicz*].

²¹ *OBG*, *supra* note 19 at para 32.

²² *Ibid* at para 8; *Winfield & Jolowicz*, *supra* note 20 at para 19-019.

²³ [2008] UKHL 19, [2008] 1 AC 1174 [*Total Network*].

²⁴ *Ibid* at para 123. See also *ibid* at paras 100, 223.

²⁵ *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 at para 36 [*AI Enterprises*].

imposes liability where the defendant has committed a wrong against a third party, with the intention of harming the plaintiff.²⁶ In *OBG*, Lord Hoffmann articulated the elements of this tort:

The essence of this tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant.²⁷

First, the defendant must have employed “unlawful means” against a third party, that is, a wrong that is “actionable by that third party.”²⁸ The defendant’s act must interfere with “the *freedom* of a third party . . . to deal with the claimant,”²⁹ or, in another formulation also adopted by Lord Hoffmann, with “the *liberty of action* of a third party” in relation to the plaintiff.³⁰ Second, the requisite intention for the tort is satisfied where “[o]ne *intends to cause loss* even though it is the means by which one achieved the end of enriching oneself,” but not where the loss was “merely a foreseeable consequence of one’s actions.”³¹

Subsequently, this reorganization and the elements of the tort were largely imported to Canada in *AI Enterprises Ltd. v Bram Enterprises Ltd.* (“*AI Enterprises*”). The Supreme Court characterized the unlawful means tort as “parasitic”:

Liability to the plaintiff is based on (or parasitic upon) the defendant’s unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)’s use of unlawful means against B (the third party).³²

Justice Cromwell, writing for the Court, agreed with Lord Hoffmann that the “unlawful means” element is only satisfied where the defendant commits an “actionable civil wrong” against the third party.³³ Declining to adopt the

²⁶ Carty, *Analysis*, *supra* note 1 at 18.

²⁷ *OBG*, *supra* note 19 at para 47.

²⁸ *Ibid* at para 49.

²⁹ *Ibid* at para 51 [emphasis added]. See also *ibid* at para 320.

³⁰ *Ibid* at paras 48, 53 [emphasis added]. See also Bagshaw, *supra* note 20 at 63ff.

³¹ *Ibid* at para 62 [emphasis added].

³² *AI Enterprises*, *supra* note 25 at para 23.

³³ *Ibid* at para 74.

respondents' submissions proposing a broader definition of an "unlawful" means, he agreed with the House of Lords that it was inappropriate to "tortify" criminal and regulatory law "by imposing civil liability where there would not otherwise be any."³⁴

Notably, however, Cromwell J departed from *OBG* by dismissing the requirement that the unlawful means "must interfere with the third party's freedom to deal with the plaintiff."³⁵ In his view, it was unnecessary to "resort to this additional 'freedom to deal' qualification":

Whether the unlawful means interfere with the plaintiff's right to deal with the injured third party or with some other party, the fact that the defendant aims at the plaintiff provides a sufficient nexus between the unlawful means and the interests of the plaintiff to justify imposing liability.³⁶

In part, this departure stemmed from Cromwell J's view that the "best rationale" for the tort is "liability stretching."³⁷ In his view, this rationale "sees the tort as extending civil liability without creating new actionable wrongs" by "extending an existing right to sue from the immediate victim of the unlawful act" to the plaintiff targeted by the defendant.³⁸

The Problems Posed for Corrective Justice

As articulated in *OBG* and *AI Enterprises*, the unlawful means tort appears to pose three problems for corrective justice theory. First, the tort provides the plaintiff standing to sue a defendant that committed an actionable wrong against a third party, even though it is not immediately evident that the defendant has breached a right of the plaintiff. Even if the defendant's act causes a third party to terminate its economic relationship with the plaintiff, one might object that the third party's free choice to do so cannot, in itself, generate liability by the

³⁴ *Ibid* at paras 26, 45.

³⁵ *Ibid* at para 87. See also Pey-Woan Lee, "The Unlawful Means Tort in Canada" (2014) 130 Law Q Rev 559 at 562.

³⁶ *Ibid*.

³⁷ *Ibid* at para 49.

³⁸ *Ibid* at paras 37, 43.

defendant to the plaintiff.³⁹ Rather, some primary right must be identified in the plaintiff.⁴⁰ Otherwise, the tort would violate the basic principle of privity by allowing the plaintiff to recover for a wrongful act suffered by a third party.⁴¹ The problem is compounded by the fact that the tort contemplates recovery for pure economic loss.⁴² As a rights-based account of private law, corrective justice requires the plaintiff to establish a juridical right *vis-à-vis* the defendant in order to recover economic loss resulting from the latter's interference with the right.⁴³ However, a person "cannot have a possessory or property right in the continued custom or business of others."⁴⁴ If such a right did exist, the perverse implication would be that any market competition could attract liability.

Second, the role of the "unlawful means" element in Cromwell J's formulation of the tort is arguably inconsistent with the bilaterality of private law. On the one hand, this element distinguishes the unlawful means tort from the American "*prima facie* tort" developed in *Tuttle v Buck*.⁴⁵ Unlike the Anglo-Canadian tort, the *prima facie* tort imposes liability for "intentionally causing damage without using unlawful means," unless the defendant's act can be shown to be justified.⁴⁶ The corrective justice approach does not countenance this imposition of liability, since it permits recovery for *damnum absque injuria*.⁴⁷ On the other hand, some commentators have criticized the unlawful means element as "an arbitrary and illogical limit" on the development of the tort.⁴⁸

In *AI Enterprises*, Cromwell J portrayed the unlawful means element as part of "a sufficient nexus" that would "justify imposing liability" on the defendant.⁴⁹

³⁹ Peter Benson, "Misfeasance as an Organizing Normative Idea in Private Law" (2010) 60:3 UTLJ 731 at 741 ["Misfeasance"].

⁴⁰ Allan Beever, *A Theory of Tort Liability* (Oxford: Hart Publishing, 2016) at 137 [ATTL].

⁴¹ JW Neyers, "Rights-based justifications for the tort of unlawful interference with economic relations" (2008) 28:2 LS 215 at 222 ["Rights-based justifications"].

⁴² JW Neyers, "The economic torts as corrective justice" (2009) 17 Torts LJ 162 at 166 ["Economic torts"]. See e.g. *Hardie Finance Corp Pty Ltd v Abern (No 3)*, [2010] WASC 403 at para 706 [Hardie].

⁴³ Neyers, "Economic torts," *supra* note 42 at 166; Peter Benson, "The Problem with Pure Economic Loss" (2009) 60:4 SCL Rev 823 at 845.

⁴⁴ Benson, "Misfeasance," *supra* note 39 at 740.

⁴⁵ *Tuttle v Buck*, 119 NW 949 (1909). See Carty, *Analysis*, *supra* note 1 at 84-85.

⁴⁶ OBG, *supra* note 19 at para 145. See *Restatement (Second) of Torts* §§767-68 (1979).

⁴⁷ "Loss or harm that is incurred from something other than a wrongful act and occasions no legal remedy." Bryan A Garner et al, eds, *Black's Law Dictionary*, 10th ed (St. Paul, MN: Thomson Reuters, 2014) *sub verbo* "damnum absque injuria."

⁴⁸ Tony Weir, *Economic Torts* (Oxford: Oxford University Press, 1997) at 21 n 1. See also *ibid* at para 146.

⁴⁹ *AI Enterprises*, *supra* note 25 at para 87.

Yet, that role is incompatible with corrective justice's requirement of an "articulated unity" of the plaintiff's right and defendant's duty, which unites the parties in one moral transaction.⁵⁰ On the logic of his analysis, the unlawful means requirement seems to pertain only to the defendant's side of the transaction. This rationale is arguably inconsistent with the parties' transactional equality. By founding liability upon the defendant's unlawful act, even if it is aimed at the plaintiff, he refers to a merely factual and not juridical nexus between the parties.⁵¹ As Weinrib explains:

[It cannot be that] the entire justificatory weight of the relationship rests on the reason for considering the defendant to be under a duty; right is then immediately attributed to anyone who would benefit from the performance of that duty.⁵²

To be intelligible as an expression of corrective justice, the tort must be theorized in a manner that accounts for how it protects "a person's freedom with respect to the actions of another."⁵³

Third, insofar as the existence and elements of the tort are justified as a judicial instrument to prevent "excessive competitive conflict,"⁵⁴ it raises concerns about the extent to which a corrective justice approach can accommodate distributive considerations. The regulation of commercial behaviour is generally understood to be a question of the welfare of the community as a whole. Such matters belong to distributive justice, a domain that courts have traditionally avoided, particularly in the adjudication of private legal disputes.⁵⁵ For this reason, Lord Hoffmann cautioned that the tort "was designed only to enforce *basic* standards of civilised behaviour in economic competition, between traders or between employers and labour."⁵⁶ The concerns about the appropriateness of common law tools in intervening in this area may be

⁵⁰ Weinrib, *IPL*, *supra* note 4 at 123.

⁵¹ See *ibid* at 124-25.

⁵² *Ibid* at 124.

⁵³ *Ibid*.

⁵⁴ Carty, "Modern Functions," *supra* note 2 at 277.

⁵⁵ Ross Grantham & Darryn Jensen, "The Proper Role of Policy in Private Law Adjudication" (2018) 68:2 *UTLJ* 187 at 191, 198-201. See also Weinrib, *IPL*, *supra* note 4 at 210.

⁵⁶ *OBG*, *supra* note 19 at para 56 [emphasis added].

warranted.⁵⁷ If the primary justification for this economic tort is a strictly regulatory function, then it would be inappropriate from a corrective justice perspective. In light of these observations, the next section of the paper considers various proposed rationalizations of the unlawful means tort.

