STEAMPUNK LIABILITY: CONSPIRACY TO HARM AND THE DIVERSITY OF LEGAL TRADITIONS WITHIN THE COMMON LAW OF TORTS

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Abstract

The tort of conspiracy to harm, which assigns liability expressly on the basis of the defendants' malicious motive, continues its anomalous existence, having outlived repeated unsuccessful attempts by senior common law courts to explain and justify its operation. Part I of this paper offers an overview of conspiracy to harm jurisprudence from its modern birth in *Mogul Steamship* to *Lonrho*. Part II argues that, despite efforts to develop justifications for the tort's existence over the last century, conspiracy to harm has been expressly recognized for the last four decades as both unjustifiable and an immovable fixture of Anglo-Canadian tort law. This understanding had, until recently, discouraged extension of the tort's anomalous principles of liability to other areas of English tort law. Part III considers a consequent shift in conspiracy to harm jurisprudence which has extended the tort's anomalous principles to unlawful means conspiracy, a superficially similar, but substantially distinct, tort. Part IV suggests the possibility that, rather than an inexplicable anomaly, conspiracy to harm might more accurately be thought of as a legal anachronism, a contemporary tort powered by a distinct body of normative principles left behind by the common law over a century ago. Recognizing that this category of tort liability is, unlike the balance of Anglo-Canadian tort law (and unlawful means conspiracy in particular), anchored in the distinct legal tradition of a different time highlights, and explains, the conceptual singularity of conspiracy to harm. On this understanding, rather than a source of conceptual entropy within the contemporary Anglo-Canadian law of torts, conspiracy to harm is recognized for what it is: a unique vestige of a distinct understanding of interpersonal liability, now all-but-extinct, but preserved within the broader structure of the common law of torts.

Introduction

Ordinarily, subjective motive or purpose is understood as playing no role in the assignment of private liability at common law. As one commentator put it, "the law focuses exclusively on what the defendant was doing, either using or touching something belonging to another, or damaging something belonging to another in the

course of doing something else."[1] The tort of conspiracy to harm, together with a small number of other tort doctrines,[2] stands out as exceptional in this context. This marginal component of modern Anglo-Canadian tort law assigns liability to concerted conduct that is intended to harm another on the basis of the wrongful motive of the conspirators and that succeeds in doing so. It is, perhaps, the tort's enduring anomalous status that has prompted the House of Lords to make several distinct efforts to explain its existence since the late 19th century. Since 1981, however, it seems to have stopped trying.[3] The acceptance of conspiracy to harm as anomalous and inexplicable has produced two distinct but equally problematic responses. Both responses result from a failure to recognize the distinction between conspiracy to harm and the superficially similar, but theoretically distinct, tort of unlawful means conspiracy. Unlawful means conspiracy assigns liability to all conspirators who have agreed to undertake a course of action harmful to the defendant which is advanced by unlawful means, regardless of their actual purpose in doing so and regardless of how many (or few) of the conspirators actually employ the agreed-upon unlawful means.[4]

The Supreme Court of Canada, in *Canada Cement LaFarge Ltd v B.C. Lightweight Aggregate Ltd*,[5] recognized conspiracy to harm as a "commercial anachronism"[6] of questionable utility, but nonetheless extended its perplexing reliance on wrongful intention to circumstances previously captured by unlawful means conspiracy. Contrast this with England, where Lord Neuberger suggested in *Revenue and Customs Commissioners v Total Network SL*[7] that unlawful means conspiracy should be developed by analogy to the principles of conspiracy to harm. This paper argues that these decisions, both of which will hinder the future principled development of unlawful means conspiracy through inappropriate linkage to conspiracy to harm, flow from a widespread failure to recognize conspiracy to harm

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[1] Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016) at 159.

[2] This tort is variously labelled lawful means conspiracy, conspiracy to injure, predominant purpose conspiracy, and, in the occasional Canadian case, conspiracy to harm. See *Roman Corp v Hudson's Bay Oil and Gas Co*, [1973] SCR 820, 36 DLR (3d) 413. For conceptual clarity, this paper favours the last of these. Other torts sharing this exceptional corner of the common law of torts include, *inter alia*, malicious falsehood, private nuisance (of the sort described in *Hollywood Silver Fox Farm v Emmett*, [1936] 2 KB 468, 1 AII ER 825, slander to title, and, in the author's view, the defamation torts.

[3] See *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)*, [1982] AC 173, 2 AII ER 456 [*Lonrho*].

[4] *Lonrho Plc v Fayed*, [1992] 1 AC 448 at 465–466, 3 AII ER 303 [*Fayed*].

[5] [1983] 1 SCR 452, 145 DLR (3d) 385 [*LaFarge*].

[6] *Ibid* at 473.

[7] [2008] UKHL 19, 1 AC 1174 [*Total Network*].

for what it is—a doctrinal remnant of a distinct understanding of justifiable interpersonal conduct.

While conspiracy to harm is, at this point, an entrenched anomaly in Anglo-Canadian tort law, this paper argues that it should not be seen as having no intelligible normative content. Rather, conspiracy to harm is, I suggest, a contemporary manifestation of a long-abandoned general principle of liability for the intentional infliction of harm.[8] Judicial attempts to offer substantive explanations for the existence of this doctrine have, on the contrary, ignored legally significant motive as a possible explanation for the tort's existence and operation. On those occasions in which courts have tried to justify the tort's imposition of liability, the focus has been almost exclusively on the fact that, in conspiracy to harm, the wrongfulness of any particular conduct may turn exclusively on the fact that it was undertaken in concert rather than singly. This focus on the role of combination in the tort's assignment of liability has created a circumstance in which combination is considered to be the *only* salient structural aspect of conspiracy to harm, paving the way for the drawing of inappropriate linkages with conspiracy to use unlawful means in *LaFarge* and *Total Network* solely on the basis that both torts impose liability on the basis of concerted conduct.

The argument presented here is advanced as follows: Part I provides an overview of the tort of conspiracy to harm through the House of Lords' "famous trilogy,"[9] *Mogul Steamship Co Ltd v McGregor, Gow, & Co*,[10] *Allen v Flood*,[11] and *Quinn v Leathem*.[12] These decisions have been characterized by the House of Lords as standing, collectively, for the propositions that 1) a combination of two or more persons to wilfully harm another is unlawful and, if it results in harm to that person, is actionable, and 2) if the real purpose of the combination is not to harm another, but to forward or defend the lawful interests of those who enter into it, then no wrong is committed and no action will lie, although harm to another ensues.[13] This section also briefly recounts the treatment of conspiracy to harm by the House of Lords in the milestone decisions in *Sorrell*, *Lonrho*, and *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*.[14] Part II examines the various explanatory efforts of the House of Lords in Part I, and evaluates the explanatory capacity of the two primary justificatory theories advanced in that jurisprudence, both of which flow from the tort's focus on concerted

[8] As the analysis below illustrates, the relationship between motive and intention in conspiracy to harm has been a muddy one. For the most part, it seems, the tort has come to rest on a presumption that intentional harmful conduct springs from an improper motive of some sort, placing the onus upon the defendants to prove that they acted on a proper motive.

[9] *Sorrell v Smith*, [1925] AC 700 at 712 [*Sorrell*].

[10] [1892] AC 25 [*Mogul Steamship*].

[11] [1898] AC 1, 62 JP 595 [*Allen*].

[12] [1901] AC 495, 65 JP 708 [*Quinn*].

[13] *Sorrell*, *supra* note 9.