PROPOSED ACCOUNTS OF THE UNLAWFUL MEANS TORT

Principled Exceptions to the Privity Rule

In response to the observation that the tort does not appear to pertain to a right of the plaintiff, two explanations have been advanced. Both of these accounts can be broadly categorized as justifying the tort as an exception to the privity rule in private law. Normally, the privity rule limits standing to sue to a plaintiff whose right was violated.⁵⁸ First, Robert Stevens has argued that an exception to the rule “may be justified on the basis that it prevents [the defendant] from using others as means to his own ends.”⁵⁹ He argues that the unlawful means tort is such an exception. Still, he maintains that “the general rule . . . discloses the structure of the law of torts,” and he considers the tort to be unproblematic because the defendant’s commission of an independently actionable wrong must be established.⁶⁰ Indeed, it might even be accepted that, as a descriptive matter, the modern function of the unlawful means tort is to accommodate plaintiffs who are harmed, but barred from recovery by the privity rule.⁶¹

Second, Daniel Stilitz and Philip Sales have advanced an alternative theory, arguing that the defendant’s intention to harm the plaintiff “bridges the remoteness of his unlawful actions.”⁶² Citing Lord Lindley’s opinion in *Quinn v Leathem*, they claim that liability is imposed by virtue of this bridging mechanism: the defendant’s intention to harm the plaintiff enables the latter “to overcome the defence . . . that D’s unlawful conduct is remote from P.”⁶³ According to their

⁵⁷ See *Hardie*, *supra* note 42 at para 707. See also Carty, “Modern Functions,” *supra* note 2 at 283.

⁵⁸ Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 173.

⁵⁹ *Ibid* at 188.

⁶⁰ *Ibid* at 174, 188-89.

⁶¹ Carty, “Modern Functions,” *supra* note 2 at 277.

⁶² Daniel Stilitz & Philip Sales, “Intentional infliction of harm by unlawful means” (1999) 115 *Law Q Rev* 411 at 413.

⁶³ *Ibid* at 412, citing *Quinn v Leathem*, *supra* note 1 at 534-35.

“remoteness theory,” the plaintiff needs only to show that he or she suffered a loss—has been “damaged in fact”—due to the defendant’s unlawful conduct against the intermediary, including pure economic loss.⁶⁴ The defendant’s requisite state of mind must be “a strict one,” so that it is defensible to impose liability “where none would otherwise be recognised by the law.”⁶⁵ In other words, Stilitz and Sales consider the intention element to be a “proximity mechanism” that prevents liability from blooming in an undesirable manner.⁶⁶ As such, they conclude that it would suffice that the defendant’s “actuating intent” or “purpose” was to cause harm to the plaintiff.⁶⁷

These explanations, however, merely sidestep the question of the *plaintiff’s* right that is central to a corrective justice account of the unlawful means tort. Although Stevens aims to advance a rights-based theory of tort law, his account focuses on the defendant’s wrongdoing and the third party victim, as opposed to the plaintiff’s right.⁶⁸ If his rationale were accepted, it would tend to undermine the rights-based account altogether. In truth, the privity exception argument amounts to the invocation of a “gap-filling” policy justification that imposes liability because the plaintiff would otherwise have no legal recourse.⁶⁹ It may be, as Stevens suggests, that it is in the public interest to deter defendants from “deliberately using others.”⁷⁰ The privity exception he proposes effectively deputizes a plaintiff to undertake the deterrence function by permitting him or her to recover from the defendant. Nonetheless, it is less clear why a rights-based account of tort law would countenance this explanation, given its inability to identify a pre-existing legal right in the plaintiff exigible against the defendant.⁷¹

Meanwhile, Stilitz and Sales’ account explicitly embraces the gap-filling justification. However, they take it for granted that the plaintiff simply has a legal right not to suffer any pure economic loss that was factually caused by the defendant. In so doing, they fail to justify this extension of liability to protect

⁶⁴ *Ibid* at 413, 430-31.

⁶⁵ *Ibid* at 430.

⁶⁶ See Carty, *Analysis*, *supra* note 1 at 82.

⁶⁷ Stilitz & Sales, *supra* note 62 at 427, 429.

⁶⁸ See James Goudkamp & John Murphy, “The Failure of Universal Theories of Tort Law” (2015) 21:2 *Legal Theory* 47 at 81, n 199

⁶⁹ John Murphy, “Rights, Reductionism and Tort Law” (2008) 28:2 *Oxford J Leg Stud* 393 at 402.

⁷⁰ Stevens, *supra* note 58 at 188.

⁷¹ Neyers, “Economic torts,” *supra* note 42 at 182.

against instances of pure economic loss, despite the fact that Anglo-Canadian tort law has “traditionally accorded less protection to purely economic interests than to physical integrity and property rights.”⁷² It has been cogently argued that a right not to suffer pure economic loss per se cannot be sustained at private law. One reason for this conclusion is that it is impossible to determine what constitutes a “loss” in the absence of injury to an underlying right, since whether an event has, factually speaking, caused loss could change from moment to moment; an apparent loss today could lead to a gain tomorrow.⁷³

Likewise, the proposal that the defendant’s intention “bridges” the gap attributes to the intention a normative role that is difficult to explain. It is incompatible with bilaterality under corrective justice, for the thesis situates the tort exclusively in the defendant’s side of the right-duty relationship. Moreover, if intention is the operative proximity mechanism, then the additional requirement of unlawful means would be otiose.⁷⁴ Still, in the face of strong academic criticism, the courts have consistently maintained the “key ingredient” of unlawful means.⁷⁵ Thus, the remoteness-bridging theory suffers from problems of both fit and coherence in accounting for the unlawful means tort. Ultimately, both these proposed exceptions to privity are reducible to consequentialist or loss-based considerations, rationales extrinsic to the relationship between the parties that is central to corrective justice.⁷⁶

Indirect Control

In a recent work, Allan Beever advances the novel thesis that the economic torts, including the unlawful means tort, respond to an interpersonal wrong in the defendant’s attempt to exert “indirect control” over the plaintiff through coercion.⁷⁷ His theory of tort, based on Kant’s philosophy of law, views such an attempt as a violation of the plaintiff’s “innate right.”⁷⁸ The Kantian innate right refers to one’s external freedom, “insofar as it can coexist with the freedom of

⁷² *AI Enterprises*, *supra* note 25 at para 30.

⁷³ Donal Nolan, “Rights, Damage and Loss” (2017) 37:2 Oxford J Leg Stud 255 at 262-66.

⁷⁴ Neyers, “Economic torts,” *supra* note 42 at 181.

⁷⁵ Carty, *Analysis*, *supra* note 1 at 102. See also Weir, *supra* note 48 at 73.

⁷⁶ See Murphy, *supra* note 69 at 403.

⁷⁷ Beever, *ATTL*, *supra* note 40 at 124.

⁷⁸ *Ibid.*

every other in accordance with a universal law.”⁷⁹ In Beever’s view, the Kantian conception of rights supports a person’s entitlement to be free from attempts by other persons to gain power or control over his actions, whether directly or indirectly. He contends that the “right to trade” referred to in the case law is an instance of the Kantian innate right.⁸⁰ On this account, the defendants in *Allen v Flood* were not held liable because the defendant was not attempting to injure the plaintiffs.⁸¹ The defendant’s actions were described in the subsequent case of *Quinn v Leathem* as “simply warn[ing] the plaintiff’s employers” of the employee’s intended actions.⁸² In contrast, Beever argues that the defendants in *Quinn v Leathem* were held liable because they “were trying to strike at the plaintiff . . . to control the way in which he ran his business.”⁸³

Beever offers a rights-based account of the tort, which, as a Kantian theory, appears to be compatible with the corrective justice framework. It asserts a plausible basis for the plaintiff’s right, thereby avoiding the conclusion that the plaintiff’s economic loss is *damnum absque injuria*. Nor does it advert to policy justifications to sustain the tort: “[t]he wrong is not the causing of loss, it is coercion.”⁸⁴ The indirect control theory addresses a defect identified in Stiltz and Sales’ remoteness theory, which effectively claimed that economic loss was per se recoverable.

Grounded in the view that Kantian right includes a juridical immunity from indirect control by others, the theory proposes some refinements to the current model of the tort. One important implication is that the unlawful means element is unnecessary for liability. Beever claims that this element is merely a “policy-based control mechanism,” and that the requirement that a third party was wronged creates a “logical chasm” between the plaintiff and defendant.⁸⁵ In his view, the parasitic nature of the tort is indefensible. Instead of conditioning the plaintiff’s recovery on an actionable wrong to a third party, it should be

⁷⁹ *Ibid* at 19-20. See Immanuel Kant, “The metaphysics of morals” in Mary J. Gregor, ed., *Practical Philosophy* (Cambridge: Cambridge University Press, 1996) 353 at 6:237.

⁸⁰ *Ibid* at 124-25.

⁸¹ *Ibid* at 127.

⁸² *Quinn v Leathem*, *supra* note 1 at 506.

⁸³ Beever, *ATTL supra* note 40 at 128.

⁸⁴ *Ibid* at 124.

⁸⁵ *Ibid* at 134, 137.

recognized that the relevant wrong simply is that suffered by the plaintiff.⁸⁶ For this reason, he favours reorienting the tort to focus on the defendant's intention, which he argues must be a purposive intention to exert "control" over the plaintiff.⁸⁷

Beever's proposal may appear attractive for its straightforward character, though some have criticized it as "monistic" or even "one-dimensional."⁸⁸ Nevertheless, it encounters problems of fit in relation to the features of the unlawful means tort. Even accounting for the complex history of the economic torts,⁸⁹ this view requires a significant departure from the conventional definition of the tort. As mentioned above, some of the earliest formulations of this tort included the requirement of an unlawful means. More broadly, it is questionable whether private law is committed to a principle against assertions of control per se.⁹⁰ The courts "have never fashioned a tort of undue influence," even though undue influence is a well-established legal concept and it is "a quintessential instance of control as Beever defines it."⁹¹ In any event, the "control" criterion that he posits is arguably too vague to serve as an organizing principle of the economic torts.⁹²

Taking these objections further, another problem is that the indirect control account provides no principled reason to explain why the tort is confined to economic relations. Stevens, among other commentators, has claimed that this limitation is irrational.⁹³ Yet, despite opportunities to do so, the courts have declined to extend the economic torts beyond the realm of commercial disputes.⁹⁴ In *Frame v Smith*, for instance, Wilson J explicitly denied the existence of a

⁸⁶ *Ibid* at 137.

⁸⁷ *Ibid* at 131-32.

⁸⁸ Izhak England, "Understanding Tort Law by the Kantian Moral Principle of Human Freedom," Book Review of *A Theory of Tort Liability* by Allan Beever, (2018) 9:1 J Eur Tort L 123 at 133; Zoë Sinel, "Allan Beever's One-Dimensional Tort Law Universe: A Review Article of Allan Beever, *A Theory of Tort Liability*" (2017) 27 NZULR 807.

⁸⁹ See Neyers, "Economic torts," *supra* note 42 at 167.

⁹⁰ See Sinel, *supra* note 88 at 823-826.

⁹¹ John Goldberg, Book Review of *A Theory of Tort Liability* by Allan Beever, (2017) 80:6 Mod L Rev 1183 at 1185.

⁹² *Ibid*.

⁹³ Stevens, *supra* note 58 at 189. See also *Winfield & Jolowicz*, *supra* note 20 at para 19-028.

⁹⁴ See Brandon Kain & Anthony Alexander, "The 'Unlawful Means' Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation, 2010* (Toronto: Carswell, 2010) 33 at 69.

“generalized tort of ‘wrongful interference with another’s relationship’.” She explained that the “common denominator of these torts is that they constitute wrongful interference with *economic relationships*.”⁹⁵ But if control is the underlying rationale for the tort, presumably it should extend to all kinds of social relationships, not only those involving an “economic interest.”⁹⁶ Apart from its inconsistency with the unlawful means element, the control theory leaves the tort’s domain unexplained, adding to the problems of fit.

One potential response holds that the unlawful means tort is confined to economic relationships only because a statute has already “occupied the field” in other, non-economic contexts.⁹⁷ That is, the characterization of the tort as strictly *economic* is contingent rather than necessary; at an abstract level, the tort can properly be understood as a response to the wrongfulness of indirect control. It is true that the majority in *Frame v Smith* held that any civil action relating to custody and access in family law matters was precluded because “the Legislature intended to devise a comprehensive scheme for dealing with these issues.”⁹⁸ It might then be contended that the alleged problem of fit does not arise, since the tort could have extended to non-economic relationships but for this legislative policy.

Nevertheless, only Wilson J expressly considered the domain of the unlawful means tort in *Frame v Smith*. In contrast to the majority, her refusal to extend the tort beyond the commercial context did not appear motivated by the presence of the legislated custody and access regime. Placing significance on the fact that tort law “up to this point has protected only certain types of relationships from interference,” Wilson J stated that the tort should not “be extended to a non-economic relationship.”⁹⁹ Similarly, other courts have denied the extension of this tort to family relationships, not because of the existence of a statutory regime, but due to the essentially different nature of parental interests in their

⁹⁵ *Frame v Smith*, [1987] 2 SCR 99 at 129, Wilson J (dissenting but not on this point) [emphasis added] [*Frame*]. See also *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 987-88.

⁹⁶ OBG, *supra* note 19 at para 47; *AI Enterprises*, *supra* note 25 at para 93.

⁹⁷ Neyers, “Economic torts,” *supra* note 42 at 189 n 159.

⁹⁸ *Frame*, *supra* note 95 at 111-12.

⁹⁹ *Ibid* at 129.

children.¹⁰⁰ Such interests cannot be analogized to the commercial or economic interests that the unlawful means tort protects. The indirect control theory remains inadequate in explaining the domain of this tort. In consequence, I conclude that Beever's approach offers an unsatisfactory account.

Liability Stretching

In *AI Enterprises*, Cromwell J indicated his preference for the so-called "liability stretching" rationale for the unlawful means tort.¹⁰¹ This rationale holds that the tort is parasitic and "extend[s] civil liability without creating new actionable wrongs."¹⁰² Instead of grounding a new tort liability, it "focuses on extending an existing right to sue from the immediate victim of the unlawful act to another party whom the defendant intended to target with the unlawful conduct."¹⁰³ Some have observed that "liability stretching," however, is not actually a rationale, but a descriptive metaphor for the operation of the unlawful means tort.¹⁰⁴ In other words, the metaphor does not itself justify the scope and content of the tort, though it does express certain assumptions about its underlying normative structure.

Taken on its own terms, the "stretching" explanation is confused. Despite the claim that the rationale reflects Lord Hoffmann's views in *OBG*,¹⁰⁵ it is inconsistent with his description of the unlawful means tort as "a tort of *primary* liability."¹⁰⁶ In addition, Lord Hoffmann explicitly approved Lord Lindley's statement in *Quinn v Leatham* that the rationale for the tort lies in its protection of "a person's liberty or right to deal with others."¹⁰⁷ In contrast, the liability stretching thesis holds that the plaintiff's cause of action against the defendant extends, or is stretched from, the third party's right to sue.¹⁰⁸ This is a secondary or accessory form of liability, which logically implies that the plaintiff should have

¹⁰⁰ *F v Wirral Metropolitan Borough Council*, [1991] 2 WLR 1132 at 1174-75 (CA). See Bagshaw, *supra* note 20 at 63 n 20.

¹⁰¹ *AI Enterprises*, *supra* note 25 at paras 43-44.

¹⁰² *Ibid* at para 43.

¹⁰³ *Ibid* at para 37.

¹⁰⁴ Beever, *ATTL*, *supra* note 40 at 118.

¹⁰⁵ *AI Enterprises*, *supra* note 25 at para 43.

¹⁰⁶ *OBG*, *supra* note 19 at para 8 [emphasis added]. See Lee, *supra* note 35 at 561.

¹⁰⁷ *Ibid* at para 46, citing *Quinn v Leatham*, *supra* note 1 at 534-35.

¹⁰⁸ *Ibid* at para 37.

no claim if the defendant's unlawful act causes no loss to the third party. Yet, *AI Enterprises* indicated that the unlawful means element encompasses not only actionable civil wrongs, but also "conduct that would be actionable if it had caused loss to the person at whom it was directed."¹⁰⁹ In that scenario, the immediate victim has no right to sue, and therefore nothing should extend to the plaintiff.¹¹⁰

Furthermore, the rationale is inconsistent with the relational nature of liability.¹¹¹ According to corrective justice, the defendant's normative gain must correlate to the plaintiff's normative loss to provide a reason for liability.¹¹² The parties must be the "doer and sufferer of the *same* injustice."¹¹³ Liability stretching ignores this requirement by permitting liability to arise from normative gains and losses involving "different and distinct harms."¹¹⁴ The point is aptly demonstrated in *Tarleton v M'Gawley* ("*Tarleton*"), the very case that Cromwell J cites to illustrate his approach. In *Tarleton*, the defendant obtained a normative gain by firing a cannon at the third party canoers, who had been seeking to trade with the plaintiff.¹¹⁵ This gain, in conjunction with the normative loss to the canoers' right to physical integrity, crystallized in the defendant's liability for the canoers' physical injury. In comparison, the plaintiff suffered a different normative loss in the form of an "economic harm *distinct* from those physical injuries."¹¹⁶ Though Cromwell J argued that there is no reason to leave the plaintiff uncompensated,¹¹⁷ the liability stretching rationale cannot be rationalized within a corrective justice framework.

¹⁰⁹ *Ibid* at para 26.

¹¹⁰ Beaver, *ATTL*, *supra* note 40 at 119; Lee, *supra* note 35 at 561-62.

¹¹¹ See Weinrib, *CJ*, *supra* note 4 at 3.

¹¹² Weinrib, *IPL*, *supra* note 4 at 122.

¹¹³ Weinrib, "Nutshell," *supra* note 4 at 350 [emphasis added].

¹¹⁴ *AI Enterprises*, *supra* note 25 at para 47.

¹¹⁵ *Tarleton v M'Gawley* (1793), Peake 270, 170 ER 153.

¹¹⁶ *AI Enterprises*, *supra* note 25 at para 47 [emphasis added].

¹¹⁷ *Ibid*.

THE ABUSE OF RIGHTS PROPOSAL

Unlawful Interference as Abuse of Rights

Departing from orthodox accounts that rely on policy considerations or the immediate victim's rights, Neyers argues that the unlawful means tort is a manifestation of "the Kantian idea of the abuse of rights."¹¹⁸ Briefly stated, the animating idea of this account is that persons are not permitted, within a "system of rights," to inflict gratuitous harm upon others. Where a person deliberately aims to "frustrate the purposes of another," he or she thereby commits an abuse of rights.¹¹⁹ These acts serve to transform rights "from markers of mutual freedom to instruments of subordination."¹²⁰ The unlawful means tort operates as "systematic control of the defendant's exercise of his or her rights," which protects the plaintiff from interference with his or her economic relations.¹²¹ Such limitations accord with the "normative presuppositions" of a system of rights, because rights are the juridical means by which individuals pursue their own purposes.¹²² This understanding is consistent with the corrective justice framework, insofar as it elaborates the normative incidents of a system of juridical rights.