[14] [1942] AC 435, 1 AII ER 142 [*Crofter*].

conduct. This analysis suggests that the unanimous decision in *Lonrho* that conspiracy to harm was both inexplicable and immovable paved the way for judicial missteps in both England and Canada. Part III focuses on the Supreme Court of Canada's decision in *LaFarge*, in which Estey J united the two conspiracy torts, the effect of which has been to incorporate an incongruous motive requirement into the tort of conspiracy to use unlawful means. It also explores the House of Lords' decision in *Total Network*, in which Lord Neuberger used conspiracy to harm as the analogical basis for an extension in the scope of the still-independent English tort of unlawful means conspiracy. Part IV responds to the apparent conceptual emptiness of conspiracy to harm, offering an analysis that takes seriously the role played by motive in the assignment of liability for conspiracy to harm in *Mogul Steamship*. This analysis suggests that, at its outset, the tort arose from a now-abandoned understanding of intentionally inflicted harm without just cause or excuse as wrongful in *all* contexts, whether undertaken alone or in concert with others. This position has, of course, been eroded since the House of Lords decided *Mogul Steamship* thirteen decades ago, particularly with the decisions in *The Mayor of Bradford v Pickles*[15] and *Allen*, but there is nonetheless good reason to view conspiracy to harm, on this basis, as a relic of a distinct normative order rather than an inexplicable or arbitrary singularity.

Conspiracy to harm, on this analysis, remains an abnormal basis of liability in Anglo-Canadian tort law. As a descendant of a distinct understanding of interpersonal liability foreclosed in *Allen* just five years after *Mogul Steamship*, conspiracy to harm is, I suggest, a kind of steampunk liability,[16] a vestige of a distinct form of English private ordering that has, for the most part, disappeared.[17] While difficult to reconcile with contemporary understandings of Anglo-Canadian tort liability, it is nonetheless explicable as a component of a system of private ordering that no longer exists beyond a small collection of obscure tort doctrines. Understanding conspiracy to harm as a vestige of a distinct normative tradition should discourage future efforts to close so-called 'liability gaps' between this anomalous tort and the balance of the contemporary Anglo-Canadian law of torts, the inevitable product of which would be (even more) incoherent, unprincipled, and unjustifiable limitations on interpersonal conduct.

It bears noting, at the outset, that the account below is not an attempt to justify, in a theoretical sense, the continued presence of conspiracy to harm amongst Canadian tort doctrines. Rather, it seeks to explain the tort's existence as a basis of liability in a way that permits, and even demands, such a justification. So long as

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[15] [1895] UKHL 1, [1895] AC 587 [*Pickles*].

[16] "Steampunk," in this context, refers to a contemporary genre of science fiction literature, art, and fashion combining historical and anachronistic technology and aesthetics (typified by, *inter alia*, advanced applications of steam locomotion, clockwork mechanisms, and a ubiquity of goggles, gears, and sprockets) to portray a fictional "future that never was."

[17] Although some have suggested that the time of motive-actuated liability is yet to come. See e.g. GHL Fridman, "Malice in the Law of Torts" (1958) 21 Mod L Rev 484, and Greg Bowley, "Waiting for *Donoghue*: Malice in the Law of Torts, Six Decades On" (2019) 93 SCLR 2 at 203.

conspiracy to harm retains its long-standing categorization as an inexplicable source of tort liability, the necessity of theorizing the liability it imposes is not obvious. Having made the case for conspiracy to harm as, in some way, principled, this paper leaves for the future (or for others) the task of identifying how, precisely, liability for conspiracy to harm can be theoretically reconciled with the balance of the common law of torts.

I: Nine Decades Later, No Further Ahead

The starting point of this paper is the shifting explanations offered by the House of Lords for the existence of conspiracy to harm over the last century. As illustrated below, these explanations have been derived primarily from the tort's treatment of concerted conduct. This section first reviews the three foundational cases of conspiracy to harm: *Mogul Steamship*, *Allen*, and *Quinn*. It then analyzes three subsequent decisions of the House of Lords: *Sorrell*, *Crofter*, and *Lonrho*. The treatment of each of these cases emphasizes the ways in which these courts have sought to explain and justify conspiracy to harm's anomalous existence. As such, Part I focusses on how each of these decisions treated the roles of the tort's two most salient features, concerted conduct and subjective motive. Part II will provide an integrated analysis of these explanatory efforts.

By 1843, liability for concerted harmful malevolence by otherwise lawful means had been recognized in *Gregory v Duke of Brunswick*,[18] however most conspiracy to harm jurisprudence flows from the 1892 decision of the House of Lords in *Mogul Steamship*. The plaintiff in *Mogul Steamship*, a shipping line, was the victim of a trade protection scheme organized by the defendants, its competitors in the Chinese tea trade. The defendants, through a cartel arrangement, offered price incentives to those making exclusive use of their freight services from two Chinese tea ports, and leveraged their pooled freight capacity to ensure that no competing vessel calling at either port could obtain profitable freights. The intended effect of the cartel's combined action was to make any competing service so financially unattractive as to compel a choice between carrying tea to Europe at a loss and transporting no cargo at all.

Although the House of Lords unanimously concluded that concerted conduct undertaken for the purpose of causing harm to another would be wrong even if the conduct through which that harm was inflicted would ordinarily be lawful, no liability was found on the facts. The decision of the House of Lords closely tracked Bowen

[18] [1844] 134 ER 1178 [*Gregory*]. The appropriateness of tracing the lineage of conspiracy to harm to *Gregory* has been challenged by Newark, but his objection to this treatment was simply that conspiracy played no role in making the conduct of the conspirators wrongful – "[t]o hoot as an expression of malevolence towards an actor for reasons unconnected with the performance is actionable. For two or more to conspire to hoot is clear evidence that the subsequent hooting is not a spontaneous expression of a judgment but the result of a pre-arranged demonstration of malevolence. Each conspirator is liable, not because he conspired, but because he has proved his malice." See FH Newark, "*Gregory v Duke of Brunswick* Re-Examined" (1959) 1 U Mal L Rev 111 at 119.

LJ's opinion in the Court of Appeal, which was expressly approved by Lords Watson, Morris, and Field, and stipulated that "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."[19] This was the primary distinction between the facts in *Mogul Steamship* and earlier decisions such as *Gregory*; while the defendants in *Gregory* had acted for no reason other than to cause the plaintiff harm, the defendants in *Mogul Steamship* were found to have acted exclusively to advance their own commercial interests. A commercial motive such as that which motivated the cartel's conduct was sufficient, in Bowen LJ's mind, to justify their intentional infliction of harm upon the plaintiff.[20]

Only five years after the House of Lords' decision in *Mogul Steamship*, the decision in *Allen* rendered conspiracy to harm the conceptual oddity it now is. In *Allen*, the defendant, a trade union representative, was found by the jury to have maliciously and intentionally caused harm to the plaintiffs by communicating to the plaintiffs' employer that union members employed at the same location would decline work unless the plaintiffs, members of a different trade union who had previously performed work reserved for the defendant's trade union, were dismissed. Importantly, none of the employees in *Allen* worked pursuant to ongoing contracts; all were retained on a day-to-day basis, and, as such, could rightfully depart, or be dismissed from, their positions at the conclusion of any workday without any breach of contract. The action in *Allen* arose when the plaintiffs were dismissed in response to the demands communicated by the defendant.

Lord Watson, whose opinion in *Allen* was later described as representing "the views of the majority better far than any other single judgment delivered in the case,"[21] stated that "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 for which reparation is due."[22] Therefore, the defendant's communication of his members' resolve to their employer could not become wrongful merely because it was done for the sole purpose of causing harm to the plaintiffs. While this was certainly the crux of the position taken by the majority in *Allen*, it also stands in sharp contrast to the basis of liability previously outlined by a unanimous panel of the House of Lords in *Mogul Steamship*, the majority of whom (including Lord Watson) later heard the appeal in *Allen*. Importantly, several members of the majority in *Allen* expressly excluded circumstances of concerted conduct from their opinions, leaving some doubt as to the status of the tort previously considered by the House of Lords in *Mogul Steamship*.

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[19] *Mogul Steamship Co v McGregor, Gow, & Co*, [1889] 23 QBD 598, 53 JP 709 at 613 [*Mogul Steamship 1889*]. Bowen LJ's reasons in *Mogul Steamship* have gone on to form the basis of the so-called "prima facie tort" in American law, which has been characterized as a tort that "acknowledges a general right not to be intentionally harmed." See Geri Shapiro, "The Prima Facie Tort Doctrine: Acknowledging the Need for Judicial Scrutiny of Malice" (1983) 63:4 BUL Rev 1101 at 1114.

[20] *Mogul Steamship 1889*, *supra* note 19 at 614–15.

[21] *Quinn*, *supra* note 12 at 509.

[22] *Allen*, *supra* note 11 at 92.

Just over three years after the decision in *Allen*, the third case of "the famous trilogy"[23] came before the House of Lords. Unlike *Allen*, where the defendant trade union representative had acted alone, the defendants in *Quinn* were found to have acted in combination solely to cause harm to the plaintiff.[24] Notwithstanding the *Quinn* panel's extensive familiarity with the decisions in *Mogul Steamship* and *Allen*,[25] the meaning of *Quinn* is difficult to discern.[26] Of the six members of the *Quinn* panel, three (Lords Macnaghten, Robertson, and Lindley) thought the Court of Appeal's decision in *Temperton v Russell*[27] had determined that liability would arise from conspiracies to cause harm by lawful means, while the other three (Lords Shand and Brampton and Lord Halsbury LC) did not mention that decision. In fact, the Lord Chancellor had mentioned only one authority, *Allen*, and only to say that it did not apply to the facts in *Quinn*.[28] Lord Shand mentioned only *Allen*, which he distinguished, and *Mogul Steamship*, which he thought expressed the applicable law.[29] Lord Brampton seems to have found liability on two distinct bases: the first, derived from *Mogul Steamship*, involved interference with a general right of all to "trade upon what terms they will," while the second consisted of harms arising from unlawful conspiracies.[30] Suffice it to say, *Quinn* is probably authority for the continued existence of the tort discussed in *Mogul Steamship* after the decision in *Allen*, but not for more.

The House of Lords' first effort to distil the jurisprudential meaning of the trilogy came in *Sorrell*. The most interesting aspect of *Sorrell*, for the purpose of this paper, is the disagreement among the members of the panel as to the respective roles of motive and combination in conspiracy to harm. Viscount Cave LC and Lord Atkinson, for example, acknowledged that liability for conspiracy to harm arose from the wilful and knowing infliction of harm, but denied that either subjective spite or the

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[23] *Sorrell*, *supra* note 9 at 712.

[24] *Quinn*, *supra* note 12 at 521-22.

[25] The overlap among the judges who decided the trilogy is noteworthy. The nine-member *Allen* panel included four of the seven members of the *Mogul Steamship* panel. The *Quinn* panel of six judges included three members of the *Allen* panel, two of whom had also heard *Mogul Steamship*. Another member of the *Quinn* panel, Lord Brampton, had been (as Hawkins J) one of the eight High Court Justices summoned to assist the House of Lords in *Allen*. Lord Davey, who read three of the opinions in *Quinn* (without, apparently, rendering one of his own [See *Total Network*, *supra* note 7 at para 72]), had both been a member of the *Allen* panel and represented the defendants in *Mogul Steamship* at the House of Lords. Lord James, another member of the *Allen* panel, had represented the plaintiff in *Mogul Steamship* at the House of Lords.

[26] Lord Walker, in his opinion in *Total Network*, *supra* note 7 at para 73, felt justified in suggesting that "[t]he House [of Lord]s' anxiety to explain why *Allen v Flood* was not in point makes it quite difficult to discern what *Quinn v Leathem* did decide."

[27] [1893] 1 QB 715, 57 JP 676 [*Temperton*].

[28] *Quinn*, *supra* note 12 at 506.

[29] *Ibid* at 513.

[30] *Ibid* at 525 and 531.

fact of combined conduct were prerequisites of this kind of liability.[31] Lord Dunedin, with whom Lord Buckmaster broadly agreed, thought concerted conduct to be an essential element of the tort, as civil liability of this sort arose, in his mind, from the criminal prohibition of conspiracies. Motive was, on this analysis, relevant to the assignment of liability to the extent that *mens rea* would be an essential component of a criminal conspiracy.[32] Lord Buckmaster's preferred approach would, he noted, shift the burden of proof from the defendants to the plaintiff, such that concerted harmful conduct would give rise to liability only where the plaintiff could prove it to have been spiteful and maliciously inflicted, rather than requiring defendants to make out a defence of self-interest.[33] In Lord Sumner's view, the only possible explanation for how a defence of self-interest (of the sort that had been determinative in *Mogul Steamship*) could prevent imposition of the kind of liability found in *Quinn* was that the intentional infliction of harm was, in a legally significant sense, unavoidably the product of malice or selfishness.[34] The only way that self-interest could justify the intentional infliction of harm, Lord Sumner suggested, would be if the malicious infliction of harm was unjustifiable. Lord Sumner concluded that motive, in this sense, played an obviously crucial role, but the role of combination was not as obvious: "[w]hatever part combination may really play in the decision of *Quinn v Leathem*, I hesitate to say that this element alone would have sustained the verdict in the absence of evidence of actual illwill."[35]

By the time the House of Lords decided *Crofter* in 1941, England's most senior jurists were evidently becoming comfortable with conspiracy to harm as an inexplicable fixture in English tort law. While each of Viscount Simon LC,[36] Viscount Maugham, Lord Wright, and Lord Porter[37] thought that there was something uniquely wrongful about harm intentionally inflicted through concerted conduct, none offered a clear explanation of the nature of that unique wrongfulness. Each of Lord Wright, Lord Porter, and the Lord Chancellor referred to the same two competing explanations of the wrongfulness of combinations, being the oppressive potential of concerted conduct and the historical criminality of conspiracies, but none took a definitive stance on the issue. Viscount Maugham also alluded to combinations as potentially oppressive, but similarly refrained from offering a definitive justification for the tort's existence. Remarkably, Lord Wright found himself able to confidently state that "it is

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[31] *Sorrell*, *supra* note 9 at 714.

[32] *Ibid* at 725–26.

[33] *Ibid* at 748. It is, however, worth noting that Lord Buckmaster thought such a shift in onus would nonetheless reach "the same goal" as did the reverse onus, albeit by "another path."

[34] Or, as Lord Sumner noted derisively, "mere irresponsible wantonness" (*ibid* at 739).

[35] *Ibid* at 741.

[36] Who had, together with Viscount Maugham, represented the appellant in *Quinn.*

[37] The rather cursory reasons provided by Lord Thankerton, the fifth member of the panel in *Crofter* (and whose father, Lord Watson, had been a member of the panels in both *Mogul Steamship* and *Allen*), made no effort to explain or justify conspiracy to harm as a basis of tort liability.

in the fact of the conspiracy that the unlawfulness [of a conspiracy to harm] resides,"[38] but was unable to specify the nature of that unlawfulness, accepting that "[w]hatever the moral or logical or sociological justification, the rule is as well established in English law as I here take to be the rule that motive is immaterial in regard to the lawful act of an individual."[39]

By 1981, it seems, no appetite remained for suggestions that the tort of conspiracy to harm must rest on some principled basis. In *Lonrho*, the House of Lords was asked to determine whether a combination to perform an unlawful, but not tortious, act harmful to the plaintiff could give rise to liability in conspiracy to harm in the absence of a shared intention to cause harm to the plaintiff. In other words, could the *unlawfulness* of conduct not intended to cause harm to the plaintiff stand in for the traditional requirement of an intention to cause harm? Speaking for a unanimous panel, Lord Diplock identified the fact of concerted conduct as the single aspect of conspiracy to harm requiring explanation, wondering "[w]hy should an act which causes economic loss to A but is not actionable at his suit if done by B alone become actionable because B did it pursuant to an agreement between B and C?"[40] Despite the express invitation to opine on the role of motive in the tort's assignment of liability, Lord Diplock demurred, preferring to frame his reasons around another consideration: coherence.

Identifying conspiracy to harm as a "highly anomalous cause of action,"[41] that was "too well-established to be discarded however anomalous it may seem today,"[42] Lord Diplock indicated that he viewed his choice as between the extension of an anomalous principle of liability to novel circumstance and confining it "to the narrow field to which alone it has an established claim."[43] Following the decisions of the Court of Appeal and Parker J, Lord Diplock "unhesitatingly" opted for the latter course, refraining from extending "this already anomalous tort beyond those narrow limits that are all that common sense and the application of legal logic of the decided cases require."[44] In doing so, Lord Diplock recognized that, while he could not excise the anomalous principles of liability embedded in conspiracy to harm from the common law, he need not be the catalyst of its extension.