The defendant is properly said to have abused her right only where he or she acts with the purpose of interfering "with the self-determining freedom of others."¹²³ This suggests a plausible account of the intention element of the unlawful means tort. Conversely, Neyers envisages a merely derivative role for the unlawful means element. In his view, this tort is simply the "indirect/complex form of an abuse of rights claim."¹²⁴ The paradigmatic instances of abuse of rights, he argues, lie in the *prima facie* tort cases. For example, he considers *Tuttle v Buck* to represent the "direct/simple form of an abusive rights claim," where the defendant has the predominant purpose of injuring the plaintiff and involves

¹¹⁸ Neyers, "Economic torts," *supra* note 42 at 182; Neyers, "Rights-based justifications," *supra* note 41 at 225.

¹¹⁹ Weinrib, *CJ*, *supra* note 4 at 114.

¹²⁰ Neyers, "Economic torts," *supra* note 42 at 183, citing Weinrib, *CJ*, *supra* note 4 at 114.

¹²¹ *Ibid.*

¹²² Weinrib, *CJ*, *supra* note 4 at 114.

¹²³ *Ibid.*

¹²⁴ Neyers, "Economic torts," *supra* note 42 at 184.

no intermediaries.¹²⁵ The unlawful means element in the indirect form of the claim is justified as an evidentiary device that “rebut[s] the defendant’s claim that he or she was acting non-abusively” or without a legitimate intention.¹²⁶ In effect, the account assimilates the requirement of an unlawful means to the intention element.

While the appeal to the idea of a *system of rights* is promising, the account presented by Neyers is not without its challenges. The theory regards the unlawful means element as redundant. In principle, the defendant’s intention to abuse his or her right should suffice for liability. The unlawful means requirement is then relegated to an evidentiary role.¹²⁷ But the theory’s emphasis on the defendant’s purposes then invites the objection that motive is irrelevant to liability in private law.¹²⁸ As Lord Watson stated in *Allen v Flood*, “the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong.”¹²⁹ Indeed, the rejection of the *prima facie* tort by English and Canadian courts underscores that an improper purpose, by itself, is not enough to found liability.¹³⁰

For this reason, it is difficult to see how the unlawful means tort can be characterized simply as the “indirect” variant of a “direct” action for abuse of rights. The derivative role given to unlawful means suggests a tenuous correspondence to the actual parameters of the tort. Moreover, this theory also inadequately explains why the tort is confined to interferences with economic relationships. On the view advanced by Neyers, an intentional indirect interference with any of the plaintiff’s interests—economic or otherwise—ought to constitute, *prima facie*, an abuse of rights. Therefore, like the other proposals, this account suffers from a problem of fit. It simultaneously accomplishes too much and too little, capturing conduct that does not ordinarily give rise to tortious

¹²⁵ *Ibid* at 185. See *Tuttle v Buck*, *supra* note 45.

¹²⁶ *Ibid* at 184.

¹²⁷ *Ibid* at 183. See also Neyers, “Rights-based justifications,” *supra* note 42 at 226.

¹²⁸ *Ibid* at 184, 186.

¹²⁹ *Allen v Flood*, *supra* note 1 at 92.

¹³⁰ *Cement LaFarge v BC Lightweight Aggregate*, [1983] 1 SCR 452 at 469; *OBG*, *supra* note 19 at para 145; *Sorrell v Smith*, [1925] AC 700 at 719 (HL (Eng)).

liability while leaving unresolved the tort's focus on unlawful means and economic relationships.

Systematicity and Specification

In my view, the theory's deficiencies of fit stem from a more fundamental problem. Because the abuse of rights theory conceives the tort just as "systematic control" of participants in the system of rights, it locates the gravamen of the tort in the defendant's improper purposes. Put differently, the notion of an 'abuse' is vague, as commentators have noted;¹³¹ Neyers' account of the tort appears to define abuse as encompassing any act performed with an improper purpose. In turn, it generates a justification for tortious liability whereby the *prima facie* tort becomes the paradigmatic case of abuse. This approach, in essence, directly models the parameters of the tort as a response to acting with an improper purpose per se. Viewed in this manner, the doctrine and the limitation on the exercise of freedoms it imposes are extrinsic to the scope and content of private rights.

However, this conflicts with the idea that rights are, themselves, juridical markers of freedom that define the boundaries of legally permissible conduct.¹³² Some have argued that abuse of right "is a juridically improper concept," since it expresses no more than an "*absence* of right, i.e. 'no-right' and/or 'duty not'."¹³³ This objection is conceptual, for it points out that the notion of a right cannot comfortably coexist with a duty not to abuse the right, at least at the same level of abstraction. A right is an external, juridical manifestation of the internal capacity for purposive action.¹³⁴ If the doctrine of abuse of rights is understood just to prohibit acting with improper motives, it undermines the concept of rights

¹³¹ Bruce Pardy, "Disabusing the Common Law of 'Abuse of Rights': The Only Legitimate Rule Redux" (2018) 84 SCLR (2d) 201 at 215-16. Cf Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009) at 130 (making this argument in the context of constitutional rights).

¹³² *Ibid* at 218.

¹³³ John Finnis, "Some Professorial Fallacies About Rights" (1972) 4:2 Adel L Rev 377 at 387 [emphasis in original].

¹³⁴ Benson, "Equality of Opportunity," *supra* note 17 at 221.

itself. The notion of an abuse “becomes normatively prior to the existence and definition of the right, rendering the right illusory.”¹³⁵

From a corrective justice perspective, this conceptual objection can be related to the correlativity of rights and duties. Rights and duties each have “distinct moral characters [even] while functioning together as a unity.”¹³⁶ Conversely, it might be thought that a right is merely a reflex of a duty, so that “the entire justificatory weight of the relationship rests on the reason for considering the defendant to be under a duty.”¹³⁷ Taking the defendant’s improper purposes to constitute liability does precisely this. It frames the notion of abuse of rights “at a level of abstraction that is too high to reflect the specific and distinctive character of the legal relation in private law.”¹³⁸ As a result, it superimposes the notion onto the scheme of private rights and duties in a manner that constrains these juridical expressions of freedom, contrary to the corrective justice approach. On that approach, rights are embodiments of the fundamental principle “that one person’s action [must] be united with the other’s freedom in accordance with practical reason.”¹³⁹ That is, rights are conclusions to practical reasoning, not premises subject to further considerations of “abuse”: “[a] right gives its holder the freedom to act within its bounds.”¹⁴⁰ Only if a right is the product of such reasoning can it be relied upon as a “normative marker of the parties’ relationship.”¹⁴¹

Accordingly, the key difficulty for the abuse of rights theory is that it is incomplete in an important respect. In my view, the systematicity of rights should be seen to partially constitute the scheme of rights and duties. The doctrine of abuse of rights does not directly impose a cause of action in itself, as Neyers suggests, so that an improper purpose alone grounds liability. Rather, abuse of rights is akin to an organizing principle that pertains to interpersonal transactions in a system of rights.¹⁴² As such, it still calls for a proper specification of the

¹³⁵ Pardy, *supra* note 131 at 221.

¹³⁶ Weinrib, *IPL*, *supra* note 4 at 123.

¹³⁷ *Ibid* at 124.

¹³⁸ Benson, “Equality of Opportunity,” *supra* note 17 at 229.

¹³⁹ Weinrib, *IPL*, *supra* note 4 at 122.

¹⁴⁰ Weinrib, *CJ*, *supra* note 4 at 89. See John Oberdiek, “Specifying Rights Out of Necessity” (2008) 28:1 *Oxford J Leg Stud* 127 at 135.

¹⁴¹ *Ibid* at 92.

¹⁴² See *Bhasin v Hrynew*, 2014 SCC 71 at para 64.

defendant's duty not to 'abuse' a right and, by extension, the plaintiff's right correlative to this duty. The right-duty relationships subsisting in private law, then, should incorporate the normative incidents of systematicity as part of their internal scope and content.¹⁴³ Thus understood, liability would be founded on the infringement of "rights, not purposes, which define the nature of the coexistence the law requires."¹⁴⁴

If abuse of right is abstractly defined as the defendant's deliberate undertaking to frustrate the plaintiff's juridical freedom, what does this entail in the context of economic relationships, the domain peculiar to the unlawful means tort? Once the tort is analyzed with a view to the plaintiff's right, it shall become clear that "the gist of the action [is] not malicious intention but violation of a legal right committed knowingly."¹⁴⁵ In this manner, a refined and fully specified account will be able to distinguish between motive, ill-will, or malice, on the one hand, and the intention to misuse one's means, on the other. A system of rights refuses to legitimize an abuse of right not because the defendant acted from an impure *motive*, but because she conscripted her juridical *means* as "instruments of subordination."¹⁴⁶

EXTENDING THE ABUSE OF RIGHTS PROPOSAL

The Right to Trade

In what follows, I elaborate upon this appeal to the systematicity of rights to provide a novel account of the unlawful means tort, which will elucidate the tort's compatibility with the corrective justice framework. I consider the *form* of the plaintiff's right protected by the unlawful means tort and argue that it is the "right to trade." Then, I discuss the *content* of this right as informed by corrective justice's account of "public right," the condition in which private law rights are secured by public institutions. Examining corrective justice's conception of rights and remedies reveals a coherent justification of the unlawful means tort, based in

¹⁴³ See Oberdiek, *supra* note 140 at 128.