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[38] *Crofter*, *supra* note 14 at 462.

[39] *Ibid* at 468. Lord Porter found himself in a similar position; after an inconclusive review of several potential explanations for the existence of conspiracy to harm, he simply noted at 489 that "[i]n any case it is undoubted law."

[40] *Lonrho*, *supra* note 3 at 188.

[41] *Ibid*.

[42] *Ibid* at 189.

[43] *Ibid*.

[44] *Ibid*.

It should be noted at this point that, while the decision in *Lonrho* dealt exclusively with the tort of conspiracy to harm, and not unlawful means conspiracy, Lord Diplock's reasons reflect a regrettable looseness in language, the result of which was a decade of confusion as to whether the latter tort existed at all. The decision in *Lonrho* has been described as appearing to eliminate the possibility of such liability for the concerted use of unlawful means by requiring *all* civil liability for conspiracy to flow exclusively from an intent to inflict harm upon the plaintiff. [45] While this state of confusion seems to require a very strict (and, with respect, non-contextual) reading of Lord Diplock's declaration of opposition to "extending the scope of civil tort of conspiracy [*sic*] beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff,"[46] the immediate post-*Lonrho* environment seemed to be one in which the existence of two distinct conspiracy torts was, for the first time since *Allen*, in doubt. And, although the place of unlawful means conspiracy in English law would subsequently be confirmed by the House of Lords in *Lonrho plc v Fayed*,[47] it was in the conceptual haze of the period immediately after *Lonrho* that the Supreme Court of Canada took up the issue in *LaFarge*.

II: Conspiracy Theories

As Part I above illustrates, most efforts to explain and justify the existence of conspiracy to harm as a basis of private liability have focussed on concerted conduct as the source of the tort's anomalous character. The most striking feature of conspiracy to harm, in this respect, is typically identified as the fact that it renders wrongful concerted conduct which, if undertaken by a single actor, would be rightful. Broadly put, the efforts to explain this phenomenon have focused on two putative justifications, the "oppressive combination" justification and the "criminal conspiracy" justification. *Mogul Steamship* seems to be the anchor point for what is referred to here as the "oppressive combination" justification for conspiracy to harm. Lord Hannen's reasons in *Mogul Steamship*, for example, suggested that there were "some forms of injury which can only be effected by the combination of many."[48] Lord Bramwell also made reference to this explanation, indicating that "a man may encounter the acts of a single person, yet not be fairly matched against several."[49] The oppressive combination justification was later echoed, *inter alia*, in the reasons of Lord Macnaghten in *Allen*[50]

[45] Trevor Guy & Daniel Del Gobbo, "Understanding the Anomalous: The Law of Civil Conspiracy" (2013) 42:1-2 Adv Q 143 at 148.

[46] *Lonrho*, *supra* note 3 at 189.

[47] *Fayed*, *supra* note 4.

[48] *Mogul Steamship*, *supra* note 10 at 60.

[49] *Ibid* at 45.

[50] *Allen*, *supra* note 11 at 153.

and *Quinn*,[51] Lords Brampton[52] and Lindley[53] in *Quinn*, Lord Dunedin in *Sorrell*,[54] and Viscount Maugham[55] in *Crofter*.

The oppressive combination justification for the tort of conspiracy to harm seems to suggest that the tort is grounded in a unique (from a private law perspective) kind of wrongfulness made possible only by concerted conduct. It attempts to look behind the mere existence of the cause of action to one of its distinguishing elements—combination—and proposes a justification for the assignment of liability on that basis. According to this explanation, combined conduct attracts liability where individual conduct does not because the concerted efforts of a multitude cannot be met on an equal footing by their solitary target. It is not, in other words, a fair fight, and those who act in combination against another do not merely compete with their target. By force of numbers, rather than by skill, ability, or merit, they seek to dominate, compel, and overwhelm. Bluntly, they cheat, and, through the assignment of liability in conspiracy to harm, they are held responsible.

Liability arising from unlawful combination is characterized, on this view, as reflective of the defendants' misconduct in their treatment of the plaintiff. This characterization is not, however, without shortcomings. Most obviously, it presents concerted conduct as wrongful without ever truly explaining the private law right of the plaintiff that it is understood to interfere with, that, by necessity, can *only* be interfered with by multiple actors working in concert. The closest the House of Lords has ever come to identifying the private law right interfered with by an oppressive combination was in *Crofter*, where Lord Wright unhelpfully characterized the right in issue in an action for conspiracy to harm as "that [the plaintiff] should not be damnified by a conspiracy to injure him."[56]

Notwithstanding the fact that the oppressive combination justification received sustained and consistent jurisprudential support at the House of Lords, it has proven inadequate in the context of broader trends in the industrialized world towards domination by corporate behemoths which, though single legal persons, wield private economic clout of a kind almost unimaginable at the turn of the 20th century. By the time *Crofter* was decided in 1941, the oppressive combination justification had

[51] *Quinn*, *supra* note 12 at 511.

[52] *Ibid* at 530-31.

[53] *Ibid* at 538.

[54] *Sorrell*, *supra* note 9 at 717.

[55] *Crofter*, *supra* note 14 at 448.

[56] *Ibid* at 462.

attracted serious doubts; each of Viscount Simon LC[57] and Lords Wright[58] and Porter[59] considered it unsatisfactory. Four decades later in *Lonrho*, Lord Diplock, on behalf of a unanimous panel, dismissed it as entirely incompatible with contemporary economic patterns and relations.[60]

The other explanatory effort advanced in relation to the existence of the tort of conspiracy to harm also had its roots in *Mogul Steamship*. In contrast to the oppressive combination justification, this second explanation took a more formal approach, asserting that concerted conduct produced liability because the common law had always viewed conspiracies as criminal. The civil liability produced by conspiracy to harm, on this "criminal conspiracy" analysis, is parasitic upon the unlawfulness inherent in criminal prohibition, rather than a product of purely private law considerations. Lord Bramwell, for example, suggested that acts could be lawful if performed by an individual but unlawful if performed by several because "the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes […]; while if done by several it is sufficiently important to be treated as a crime."[61] In the years after *Mogul Steamship*, the criminal conspiracy explanation of conspiracy to harm found support in Lord Brampton's reasons in *Quinn*[62] and Lord Dunedin's reasons in *Sorrell*.[63] In *Crofter*, Viscount Simon LC suggested the possibility that liability of this sort had originated in the criminal prohibition of conspiracies which had taken root in the common law after the abolition of the Court of Star Chamber.[64]

In contrast to oppressive combination, the criminal conspiracy justification simply identifies the existence of precedent (the common law's criminal jurisprudence on conspiracy) that supports the doctrine in issue (that criminal conspiracies produce private liability for any losses they cause) and justifies the existence of the private law rule through the existence of that precedent. No serious efforts are made to look behind the jurisprudence upon which the rule relies for its existence to determine the reason for *its* existence, or to evaluate whether its application to the facts of any particular case would be in keeping with the underlying rationale of the rule. In the specific context of conspiracy to harm, this understanding of the criminal conspiracy justification is borne out; each judge in the decisions described in Part I who relied on

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[57] *Ibid* at 443.

[58] *Ibid* at 467-68.

[59] *Ibid* at 487–88.

[60] *Lonrho*, *supra* note 3 at 189.

[61] *Mogul Steamship*, *supra* note 10 at 45.

[62] *Quinn*, *supra* note 12 at 530.

[63] *Sorrell*, *supra* note 9 at 725.

[64] *Crofter*, *supra* note 14 at 443–44. Lord Porter, on the other hand, considered that there was good reason to doubt whether conspiracies to injure had ever constituted criminal conspiracies at common law (*ibid* at 488).

the existence of a common law criminal prohibition of conspiracy to justify the existence of tort liability arising from conspiracies to harm simply offered that fact, and precedents to that effect, as sufficient justification for the imposition of civil liability on the same basis. At no point did any inquire into the reasons for the common law criminal prohibition of concerted conduct.