¹⁴⁴ Pardy, *supra* note 131 at 218.

¹⁴⁵ *Wirral*, *supra* note 100 at 1164.

¹⁴⁶ Weinrib, *CJ*, *supra* note 4 at 114.

persons' equal status under the "juridical conception of markets," an omnilateral structure of impersonal relations between persons pursuing their own purposes.¹⁴⁷

To begin, I return to the concept of the "right to trade," described as the "oldest potential justification" for the unlawful means tort.¹⁴⁸ In *Quinn v Leathem*, Lord Lindley expressed the idea that tort law protects such a right:

This liberty is a right recognised by law; its correlative is the general duty of everyone not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him.¹⁴⁹

Notably, Lord Hoffmann approvingly cited this passage in *OBG*, describing it as the "rationale of this tort."¹⁵⁰ Lord Lindley's opinion is of particular interest because among all the judgments in the House of Lords in *Quinn v Leathem*, his distinguishes itself by its rights-based orientation. He considered it essential that "the interference is wrongful and is intended to damage" the plaintiff, as opposed to conduct that was "justifiable in point of law" and hence exempt from liability.¹⁵¹ On the facts of the case, he found that the defendant's actions had "infringed the plaintiff's *rights* so as to give him a cause of action."¹⁵²

Despite the apparent endorsement in *OBG*, some commentators object to the existence of a right to trade. For example, Neyers argues that "it is not conceptually possible to have a right to trade in a capitalist society (as this would entail a duty not to compete)."¹⁵³ It is important to appreciate the pedigree of this critique. The analysis originates from Hohfeld, who criticized Lord Lindley's reasoning for invoking a *non sequitur*; he claimed it was incoherent to derive the

¹⁴⁷ Ripstein, *PW*, *supra* note 4 at 177.

¹⁴⁸ Neyers, "Rights-based justifications," *supra* note 41 at 220.

¹⁴⁹ *Quinn v Leathem*, *supra* note 1 at 534.

¹⁵⁰ *OBG*, *supra* note 19 at para 46. See also Lee, *supra* note 35 at 561.

¹⁵¹ *Quinn v Leathem*, *supra* note 1 at 535.

¹⁵² *Ibid* at 536 [emphasis added].

¹⁵³ Neyers, "Rights-based justifications," *supra* note 41 at 222. See also Neyers, "Economic torts," *supra* note 42 at 180.

existence of a correlative *duty* from a mere *liberty* to deal with others.¹⁵⁴ Whereas Lord Lindley posited the existence of a general “duty” not to interfere, the logical Hohfeldian correlative of a “liberty” to trade is that everyone has “no-right” to claim that the liberty-holder cannot trade.¹⁵⁵ Thus, it was suggested that he erred by conflating the permission that the law gave to Leathem to carry on the trade of butcher, with the “duty of every one not to prevent” his trade.¹⁵⁶ The latter formulation seems to imply that a competitor entering the marketplace could infringe another’s right to trade by depriving his competitor of customers.¹⁵⁷ Hence, the “right to trade” is often considered a misguided basis for the tort, since a business owner cannot have a right to one’s customers.¹⁵⁸

Strictly speaking, however, the Hohfeldian objection is misplaced. As Halpin has shown, Hohfeld’s concept of a “liberty” elides the distinction between “the absence of a duty not to do the privileged act” and “recognition and protection by the law in doing the act.”¹⁵⁹ The former is merely a “no-duty.” In contrast, the latter describes a freedom to do something that is positively protected by law.¹⁶⁰ For example, when speaking of the “liberty” of a landowner to enter her land, there are two possible meanings. One is that by entering, the landowner is not in breach of a duty to anyone. The other is that the law “positively protect[s]” the landowner’s entitlement to enter by ensuring that she cannot be ejected for trespass.¹⁶¹

The operative meaning in *Quinn v Leathem* was the latter, since Lord Lindley could not be taken to have asserted that Leathem had “no-duty” to trade as a butcher. The point is that the Hohfeldian concept of a liberty is laden with a set of underlying rights; the legal protection conferred by it “can be broken down into a set of rights with correlative duties.”¹⁶² In spite of this, Hohfeld asserted that it was nonsensical to correlate a duty with a liberty. That assertion would

¹⁵⁴ Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23:1 Yale LJ 16 at 36-37.

¹⁵⁵ *Ibid* at 36.

¹⁵⁶ See Pierre Schlag, “How To Do Things With Hohfeld” (2015) 78:1 Law & Contemp Probs 185 at 207.

¹⁵⁷ Ronald Podolny, “The Tort of Intentional Interference with Economic Relations: Is Clarity out of *Reach*?” (2011) 52 Can Bus LJ 63 at 77.

¹⁵⁸ See Ripstein, *PW*, *supra* note 4 at 180.

¹⁵⁹ AKW Halpin, “Hohfeld’s Conceptions: From Eight to Two” (1985) 44:3 Camb LJ 435 at 444.

¹⁶⁰ *Ibid* at 444 [emphasis added].

¹⁶¹ *Ibid* at 443.

¹⁶² *Ibid* at 445.

have been correct if Lord Lindley had attempted to correlate “the general duty of everyone” with a “no-duty” on Leatham’s part to carry on his trade.¹⁶³ But he clearly did not. The related objection, that the correlative duty must be a duty not to deprive the plaintiff of his customers and is hence unworkable, ignores the fact that his liberty to trade is merely a liberty to *attempt* to trade with others. It does not entail that the plaintiff must be successful in his endeavours to carry on a trade, in the sense of being commercially profitable.¹⁶⁴

Accordingly, I argue that Lord Lindley, by referring to “a person’s liberty or right to deal with others,” was not suggesting that the law would protect his profit margins from other competitors. In other words, he was not declaring the existence of a duty not to compete. Instead, in the earlier words of Bowen LJ in *Mogul Steamship*, he was simply affirming that “the law recognises and encourages” the capacity of a person to lawfully participate in the market.¹⁶⁵ As discussed, the “right to trade” might simply refer to a set of protections that the law accords to market participants, which enable them to attempt to deal with others. These include the prohibition of certain illegitimate business practices,¹⁶⁶ and the scope of protection for persons who endeavour to carry on a trade may be considered “[t]he dividing line between lawful competition . . . and unlawful competition.”¹⁶⁷

That is a possibility Neyers and other critics regrettably did not consider, since they exclude the notion that the right to trade is “a *measured* or *limited* right” that constrains certain kinds of competitive behaviour but not others.¹⁶⁸ The oversight is likely motivated by Hohfeld’s all-or-nothing assumption that a liberty must refer either to the absence of a duty on the plaintiff to carry on a trade, or else, to the legal capacity to carry on a *successful* enterprise. Far from it being a conceptual impossibility for the “liberty to trade” to be correlative to a duty, it is eminently logical to consider whether it encompasses “a set of protecting rights” which prevent interference with this liberty.¹⁶⁹ In this sense, one can theorize the

¹⁶³ *Quinn v Leatham*, *supra* note 1 at 534.

¹⁶⁴ Halpin, *supra* note 159 at 448-49.

¹⁶⁵ *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1889), 23 QBD 598 at 614 (CA) [*Mogul Steamship (CA)*]. See Halpin, *supra* note 159 at 448-49.

¹⁶⁶ Simon Deakin & John Randall, “Rethinking the Economic Torts” (2009) 72:4 Mod L Rev 519 at 534.

¹⁶⁷ Halpin, *supra* note 159 at 449.

¹⁶⁸ Nicholas J McBride, “Rights and the Basis of Tort Law” in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (Oxford: Hart Publishing, 2011) 331 at 339 [emphasis in original].

¹⁶⁹ Halpin, *supra* note 159 at 446.

plaintiff's right to trade and the defendant's correlative duty not to unlawfully interfere, as forming the right-duty relationship that inheres in the unlawful means tort.

The Condition of Public Right

Having dispelled the conceptual objection to the "right to trade," it is possible to specify this right, not merely as a reflex of the duty not to interfere with the plaintiff's trade, but as a distinct "juridical manifestation[] of the freedom inherent in self-determining agency."¹⁷⁰ I contend that the legal interests and protections underlying the right to trade may be reconciled with the corrective justice framework through the Kantian idea of "public right." Although Neyers uses "public right" to denote rights created by the criminal law,¹⁷¹ in using this term I invoke corrective justice's understanding of the "public character of private law."¹⁷²

According to Weinrib, "public right" is the "condition in which public institutions actualize and guarantee rights."¹⁷³ The idea is that the effects of private rights are altered once they are protected and enjoyed under public institutions:¹⁷⁴

public right . . . integrates these rights into a *public* and *systematic* totality of persons, norms, and institutions, thereby moving from bilateral relationships, in which each right (as well as its correlative duty) stands on its own, to the *omnilateral relationship* among members of a state, in which the rights and correlative duties become constituents of a comprehensive whole.¹⁷⁵

The two features of public right, publicness and systematicity, pertain "respectively to the form and content of public right." Publicness, the formal

¹⁷⁰ Weinrib, *IPL*, *supra* note 4 at 122.

¹⁷¹ Neyers, "Rights-based justifications," *supra* note 41 at 228; Neyers, "Economic torts," *supra* note 42 at 187.

¹⁷² Weinrib, *IPL*, *supra* note 4 at 218.

¹⁷³ Ernest J Weinrib, "Private Law and Public Right" (2011) 61:2 UTLJ 191 at 195 ["Public Right"].