By the time *Lonrho* was decided in 1981, enthusiasm for attempts to explain or justify the continued existence of conspiracy to harm seems to have waned. In *Lonrho*, Lord Diplock accepted the existence of conspiracy to harm not only as an anomalous ground of liability, but as an expressly *inexplicable* anomalous ground of liability:

> The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today.[65]

As noted above, Lord Diplock recognized conspiracy to harm as an unjustifiable and anomalous ground of liability in the context of contemporary tort law, and rejected any invitation to extend its principles into new areas.[66] Lord Diplock's concession that no sound justification existed for liability for conspiracy to harm marked a transition to a period in which any pretence to substantively justifying the tort's continued existence and application to the conduct of those subject to it was abandoned. Lord Diplock's decision in *Lonrho* to abandon efforts to explain the tort's existence is, on this analysis, a shift away from those earlier bases of justification into a third approach, in which the tort's continued existence is justified by precedent alone. For Lord Diplock, the tort of conspiracy to harm constituted a valid tort and incorporated the elements that it did simply because prior courts had said so. This strictly formal approach to the tort, I suggest, has discouraged subsequent efforts to understand conspiracy to harm, and has had the effect of downplaying conceptual problems posed by its anomalous nature.

If, as I suggest above, the decision in *Lonrho* represents the beginning of a distinct and regrettable approach to the struggle to explain conspiracy to harm, Estey J's decision in *LaFarge* and Lord Neuberger's reasons in *Total Network*, considered below, can be viewed as the logical product of that approach. While Lord Diplock may have accepted the unjustifiable existence of conspiracy to harm in *Lonrho*, he at least recognized the significance of doing so: conspiracy to harm assigned liability to conduct in circumstances in which doing so could not be justified. On this basis, Lord Diplock refused to extend that unjustifiable form of liability to any factual context beyond the strict requirements of existing jurisprudence. As Part III below demonstrates, Canadian and English law have extracted very different conclusions

[65] *Lonrho*, *supra* note 3 at 189.

[66] *Ibid.*

from Lord Diplock's reasons in *Lonrho*, yet have ended up in remarkably similar (and equally concerning) positions.

III: Diverging Treatment, Dubious Outcomes

Parts I and II of this paper have, respectively, outlined the jurisprudential treatment of conspiracy to harm from *Mogul Steamship* to *Lonrho*, and analyzed the legal reasons provided therein for the existence of this singular kind of liability. This part examines the decisions of the Supreme Court of Canada in *LaFarge* and the House of Lords in *Total Network*, and the diverging paths taken by those courts as a result of Lord Diplock's conclusion that conspiracy to harm, in 1981, was entrenched anomalous liability.

Both *LaFarge* and *Total Network* presented opportunities to confuse the torts of conspiracy to harm and conspiracy to use unlawful means. Unlawful means conspiracy assigns liability to all conspirators who have agreed to undertake a course of action harmful to the defendant which is advanced by unlawful means, regardless of their purpose in doing so and regardless of how many (or few) of the conspirators actually employ the unlawful means. As noted in Part I above, Lord Diplock's reasons in *Lonrho* had set the stage for a period of uncertainty as to whether or not the latter tort existed at all, leaving some[67] under the impression that a predominant purpose to cause harm to the defendant was an essential prerequisite of all civil liability flowing from concerted conduct. In both *LaFarge* and *Total Network*, the challenge of differentiating between two torts focussing on concerted conduct proved to be insurmountable.

Unlike the decision in *Lonrho*, which focused on the scope of liability for conspiracy to harm, the Supreme Court expressly considered a somewhat broader question. In *LaFarge*, the plaintiff sought damages for business losses suffered as a result of the defendant's participation in a conspiracy to coordinate the British Columbia market for lightweight concrete aggregate. The defendant had previously pleaded guilty to a conspiracy charge brought pursuant to s. 32(1)(c) of the *Combines Investigation Act*.[68] Rather than determining only whether a combination to perform this unlawful (but not tortious) act harmful to the plaintiff could give rise to liability in conspiracy to harm in the absence of a shared intention to cause harm to the plaintiff, Estey J's decision in *LaFarge* also considered "whether there is a second tort of conspiracy 'to perform an unlawful act', in addition to the long-existing tort of conspiracy to injure."[69] Having reviewed the jurisprudence, Estey J found himself, on one hand, persuaded by Lord Diplock's reasons in *Lonrho*, including the apparent stipulation of an intent to cause harm as a prerequisite for liability in civil conspiracy,

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[67] See e.g. *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*, [1990] 1 QB 391, [1989] 3 AII ER 14.

[68] RSC 1970, c C-23.

[69] *LaFarge*, *supra* note 5 at 456.

while, on the other, persuaded by substantial jurisprudential and scholarly authorities to the effect that civil liability could, in fact, arise in the context of a conspiracy to use unlawful means. Attempting to reconcile these competing positions, Estey J determined *LaFarge* on the basis of the following oft-quoted statement of law:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> 1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
> 2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.[70]

Estey J stipulated that, in the context of the second branch of what he described as the "tort of conspiracy," the knowledge requirement amounted to what he described as "constructive intent" on the part of the combiners to cause harm to the plaintiff.[71] Therefore, rather than recognize a "second tort" of conspiracy to use unlawful means (the existence of which has been repeatedly confirmed in English law[72]), the Supreme Court in *LaFarge* expressly recognized *all* civil liability in conspiracy as flowing from the intention, either actual or constructive, of the conspirators to cause harm, expanding the scope of what had previously been the tort of conspiracy to harm to capture both the previously-independent tort of unlawful means conspiracy as well as concerted unlawful conduct undertaken without an express intention to cause harm to the plaintiff.[73]

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[70] *Ibid* at 471–72.

[71] *Ibid* at 472.

[72] See *Rookes v Barnard*, [1964] AC 1129, [1964] 1 AII ER 367 [*Rookes*]; *Fayed*, *supra* note 4; *Total Network*, *supra* note 7.

[73] The formula set out by Estey J in *LaFarge* was subsequently confirmed as the basis of the "current state of the law in Canada with respect to the tort of conspiracy" in *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 986, 74 DLR (4th) 321 [*Hunt*]. As *Hunt* considered a motion to strike, Wilson J indicated, at 986, that she did not consider it "appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy." That said, Estey J's formulation has undoubtedly contributed to a novel approach to unlawful means conspiracies amongst Canadian judges. See e.g. *Agribrands Purina Canada Inc v Kasamekas*, 2011 ONCA 460 [*Agribrands*], where Goudge JA characterized the second branch of Estey J's "tort of conspiracy" as "the tort of unlawful conduct conspiracy", a label which ignores the fact that unlawful means are also captured by the first branch of Estey J's formulation. Goudge JA also characterized "unlawful conduct conspiracy" as requiring for the assignment of liability "unlawful conduct by each conspirator." Goudge JA went on to say that "[t]here is no basis for finding an individual liable for unlawful conduct conspiracy if his or her conduct is lawful or, alternatively, if he or she is the only one of those acting in concert to act unlawfully. The tort is designed to catch unlawful conduct done in concert, not to turn lawful conduct into tortious conduct." (*ibid* at para 28, relying on *Bank of Montreal v Tortora*, 2010 BCCA 139). This characterization is impossible to

The first branch of Estey J's "tort of conspiracy" has come to be labelled "predominant purpose conspiracy, and implicitly recognizes intention as a core aspect of conspiracy to harm liability but does not analyze this recognition in any depth. The expansion of the scope of liability for conspiracy to harm in *LaFarge* should not, however, be taken as an endorsement of its continued place in Canada's law of torts. Like Lord Diplock, Estey J doubted both the utility and justifiability of civil conspiracy liability in the contemporary environment, but nonetheless considered it "too late in the day to uproot the tort of conspiracy to injure from the common law."[74] As such, after the decisions in *Lonrho* and *LaFarge*, the scope of conspiracy to harm liability in England and Canada seems to have been very different, but the continued existence of the tort in both jurisdictions, in which a combination of actors could be held liable for intentionally harmful conduct for which no action would lie against a single actor, was definitively recognized as an unjustifiable and inexplicable anachronism.