¹⁷⁴ *Ibid* at 198. See also JW Neyers, "Explaining the Inexplicable? Four Manifestations of Abuse of Rights in English Law" in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (Oxford: Hart Publishing, 2011) 309 at 310 ["Explaining the Inexplicable"].

¹⁷⁵ *Ibid* at 203 [emphasis added].

aspect of public right, refers to the condition of legal norms being known by all. Systematicity, its substantive aspect, bears on the understanding of legal norms and institutions as forming a systematic whole.¹⁷⁶ Together, these features “provide a court with a new principle of decision based on the omnilateral standpoint of a public institution” that supplements the bilateral relationships of corrective justice.¹⁷⁷

It is in this condition that the notion of abuse of rights is realized.¹⁷⁸ When private law norms are made systematic, the effect of a private right may be extended or attenuated.¹⁷⁹ Weinrib suggests, for example, that contractual rights come to enjoy an *in rem* protection because “public right makes the contract a juridical object for everyone” in a system of reciprocal assurance “that relates all to all.”¹⁸⁰ This development is thought to underpin the tort of inducing breach of contract. It is significant, then, that Lord Lindley drew an analogy between the unlawful means tort and the principle underlying *Lumley v Gye*, the case that established the tort of inducing breach of contract.¹⁸¹ The general notion of abuse of rights is similarly grounded in the omnilateral, systematic nature of public right. Because a person is related to everyone else in this condition, systematicity imposes requirements to uphold “the rightful form of association” of individuals, that is, public right’s “own integrating conception of a people, of its laws, and of its institutions.”¹⁸² Accordingly, it prohibits the anti-social act of using one’s rights as “instruments of subordination” by purposefully inflicting gratuitous harm on and frustrating the freedoms of another.¹⁸³

The significance of public right to the unlawful means tort, I argue, lies in the connection between the “right to trade” and a legal system’s stance against abuse of rights. In the case of an unlawful interference with economic relations, the defendant has committed what can be broadly characterized as an abuse of right. But whereas Neyers’ theory sees the defendant’s wrongful purpose as the

¹⁷⁶ *Ibid* at 196-98.

¹⁷⁷ *Ibid* at 200.

¹⁷⁸ Neyers, “Explaining the Inexplicable,” *supra* note 174 at 311.

¹⁷⁹ Weinrib, “Public Right,” *supra* note 173 at 204.

¹⁸⁰ *Ibid* at 205.

¹⁸¹ *Quinn v Leathem*, *supra* note 1 at 535, citing *Lumley v Gye* (1853), 118 ER 749.

¹⁸² Kant, *supra* note 79 at 6:306; Weinrib, “Public Right,” *supra* note 173 at 197.

¹⁸³ Weinrib, *CJ*, *supra* note 4 at 114.

gravamen of the tort, I suggest that the liability responds to a more specific kind of inconsistency with public right. The effect of systematicity is not to replace the set of juridical freedoms that prevailed prior to the condition of public right, but rather, to add a new “layer of analysis that . . . leaves intact” those right-duty relationships.¹⁸⁴

In the case of the unlawful means tort, the normative implications of this new layer derive from the form of market relations, which is only fully recognized under public right. Like all the economic torts, this tort is oriented toward interferences of economic and commercial relations. As I will argue, the corrective justice approach does implicate a particular understanding of such relations. The “juridical conception of market transactions” is a form of omnilateral relation in which persons are entitled to use or dispose of their means as they see fit.¹⁸⁵ Interactions in the juridical market are impersonal, consistent with the conception of personality that pervades private law, for within the market everyone is influenced by everyone while “all act to pursue ends of their own.”¹⁸⁶ In this respect, the juridical market accords to each participant an equal status. As persons transact impersonally and are related omnilaterally, “they all rank equally as persons whose activities can coexist within the system of rights.”¹⁸⁷ To be sure, the juridical conception of the market is an abstract and idealized image of actual market transactions, but one which is appropriate to the juridical conception of personhood and its focus on the external manifestation of choice.¹⁸⁸

When the defendant employs unlawful means with the intent to utilize the mechanisms of the market to harm the plaintiff, he has acted inconsistently with the plaintiff’s equal status as a participant in this juridical market. The court acknowledges this subversion of market relations as an injury correlative to the plaintiff’s right to trade. As such, the tort responds to “the targeting of the plaintiff by the defendant *through the instrumentality* of unlawful acts against a third

¹⁸⁴ Weinrib, “Public Right,” *supra* note 173 at 205.

¹⁸⁵ Ripstein, *PW*, *supra* note 4 at 176-77.

¹⁸⁶ Weinrib, *CJ*, *supra* note 4 at 114. See also Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1998) at 251-53 [ERL].

¹⁸⁷ *Ibid.*

¹⁸⁸ Weinrib, *IPL*, *supra* note 4 at 104; Benson, “Equality of Opportunity,” *supra* note 17 at 211.

party.”¹⁸⁹ Like the form of the market itself, which is impersonal and omnilateral, the right to trade is a product of public right that links everyone to everyone as a specified form of the “correlative universal right” that imposes “systematic control” against abuse of rights.¹⁹⁰ This treatment flows from the need to uphold the juridical conception of the market. In turn, as I shall explain, this conception is essential to the understanding of rights and remedies under corrective justice.

Corrective Justice and the Market

Latent within corrective justice’s conception of private rights and remedies is the idea of the omnilateral relationship that public right makes explicit. As opposed to accounts that view a right as the mere causative event of a remedy, corrective justice posits that a remedy is the continuation of the plaintiff’s injured right. It accordingly conceives an award of monetary damages as restoring to the plaintiff the quantitative form of that right.¹⁹¹ This “thesis of continuity” reflects the internal coherence of a system of rights, in that at all times, the plaintiff maintains her entitlement to possess her right, whether in its original or remedial form.¹⁹² Like the right of which it is a continuation, a remedy expresses the law’s “concern for equal liberty and security for all.”¹⁹³

According to the continuity thesis, the substance of the remedy is seen as the same as that of the underlying right. Since rights are juridical means by which a person can pursue her purposes externally in the world, the remedy must have a similarly external manifestation.¹⁹⁴ This provides an answer to the objection, for instance, that a mere apology by the defendant could satisfy the remedial demands of corrective justice.¹⁹⁵ An apology, being solely a reflection of a defendant’s inward, subjective state, would not restore to the plaintiff her injured right since it does not restore the external means that she lost.¹⁹⁶ By setting aside such

¹⁸⁹ *AI Enterprises*, *supra* note 25 at para 78 [emphasis added].

¹⁹⁰ Neyers, “Economic torts,” *supra* note 42 at 184.

¹⁹¹ Weinrib, *CJ*, *supra* note 4 at 94, 98.

¹⁹² *Ibid* at 92-93. See also Ernest J Weinrib, “Causal Uncertainty” (2016) 36:1 Oxford J Legal Stud 135 at 144-45.

¹⁹³ Ripstein, *ERL*, *supra* note 186 at 49.

¹⁹⁴ Weinrib, *CJ*, *supra* note 4 at 93.

¹⁹⁵ Perry, “Conceptions,” *supra* note 7 at 36. See also Stephen R Perry, “The Moral Foundations of Tort Law” (1992) 77 Iowa L Rev 449 at 494.

¹⁹⁶ Weinrib, *CJ*, *supra* note 4 at 91-93; Ripstein, *PW*, *supra* note 4 at 252.

internal considerations, private law embraces terms of interaction that recognize the parties as free and equal in respect of their juridical personality.¹⁹⁷

Monetary damages are an appropriate way to restore what the plaintiff has lost, because money is the “universal means by which men exchange their industriousness with one another.”¹⁹⁸ Put differently, the corrective justice theory perceives the violation of a private right to be wrongful because rights are “juridical markers of the freedom” to pursue one’s ends or projects in the world.¹⁹⁹ When rights are violated, the plaintiff is deprived of the external means by which he can pursue his ends; money substitutes for and remedies the injured right by restoring to the plaintiff those means. As discussed above, for corrective justice, there is an equivalence between the right and the remedy, insofar as both embody a person’s “self-determining freedom.”²⁰⁰ The equivalence of means and money follows, because money is the universal form of value, which can be exchanged for almost any other means.²⁰¹ In this way, damages reflect private law’s mode of social ordering, based on fair terms of interaction.²⁰²

An important postulate of this system of remedies is the idea of a market. Corrective justice posits an equivalence between right and remedy, as well as the effectiveness of monetary damages as a remedy. From this perspective, such damages must be capable of serving as substitutes for one’s means.²⁰³ If a sum of money could not be assimilated to one’s external means and used to further one’s purposes, such as by being exchanged for external acquisitions, the remedy could not truly restore the plaintiff’s right. Such a situation would be inconsistent with the condition of public right, which purports to ensure that rights are public, systematic, and enforceable.²⁰⁴ In order to do so, a juridical idea of the market must be inherent in the system of rights, since the remedy, money, must be capable of being converted to other means of equivalent value. This attributes to the remedy an objective existence, similar to the right of which it is another

¹⁹⁷ Benson, “Equality of Opportunity,” *supra* note 17 at 219.

¹⁹⁸ Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009) at 305. See also Ripstein, *ERL*, *supra* note 186 at 58.

¹⁹⁹ Weinrib, “Public Right,” *supra* note 173 at 193.

²⁰⁰ Weinrib, *CJ*, *supra* note 4 at 87.

²⁰¹ Ripstein, *PW*, *supra* note 4 at 252.

²⁰² See Ripstein, *ERL*, *supra* note 186 at 49.

²⁰³ Weinrib, *CJ*, *supra* note 4 at 95.

²⁰⁴ See *ibid* at 110-12.

form.²⁰⁵ Valuation, in turn, depends on the existence of a “community of exchange,” in the form of the market.²⁰⁶

The relevant conception of the market expresses the juridical personality of the transacting individuals.²⁰⁷ In the condition of public right, the abstraction from persons’ needs, wishes, or advantage intrinsic to the juridical standpoint takes on a new, constitutive dimension. Under a system of rights, this abstraction has a universalizing character, in that all participants are reciprocally and formally related to one another. They are taken to exist and interact together in a form of civil society, in virtue of their common possession of wants and needs, though each person’s *particular* wants and needs are different.²⁰⁸ That is, the fact that abstract persons transact with one another to satisfy their particular, concrete needs constitutes the juridical market as a purely horizontal ordering of interpersonal relations. As part of this ordering, they recognize themselves “as persons with particular and separate interests that they viewed as their own and wanted to pursue.”²⁰⁹ As such, the juridical conception of markets has both an impersonal and omnilateral feature. It is a distinctive normative space, a “*universality* appropriate to the relations between concrete persons pursuing their *separate* interests and particular ends.”²¹⁰

This market is an abstract, universalizing form of relations immanent in public right. Given the equivalence between money and means that corrective justice posits, the market can itself be considered as a kind of means for the pursuit of one’s purposes. Tort law, supplemented by considerations of systematicity, serves to uphold this mode of ordering. In this manner, public right informs the content of the “right to trade.” When a person deliberately targets another “through the instrumentality of unlawful acts against a third party,”²¹¹ she imperils this mode of ordering. This act implicates the plaintiff’s right to trade, which embodies a relation of status as an equal participant under this conception

²⁰⁵ See *ibid* at 198.

²⁰⁶ See Jean-Philippe Deranty, “Hegel’s Social Theory of Value” (2005) 36:3 *The Philosophical Forum* 307 at 310.

²⁰⁷ See Ripstein, *PW*, *supra* note 4 at 177.

²⁰⁸ See GWF Hegel, *Hegel’s Philosophy of Right*, translated by TM Knox (Oxford: Oxford University Press, 1952) at §192.

²⁰⁹ John Rawls, *Lectures on the History of Moral Philosophy* (Cambridge: Harvard University Press, 2000) at 345.

²¹⁰ *Ibid* at 346 [emphasis added].

²¹¹ *AI Enterprises*, *supra* note 25 at para 78.

of markets. Public right attributes to everyone an equal status to participate in the juridical market and refuses to legitimize acts that deliberately frustrate the operation of the market.

From this status flows certain rights and duties, which reflect the fair terms of interaction under its form of private ordering. In Lord Lindley's words, the impersonal form of market relations entails a person's "liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people."²¹² This statement captures two features essential to the juridical conception of markets. These two rationales underpin the right to trade, a right that applies equally to all and places a party, as Bowen LJ stated, "at no special disadvantage as compared with others."²¹³ First, as discussed, market relations are impersonal. Persons participate in the market to exchange their means, and their particular, separate, inward purposes are relevant only insofar as each person's means are a proxy for those purposes.

Second, persons must be able to enjoy their holdings, proprietary and contractual, securely. This presupposes that persons can engage in commercial relations against a general background of lawful interaction. As Deakin and Randall note, the market is embedded in rules of the common law.²¹⁴ For instance, private law recognizes the freedom that owners of property have "to enjoy the bargaining position that another's preferences independently produce," but not to any specific object of their desires or to exercise jurisdiction over the means of another.²¹⁵ The valuation of means, and the effectiveness of a remedy, that corrective justice presupposes are only possible where persons' holdings and transactions are made reliably secure under a public regime of laws. The unlawful means tort responds to an attempt to subvert the terms of fair interaction. It prevents a defendant from exploiting the omnilateral form of the market, by

²¹² *Quinn v Leathem*, *supra* note 1 at 534.

²¹³ *Mogul Steamship (C.A.)*, *supra* note 165 at 614.

²¹⁴ Deakin & Randall, *supra* note 166 at 528.

²¹⁵ Larissa Katz, "Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right" (2013) 122 *Yale LJ* 1444 at 1468; Benson, "Equality of Opportunity," *supra* note 17 at 211.

injuring a third party, to deny others the equal freedom to pursue their purposes and ends.²¹⁶

Equality of Opportunity and the Right to Trade

As a matter of public right, a court preserves rights and remedies as markers of freedom by upholding the form of relations appropriate to the market. In my view, the protection of the integrity of the juridical market is the justification for the unlawful means tort. A person who commits an independently actionable wrong against a third party, with the intention to target another, disrupts this mode of social ordering. The systematicity of a condition of public right attributes to each person an equal status to participate in the juridical market. When the cause of action is established, the court awards damages commensurate to the plaintiff's economic injury, which restores to her the factual, pecuniary incidents of the right that she had lost. In this sense, everyone has an equal opportunity to utilize and exchange one's means in the pursuit of her own purposes. The right to trade embodies that status and is correlative to a duty not to abuse the right, a duty "to leave them in the undisturbed enjoyment of their liberty of action."²¹⁷

As such, it is not a "classically delineated" private right—a right to one's reputation, bodily integrity, or property—but a right with a public element.²¹⁸ This proposed account of the unlawful means tort does not imply acceptance of a *prima facie* tort. It is not founded on the unjustified infliction of economic loss, but rather, the interference with the equal status of juridical persons under public right. In truth, the imposition of liability to uphold rights with public elements is not unknown to private law. The common law has long acknowledged the existence of a "law of the realm," which imposes duties on members of certain professions toward the public.²¹⁹ For example, the "common calling" cases and

²¹⁶ See Ripstein, *PW*, *supra* note 4 at 171.

²¹⁷ *Quinn v Leathem*, *supra* note 1 at 537.

²¹⁸ Neyers, "Economic torts," *supra* note 42 at 183.

²¹⁹ Amnon Reichman, "Professional Status and the Freedom to Contract: Toward a Common Law Duty of Non-Discrimination" (2001) 14:1 *Can JL & Jur* 79 at 90 ["Professional Status"].

cases involving property “affected with a public interest,” fall within this category, articulating qualifications on the scope of private rights.²²⁰

Such duties are not strictly contractual, but “are akin to obligations which flow from assuming a status.”²²¹ In the case of a common calling, the profession is non-associational in nature, in that it is “constituted around transactions with abstract customers,” or customers who are not conceptualized in terms of their personal characteristics. As Reichman argues, certain professions, such as innkeepers and common carriers, by their nature cannot simply pick and choose their customers. They hold themselves out as serving the general public, carrying on business in an impersonal manner.²²² The ideal of publicness and orientation toward an abstract customer is a constitutive, and not merely regulative, feature of those professions. Just as membership in a profession entails status-based obligations, the juridical market confers an equal status on all participants, which gives rise to the right to trade.

By protecting this status, the unlawful means tort can be said to protect a kind of equality of opportunity. In this vein, it has been suggested that the tort operates to delineate the boundaries between legitimate and illegitimate competition, thereby “maintain[ing] the integrity of the competitive process.”²²³ From the juridical standpoint, however, the tort’s function is basic and formal, as opposed to substantive. In my view, it simply ensures that persons are afforded an equal opportunity to endeavour to carry on trade or business within a structure of “basic standards of civilised behaviour in economic competition” that,²²⁴ at least from the perspective of private law, secures for everyone a means of impersonal exchange. No person can employ unlawful means to deprive another of their status, or formal opportunity to participate in the market. The rights and duties accruing from a status are not purely private, in that they do not arise as a normative incident of juridical personality alone.²²⁵ The right to trade considers persons “as members of civil society, that individuals are recognized as vested

²²⁰ Amnon Reichman, “Property Rights, Public Policy and the Limits of the Legal Power to Discriminate” in Dan Friedmann, ed, *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) 245 at 248-52.

²²¹ Reichman, “Professional Status,” *supra* note 219 at 81, 117.

²²² *Ibid* at 115, 118 [internal quotation marks omitted].

²²³ Deakin & Randall, *supra* note 166 at 528-29, 532.

²²⁴ *OBC*, *supra* note 19 at para 56.

²²⁵ See Reichman, “Professional Status,” *supra* note 219 at 127.

with this equal right.”²²⁶ In other words, it presupposes the existence of a collectivity, or the “integrating conception of a people” under public right.²²⁷ Despite this quasi-public dimension, the unlawful means tort provides a basis for formal equality of opportunity that is ultimately compatible with the theory of corrective justice.²²⁸

APPLYING THE ABUSE OF RIGHT THEORY

Unlawful Means

Because the juridical market constitutes an omnilateral relationship between persons, rather than between the individual and the state, the right to trade pertains only to interpersonal wrongs. In consequence, the right to trade is implicated only when a person’s capacity to independently pursue her purposes is interfered with by an independently actionable wrong. In this manner, the justification for the unlawful means tort differs somewhat from the “fair competition” rationale advanced by others. Kain and Alexander, for instance, analogize the market to a “game” where liability is imposed for “cheating” the competitive rules.²²⁹ Although the market and a “game” might resemble each other, the latter is different in that it presupposes the existence of a higher norm, above the players, that governs fair play. The relationship between the putative player and the notional authority that determines “the rules of a game,”²³⁰ such as an umpire or the Competition Bureau, is vertical and bilateral, rather than horizontal and omnilateral. The “cheating” theory of the tort, then, only approximates the form of relations constituted by public right.

As Cromwell J has also noted, “[i]f the primary purpose of the tort were to uphold the institution of market competition, it would be irrelevant whether the interference was intentional or negligent,” since presumably, parties could unknowingly engage in anti-competitive or externality-creating behaviour.²³¹ On

²²⁶ Weinrib, “Public Right,” *supra* note 173 at 197; Benson, “Equality of Opportunity,” *supra* note 17 at 234.