Perhaps the most notable aspect of *Total Network*, in this respect, is that it is not a case in which conspiracy to harm was in issue. The significance of *Total Network*, for the purposes of this paper, is that, almost three decades after *Lonrho*, Lord Diplock's caution in handling an anomalous principle of liability had, evidently, fallen out of fashion.

In *Total Network*, the respondent had been the beneficiary of thirteen "carousel" transactions fraudulently targeting the British Value Added Tax (VAT) system. The effect of these complex transactions, put simply, was that Total Network was refunded VAT in relation to transactions in which no VAT had been paid. The Revenue and Customs Commissioners claimed that each of the carousel transactions had constituted an unlawful means conspiracy and sought recovery of the VAT amounts that had been remitted to Total Network. At issue in the House of Lords was whether liability in unlawful means conspiracy could arise in relation to conduct which would not have been independently actionable against any of the conspirators, but which was nevertheless fraudulent in its combined effect. In the course of this determination, four of the five members of the panel discussed conspiracy to harm in their consideration of the proper scope of unlawful means conspiracy, but none offered a justification for its existence.

Lord Hope, in *Total Network*, seems to have agreed with Lord Wright's characterization in *Crofter* that "it is in the fact of the conspiracy that the unlawfulness resides,"[75] but, like Lord Wright, offered no explanation of the nature of that wrongfulness. Lord Scott expressly denied that conspiracy to harm was anomalous at all, crediting its existence, like every other action on the case, to a creeping expansion in English law of factual circumstances recognized as "sufficiently reprehensible" to

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reconcile with the decisions of the House of Lords in both *Rookes*, *supra* note 75 and *Total Network*, *supra* note 7, both of which imposed liability on parties in unlawful means conspiracy solely for their participation in conspiracies advanced by the unlawful acts of their co-conspirators, but not their own.

[74] *LaFarge*, *supra* note 5 at 473.

[75] *Total Network*, *supra* note 7 at para 41; *Crofter*, *supra* note 14 at 462.

justify the imposition of liability.[76] Lord Scott did not, however, explain what it was about concerted conduct intended to cause harm that made it, but not individual conduct of the same sort, "sufficiently reprehensible" to attract liability. Lord Walker, though expressly recognizing the tort as anomalous and noting prior justificatory efforts employing the oppressive combination and criminal conspiracy explanations did not adopt either approach.[77]

Lord Neuberger's reasons in *Total Network* stand apart in their treatment of conspiracy to harm. In the course of discussing whether criminal, non-tortious acts could, when committed in furtherance of a concerted course of conduct, constitute "unlawful means" for the purpose of an allegation of unlawful means conspiracy, Lord Neuberger drew an analogy between the two conspiracy torts:

> […] it appears that the law of tort takes a particularly censorious view where conspiracy is involved. Thus, a claim based on conspiracy to injure can be established even where no unlawful means, let alone any other actionable tort, is involved. That tort is therefore frequently described as anomalous; yet its existence is very well established. Its centrally important feature is that the conspiracy must have as its primary purpose injury to the claimant. my [*sic*] judgment, given the existence of that tort, it would be anomalous if an unlawful means conspiracy could not found a cause of action where, as here, the means "merely" involved a crime, where the loss to the claimant was the obvious and inevitable, indeed in many ways the intended, result of the sole purpose of the conspiracy, and where the crime involved, cheating the revenue, has as its purpose the protection of the victim of the conspiracy.[78]

Dissecting this remarkable passage, the first point of note is that Lord Neuberger clearly acknowledged the fact that conspiracy to harm is "frequently described as anomalous", but this acknowledgement was followed immediately by a recognition that its "existence is very well established."[79] To this point, Lord Neuberger's opinion had not deviated from that given by Lord Diplock over three decades earlier: the tort is anomalous, but law nonetheless, having been recognized as such in binding precedent.[80]

The point of departure between the two was their response to the recognition of the tort's anomalous nature. Recall that Lord Diplock refused to extend anomalous principles beyond the narrowest context compatible with precedent.[81] Lord Neuberger, on the contrary, adopted this anomalous tort as his conceptual anchor, pointing out that

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[76] *Total Network*, *supra* note 7 at para 56.

[77] *Ibid* at paras 66 and 77.

[78] *Ibid* at para 221.

[79] *Ibid*.

[80] *Ibid* at para 222.

[81] *Lonrho*, *supra* note 3 at 189.

it assigned liability for entirely lawful conduct undertaken for the purpose of causing harm.[82] With this conceptual anchor in mind, Lord Neuberger observed that, if another tort arising exclusively from concerted conduct (unlawful means conspiracy) could not produce liability where the means employed constituted "merely"[83] criminal conduct the "obvious and inevitable" result of which would be loss suffered by the plaintiff, it would itself be an anomaly in light of the existence of liability for conspiracy to harm. In other words, having acknowledged the unshakable existence at law of an inexplicable basis of liability, Lord Neuberger thought any 'liability gaps' identified around it could not be tolerated, treating those gaps themselves as problems to be remedied rather than as the product of the existence of the anomalous basis of liability.[84]

It is worth noting in this context that the question at issue in *Total Network*—whether unlawful but individually non-tortious conduct was sufficient to give rise to liability in unlawful means conspiracy—is the precise parallel to that at issue in *Lonrho* in relation to conspiracy to harm. In the earlier decision, Lord Diplock specifically refused to recognize concerted conduct contrary to law, but undertaken without an intent to cause harm, as sufficient to give rise to liability in conspiracy to harm.[85] That Lord Neuberger, in analogizing unlawful means conspiracy to conspiracy to harm, failed to take note of the latter doctrine's own treatment of non-tortious conduct contrary to law is itself remarkable.

It is also worth noting that Canadian courts have, for the most part, followed Estey J's guidance in *LaFarge* as to the potential future role of the tort of conspiracy

[82] *Total Network*, *supra* note 7 at para 221.

[83] The suggestion being that conduct criminally prohibited is inherently wrongful in all possible senses, a dubious assertion given the sort of morally innocuous conduct presently subject to criminal prohibition. Consider, in the Canadian context, *Criminal Code*, RSC 1985, c C-46, s 250(2), which imposes a criminal prohibition on the facilitation of water skiing by night.

[84] It should be obvious, from Lord Neuberger's comments, that he views conspiracy to harm and conspiracy to use unlawful means as distinct bases of tort liability, rather than two elements of a single "tort of civil conspiracy", a position shared by the author. While this seems to be a point of some dispute, both among the judiciary and the academy, there is no obvious reason to prefer a "single tort" approach to the conspiracy torts over the traditional "two tort" understanding – particularly if one takes the position, as I do, that combination is a normatively insignificant component of both bases of liability. If this is the case, identifying the conspiracy torts as diverging branches of a single tort becomes as nonsensical as grouping all torts which may be accomplished by a person acting alone as "branches" of a single tort – the "battery branch" of the "single actor" tort, for example. As Birks put it, "a classification is flawed if any term at any one level is part of an answer to an alien question, as where 'herbivorous' appears in the division by habitat." To classify tort doctrines by how many actors are required to engage in any particular type of tortious conduct is, in my view, as flawed as including a dietary descriptor in a classification of habitat. See Peter Birks, *Unjust Enrichment*, 2nd ed, (Oxford: Oxford University Press, 2005) at 20.

[85] *Lonrho*, *supra* note 3 at 189.

to harm in Canadian tort law.[86] In *Frame v Smith*,[87] for example, the Supreme Court of Canada considered a motion to strike out a claim in "the tort of conspiracy"[88] in the context of a family dispute. Drawing on *LaFarge*, Wilson J noted that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context."[89] Interestingly, Wilson J, with whom the balance of the court agreed on this point,[90] remarked that an extension of liability of this sort into the child custody and access context "would not be consistent with the rationale expressed in *Mogul* [*Steamship*] namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination."[91] This clear appeal to the oppressive combination justification seems out of step with the justificatory evolution noted above, but, for what it is worth, Wilson J herself only seemed to have accepted the validity of this justification for liability in civil conspiracy on a contingent basis. Immediately after the above excerpt, Wilson J noted that the outcome of such a combination (that "[t]he alleged conspiracy by the defendants would be actionable but the same conduct done by the spouse alone would not be actionable"[92]) constituted "differing treatment [of concerted conduct] for no principled reason," leading her "to conclude that this tort should not be extended to the family law context."[93] Despite some confusion, therefore, it seems that, in *Frame*, the Supreme Court was able to follow Estey J's guidance regarding the future expansion of liability for civil conspiracy, recognizing in its anomalous principles something to be limited rather than propagated.

In the English context, however, in light of the opinions in *Total Network*, and Lord Neuberger's in particular, it seems possible that, having failed to offer a compelling combination-oriented explanation for liability arising from the tort of conspiracy to harm, the best that English jurisprudence can offer is a figurative shrugging of shoulders. This conceptual impasse is, it seems, predicated on a collective acceptance that the significance of *Mogul Steamship*, *Allen*, and *Quinn* was that conspiracy to harm exists as a valid ground of liability, but that motive is otherwise irrelevant in tort law. In this vein, Part IV asks, in a limited fashion, whether there might be another way of explaining the existence of this anomalous liability, an

[86] See *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57; *HMB Holdings Ltd v Replay Resorts Inc*, 2021 BCCA 142; *Reisinger v JC Akin Architect Ltd*, 2017 SKCA 11; *Laboratoires Servier v Apotex Inc*, 2007 FCA 350; *Skybridge Investments Ltd v Metro Motors Ltd*, 2006 BCCA 500; *Sauvé v Canada*, 2011 FCA 141.

[87] *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 [*Frame*].

[88] *Ibid* at 123.

[89] *Ibid* at 124.

[90] *Ibid* at 109.

[91] *Ibid* at 125.

[92] *Ibid.*

[93] *Ibid*.

understanding that would justify maintaining the independent existence, and theoretical segregation, of the two conspiracy torts.

IV: Modern Malice: Steampunk Liability?

The identification of conspiracy to harm by Lord Diplock as an inexplicable anomaly seems to have permitted the tort to be viewed as conceptually empty: it exists, but its essence and operation need not be given too much thought. In *LaFarge*, as an effort to save liability for conspiracy to use unlawful means from the post-*Lonrho* haze, Estey J grafted it onto conspiracy to harm despite his recognition, in the same decision, that he could not explain why the latter doctrine even *was* a tort. In the context of Lord Neuberger's reasons in *Total Network*, the tort of conspiracy to harm appears assumed to be an unprincipled basis of liability, and therefore available for comparison to other bases of liability on a purely superficial, structural basis. If a tort deals with concerted conduct, on this analysis, it must be relatable somehow to any other tort which addresses similar kinds of conduct.

The purpose here is to suggest another possibility. What if, rather than merely an inexplicable and conceptually empty node of entropy anchored in the common law by precedent alone, the tort today known as conspiracy to harm was recognized as something else, a principled and reasoned articulation of a distinct understanding of liability left behind by the common law over a century ago? What if conspiracy to harm is the private law equivalent of a steam-powered aircraft or a clockwork microprocessor—the technology of over a century ago at work in a contemporary context?

Although the analysis that follows in support of this hypothesis hews closely to the reasons of the judges who decided *Mogul Steamship* at various levels of court, there is some basis upon which to think that the malicious infliction of harm was more broadly viewed as giving rise to liability before the turn of the 20th century. Newark certainly considered this to have been the case.[94] In 1843, Coltman J, in his reasons in *Gregory*, alluded to the possibility that an intent to cause harm could give rise to liability even in the context of a lawful act undertaken singly.[95] Addison, a commentator on common law interpersonal obligations, wrote in 1864 that "every malicious act is wrongful in itself in the eye of the law, and if it causes hurt or damage to another, it is a tort, and may be made the foundation of an action."[96] Similarly, when the House of Lords considered the normative significance of subjective motive in *Allen*, a majority of the eight judges of the High Court summoned to assist seem to

[94] Newark, *supra* note 18.

[95] "It is to be borne in mind that the act of hissing in a public theatre is, *primâ facie*, a lawful act; and even if it should be conceded that such an act, though done without concert with others, if done from a malicious motive, might furnish a ground of action, yet it would be very difficult to infer such a motive from the insulated acts of one person unconnected with others." *Gregory*, *supra* note 18 at 1181.

[96] CG Addison, *Wrongs and their Remedies*, 2nd ed (London: V and R Stevens, Sons, and Haynes, 1864) at 23.

have shared Addison's view.[97] Although bound by the prior decisions of the House of Lords in *Mogul Steamship* and *Pickles*, each of Hawkins,[98] Cave,[99] North,[100] Wills,[101] Grantham,[102] and Lawrance[103] JJ considered the intentional infliction of harm without just cause or excuse to constitute an actionable wrong. *Mogul Steamship* and *Pickles*, on this analysis, were cases of intentional harm in which just cause or excuse was held to exist in relation to, respectively, conduct in support of one's own self-interest and the exploitation of one's own real property.

Useful insight into the pre-*Allen* state of affairs can be extracted from the opinions of the House of Lords in *Mogul Steamship* itself, wherein, as the analysis below illustrates, numerous members of the panel clearly evaluated the defendants' concerted conduct in two distinct ways. First, they considered whether any of the acts undertaken by members of the cartel had been independently actionable on the basis of their individual conduct, an analysis which points at the tort today identified as unlawful means conspiracy. Second, they considered whether the cartel, in carrying out conduct harmful to the plaintiff, had acted for the purpose of inflicting that harm, the familiar analysis germane to conspiracy to harm. The significance of this two-stage evaluation is that each of these judges considered motive at *each* of these two stages. In other words, each inquired as to whether malicious and harmful *individual* conduct had taken place for the purpose of his unlawful means conspiracy analysis. Such an inquiry could only indicate that the judges in question considered malicious harm to be wrongful and actionable, as Addison and Coltman J evidently had several decades before, whether undertaken singly or in concert.[104]

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[97] As such, *Allen* stands as one of the rare occasions upon which the House of Lords, having summoned the judges of the High Court, disagreed with their opinion. See Van Vechten Veeder, "Advisory Opinions of the Judges of England" (1900) 13 Harv L Rev 358 at 360.

[98] *Allen*, *supra* note 11 at 14. As noted in the text accompanying note 25, Hawkins J was a future member of the *Quinn* panel as Lord Brampton.

[99] *Allen*, *supra* note 11 at 36.

[100] *Ibid* at 42.

[101] *Ibid* at 47.

[102] *Ibid* at 57.

[103] *Ibid* at 58.

[104] Note should be taken, in this context, of John Murphy's recent contention to the effect that the tort of conspiracy to harm in its final, post-*Quinn* form, was in fact the product of a decades-long effort on the part of the English judiciary to "develop tort law so as to moderate the effect of removing criminal responsibility for conspiracy [in the trade union context]." This account stops just short of identifying the recognition of conspiracy to harm in *Mogul Steamship* as instrumental *dicta* intended for subsequent use against trade union activity. The subsequent treatment of *Mogul Steamship* in *Allen* and *Quinn*, Murphy argues, reflects, as much as anything else, "judicial ideological commitments," suggesting that Lord Halsbury LC had undertaken extraordinary efforts to impose liability on the trade unionist defendants in *Allen* and *Quinn*. See John Murphy, "Contemporary Tort Theory and Tort Law's Evolution" (2019) 32:2 Can JL & Jur 413 at 420-22. Harry Arthurs briefly advances a similar position, suggesting that "[t]ort doctrines, such as conspiracy to injure, inducing breach of contract and wrongful interference with economic rights were developed with the transparent purpose of curbing union power." See Harry W Arthurs, "Labour and the "Real" Constitution" (2007) 48:1-2 C de D 43 at 58. Both Murphy and Arthurs,

While Lord Halsbury LC and Lord Watson were ambiguous in their view on the role of motive in assigning liability, others, such as Lords Morris, Bramwell, Field, and Hannen took clearer positions. Lord Morris adopted the reasons of Bowen LJ in their entirety,[105] indicating in his brief opinion that both the object of the cartel and their means of obtaining it had been lawful.[106] With specific reference to the means, Lord Morris first ruled out the occurrence of any acts to disturb existing contracts or inducements to breach them, following which he indicated that the defendants' "action was aimed at making it unlikely that that any one would enter into contracts with the plaintiffs," and that the "use of rhetorical phrases in the correspondence cannot affect the real substance and meaning of [the action in question]."[107] Lord Morris, therefore, was at pains to specifically note that the motive for the means selected by the cartel to achieve their object had been a legitimate one.