²²⁷ Weinrib, “Public Right,” *supra* note 173 at 197.

²²⁸ See Benson, “Equality of Opportunity,” *supra* note 17 at 243.

²²⁹ Kain & Alexander, *supra* note 94 at 171.

²³⁰ *Ibid* at 172.

²³¹ *AI Enterprises*, *supra* note 25 at para 42; Deakin & Randall, *supra* note 166 at 530.

my proposed account, the tort has a less ambitious role. Tortious liability is not responsive to the internal needs or wishes of competitors, nor to the maximization of market competition. Rather, it simply ensures a formal opportunity to transact as a juridical person equal in standing to others. In contrast, if the fair competition rationale were accepted, it would be counterproductive to maintain the intention element of the tort. To do so would generate the seemingly perverse result that “a defendant will be protected from liability by his own ignorance . . . or even stupidity.”²³² On the grounds of fit and coherence, these considerations militate against the view that the economic torts serve to optimize the competitive features of the market.²³³

Moreover, to broaden the unlawful means element beyond the requirement of an interpersonal wrong would potentially assimilate private law disputes to distributive functions. Such an approach is contrary to the corrective justice understanding of private law adjudication. As the Privy Council aptly observed in a conflict of laws case:

All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the state law, as well as against individuals who may be injured by their misconduct.²³⁴

Thus, much of the regulation of competition belongs to the distributive function of the legislature, which acts for the community. Recognition of this difference between common law and legislated rights explains the concerns about “tortifying” the criminal law. Lord Hoffmann, for example, warned of creating liability for “something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant,” and hence is not an interpersonal wrong.²³⁵

²³² Deakin & Randall, *supra* note 166 at 539.

²³³ *Contra* Carty, “Modern Functions,” *supra* note 2 at 277.

²³⁴ *Huntington v Attrill*, [1893] AC 150 at 157 (PC).

²³⁵ *OBG*, *supra* note 19 at para 59.

It may be tempting to object that it is “passing strange that a breach of contract should be proscribed but not a crime” under the unlawful means tort.²³⁶ However, this argument erroneously presupposes that any criminal activity is more wrongful than an actionable civil wrong. To the contrary, conduct is often proscribed by the criminal law on the basis of a legislative judgment made from “a general social perspective,” that is to say, a perspective of distributive justice.²³⁷ While the unlawful means tort is confined to economic relationships, it is not concerned with distributive purposes.

As I have argued, the underlying justification of the unlawful means tort is that it secures to each person their equal status in the juridical market, which is constituted by public right. The community of interaction constituted by public right is an interpersonal ordering that “relates each person to every other person.”²³⁸ The requirement that the unlawful means be visited upon a third party reflects the tort’s purpose, which is to respond to an attempt to undermine this omnilateral form of relations through the mechanisms of the market itself. The narrow scope given to the unlawful means element accords with this account. Since public right adds, but does not substitute, “a new principle of decision” or a “layer of analysis” to private rights,²³⁹ it does not purport to expand the scope of tortious liability on the basis of distributive considerations. Those considerations, which are extrinsic to the relations between the subjects of public right, are the domain of the legislature rather than the court.

Intention

At the same time, it is insufficient for liability that an independently actionable wrong occurs to the third party. Unless a defendant determines to target the plaintiff, a violation of the right to trade has not occurred, because it cannot be said that he has transformed the structure of the market into an instrument of subordination.²⁴⁰ The abuse of rights theory views the subversion of the plaintiff’s equal status in the market as the wrong. Because the juridical

²³⁶ *Ibid* at para 152.

²³⁷ Bagshaw, *supra* note 20 at 77.

²³⁸ Weinrib, “Public Right,” *supra* note 173 at 197, 205.

²³⁹ *Ibid* at 200, 205.

²⁴⁰ *Cf* Weinrib, *CJ*, *supra* note 4 at 114.

market is an ordering of impersonal relations, the plaintiff's right protects her status to transact impersonally with others, without their regard for her particular purposes or identity. For this reason, liability only accrues where the defendant possesses the intention to target the plaintiff. In employing unlawful means against a third party with this intention, the defendant has singled out the plaintiff in a manner inconsistent with the impersonal quality of the juridical market: the defendant acts to visit harm upon *this particular* person.

Seen in this light, the account supports Lord Hoffmann's distinction in *OBG* "between ends, means and consequences."²⁴¹ The wrongfulness of the defendant's action is found not in any personal animus against the plaintiff, but rather in the commitment to the purpose of striking at him; mere negligence or foreseeability of loss does not posit an inconsistency between the defendant's freedom and the right to trade of others.²⁴² Indeed, since corrective justice understands liability as a response to an interpersonal wrong, the identity of the particular plaintiff and defendant are always relevant. In this sense, it is coherent to theorize the intention element as involving the targeting of a specific, identifiable person.²⁴³ As Beever suggests, it is not that "the defendant must target *the harm* to the plaintiff . . . [but] that the defendant must target the plaintiff" through the unlawful means.²⁴⁴ The existence of this intention can be determined objectively, by asking whether it manifests to a reasonable person a singling out of the plaintiff. Furthermore, because the element of intentionality does not require "balancing" the public utility of the defendant's act against the plaintiff's interests, the imposition of liability is judicial and not legislative.²⁴⁵

On this account, it is apparent that the role of the intention element is neither a remoteness-bridging device nor an ingredient of liability stretching. It does not prop up a cause of action for an existing wrong, so to speak, but forms part of the defendant's wrongful conduct against the plaintiff itself. A full appreciation of Lord Lindley's reasons in *Quinn v Leathem* supports this refined view. He stated that if the plaintiff "is wrongfully and *intentionally* struck at through

²⁴¹ *OBG*, *supra* note 19 at para 62.

²⁴² See Ripstein, *PW*, *supra* note 4 at 171.

²⁴³ See Allan Beever, "Transferred malice in tort law?" (2009) 29:3 LS 400 at 408.

²⁴⁴ Beever, *ATTL*, *supra* note 40 at 131 [emphasis in original].

²⁴⁵ Benson, "Equality of Opportunity," *supra* note 17 at 239, 241-42.

others,” the “damage is *not remote* or unforeseen.”²⁴⁶ But while Stilitz and Sales relied on this statement to justify their theory, the passage in *Quinn v Leathem* in fact emphasizes the plaintiff’s rights:

. . . the whole aspect of the case is changed: the wrong done to others reaches him, *his rights are infringed* although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done.²⁴⁷

Read more fully, it strongly suggests he held that remoteness was overcome by reason of the infringement of the right, rather than intention alone. Of course, this approach is consistent with the account based on the right to trade.

Incidentally, this understanding of the tort explains its confinement to the domain of economic relationships. The right to trade is an embodiment of the plaintiff’s equal status under the juridical conception of markets. In the case of family or social relationships, the persons involved do not relate to each other as abstract individuals, but as individuals with particular desires and ends. Such relationships cannot properly be characterized as omnilateral or impersonal. Therefore, no breach of the right to trade can be invoked in these contexts. The significance of the commercial context also provides good reason to believe that Lord Hoffmann was correct to be especially concerned “not only with the legal quality of the unlawful means . . . but also with their *effect in interfering with a third party’s freedom of economic action*.”²⁴⁸ In contrast, Cromwell J dismissed the relevance of this “freedom to deal” qualification because he perceived it purely as an instrument to limit the scope of the tort; he considered that the unlawful means element sufficed to limit liability.²⁴⁹ Although it has been criticized as irrelevant to “the rationale for imposing liability,” the rights-based theory of the tort offered here accounts for the role of the “freedom to deal” element.²⁵⁰

²⁴⁶ *Quinn v Leathem*, *supra* note 1 at 535 [emphasis added].

²⁴⁷ *Ibid* [emphasis added].

²⁴⁸ *Total Network*, *supra* note 23 at para 99, citing *OBG*, *supra* note 19 at paras 51-58 [emphasis added].

²⁴⁹ *AI Enterprises*, *supra* note 25 at para 87.

²⁵⁰ *Ibid*.

CONCLUSION

This paper has argued that a fuller specification of the abuse of rights theory provides a coherent account of the tort of unlawful interference with economic relations, and moreover, that the tort is compatible with corrective justice. From that perspective, the tort appeared to be problematic due to the unclear role of the plaintiff's right, the predominant focus on the defendant's purposes, and the suggestion that it reflects considerations of distributive justice. Having reviewed various proposed justifications for the tort, I contended that the most promising approach was the abuse of rights theory and its invocation of the idea of a system of rights. This paper developed the conception of public right, remedies, and the juridical market in order to fully specify the right underlying the tort.

In virtue of the continuity of rights and remedies, a juridical conception of markets is immanent in the corrective justice outlook. The unlawful means tort protects the plaintiff's right to trade, a right flowing from a person's equal status in the juridical market. On this account, it is evident that the tort does, in fact, accord with the normative presuppositions of corrective justice. First, the right to trade underlies the triangular form of the tort, since it responds to the defendant's wrong against the plaintiff and not a third party. Second, the right-duty relationship that inheres in the tort is consistent with the correlative nature of liability. The defendant's intention to target, or single out, the plaintiff through the instrumentality of a third party forms an articulated unity with the plaintiff's capacity to transact impersonally in the condition of public right. Finally, this account justifies the scope of the unlawful means element on the basis of norms of horizontal ordering, rather than on considerations of distributive justice. It is submitted, then, that corrective justice does contain the normative resources to explain the tort of unlawful interference with economic relations.