Lord Bramwell, at the outset, stipulated that the plaintiffs had not alleged any of what can only be read as a series of bases upon which liability might have arisen, but which were not alleged:

> My Lords, the plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them.[108]

It seems unlikely that Lord Bramwell intended this passage as an introduction to liability attaching exclusively to concerted conduct, as none of trespass, violence, force, fraud, breach of contract, direct tort or violation of right requires concerted conduct as a prerequisite to liability, and no reference is made in the context of "malice or ill-will" to conduct in combination. Indeed, there is nothing to suggest that Lord Bramwell thought "any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will" was in any way distinct from the other enumerated bases of liability. As such, this passage can be read as a review of possible grounds of *individual* liability which did not arise on the facts in issue, and which could not, as a result, constitute unlawful means employed by the cartel in pursuing their objective. Neither did Lord Bramwell take issue with the accuracy of the authority upon which Lord Esher MR had relied in the Court of Appeal, Erle J's work on *Trade Unions*; rather, he simply disputed whether the cause of action discussed by both Lord Esher MR and Erle J was made out in *Mogul Steamship*:

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therefore, consider conspiracy to harm to be a judicial response to the expanding influence of trade unions, but neither offer an explanation for the appearance of the doctrine well before *Quinn* in the non-trade union context of *Mogul Steamship* (or *Gregory*, for that matter).

[105] *Mogul Steamship*, *supra* note 10 at 51.

[106] *Ibid* at 49-50.

[107] *Ibid* at 50.

[108] *Ibid* at 44.

> But it is clear that the Master of the Rolls means conduct which would give a cause of action against an individual. He cites Sir William Erle in support of his proposition, who clearly is speaking of acts which would be actionable in an individual, and there is no such act here.[109]

Insomuch as his analysis systematically rejected the possibility that any of the means employed by the cartel could have been considered tortious when undertaken by an individual member of the cartel, and therefore unlawful means for the advancement of its interests, it seems likely that Lord Bramwell thought that a cause of action related to "acts which would be actionable in an individual" of the sort referred to by Lord Esher MR and Erle J existed, but concluded that, as he had stipulated at the outset of his reasons, there was "no such act here."

Lord Field considered the issues in *Mogul Steamship* to have been entirely within the rule set down by Holt CJ in *Keeble v Hickeringill*,[110] which was characterized as standing for the proposition

> … not only that it is not every act causing damage to another in his trade, nor even every intentional act of such damage, which is actionable, but also that acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action.
>
> Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not the pursuit of lawful rights.[111]

Stipulating the law as such, Lord Field then reviewed the evidence, or lack thereof, alleged by the plaintiff, indicating that

> They do not allege that the respondents have been guilty of any act of fraud or violence, or of any physical obstruction to the appellants' business, or have acted from any personal malice or ill-will, but they say that the respondents acted with the calculated intention and purpose of driving the appellants out of the [Hankou] season carrying trade by a course of conduct which, although not amounting to violence, was equally effective, and so being in fact productive of injury to them was wrongful and presumably malicious.[112]

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[109] *Ibid* at 48 [emphasis added].

[110] (1707), 103 ER 1127, 90 ER 906 [*Keeble*].

[111] *Mogul Steamship*, *supra* note 10 at 52.

[112] *Ibid* at 53.

Having spent the bulk of his reasons working out whether the conduct of the cartel members had violated the principle set out in *Keeble*, which clearly imposes liability for malicious harmful conduct undertaken by individuals, Lord Field concluded by stating that

> Everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was *bona fide* so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm. All the acts complained of were in themselves lawful, and if they caused loss to the appellants, that was one of the necessary results of competition.[113]

His consideration of the lawfulness of the acts undertaken singly by the members of the cartel concluded, Lord Field then turned to consider whether the cartel's conduct "even if lawful in themselves if done by an individual"[114] could be made unlawful by their use as the means of achieving the only unlawful object he thought had been alleged, restraint of trade.[115] As such, Lord Field's opinion clearly reflects a sequential consideration of the lawfulness of the means selected by the members of the cartel to achieve their objective, followed by consideration of whether those means, if lawful, were rendered unlawful in aggregate if shown to have been undertaken for the purpose of achieving an unlawful object. Having found neither the means nor the object unlawful, Lord Field determined that no liability arose on the facts.

Finally, Lord Hannen, having reviewed both the object of the defendants in combining and the means agreed upon to achieve it, concluded that neither the object sought, nor the means employed by the defendants, had been unlawful. Their object, Lord Hannen observed, had been "to secure to themselves the benefit of the carrying trade from certain ports."[116] The means selected to achieve this object had been, in essence, nothing more than "offering goods or services at a cheaper rate than their rivals."[117] Neither object nor means exceeded the limits of allowable trade competition, Lord Hannen concluded, but he did observe that

> … a different case would have arisen if the evidence had shewn that the object of the defendants was a malicious one, namely, to injure the plaintiffs whether they, the defendants, should be benefitted or not. This is a question

[113] *Ibid* at 56–57.

[114] *Ibid* at 57.

[115] *Ibid*.

[116] *Ibid* at 58.

[117] *Ibid* at 59.

> on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves.[118]

Significantly, only after making this observation did Lord Hannen turn to the argument that the effect of concerted conduct might render an act lawful when performed by an individual wrongful when performed in concert.[119] This is clearly the effect of what is today described as a conspiracy to harm, indicating that his prior analysis had, in fact, related solely to the question of whether the means used by the cartel members would have been lawful if undertaken by an individual. This understanding is supported by Lord Hannen's subsequent consideration in this context of "what was the motive of the combination, whether it was for the purpose of injuring others, or merely in order to benefit those combining,"[120] providing further support for the conclusion that his earlier treatment of motive had been for the purpose of determining the status of the individual conduct undertaken in furtherance of the cartel's objective—an analysis pertinent to a conspiracy to use unlawful means, not a conspiracy to harm.

Despite the apparent dissimilarity of the reasons offered, and the vague manner in which some of the members of the panel addressed the relationship of illegitimate motive to unlawful means, it seems plausible that much of the panel in *Mogul Steamship* agreed among themselves that the intentional infliction of harm without just cause or excuse could give rise to liability at the level of the individual, and as such would constitute unlawful means by which to obtain a combination's otherwise lawful object. It is significant, in this regard, that Lord Macnaghten, who read Lord Bramwell's reasons but prepared none of his own, did not seem to consider any great disparity to exist among the other members of the panel as to the basis on which it had decided *Mogul Steamship*. Having delivered Lord Bramwell's opinion, Lord Macnaghten noted:

> My Lords, for myself I agree entirely in the motion which has been proposed, and in the reasons assigned for it in the judgments which have been delivered and in those which are yet to be delivered; and I do not think I can usefully add anything of my own.[121]

It is obviously impossible to conclude with any kind of certainty what long-dead judges were thinking when their opinions in *Mogul Steamship* were read to the House of Lords almost thirteen decades ago. However, the argument advanced here seeks to trouble the narratives that have surrounded the tort of conspiracy to harm for much of the last century, and has, hopefully, illustrated the possibility of an alternative

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[118] *Ibid*.

[119] *Ibid*.

[120] *Ibid* at 60.

[121] *Ibid* at 49.

explanation for the tort's existence aside from the oppressive combination and criminal conspiracy justifications that were abandoned by Lord Diplock in *Lonrho*. It is possible, I suggest, that the entirety of the jurisprudence of conspiracy to harm, from *Mogul Steamship* to the present, is a product of a conviction that the intentional infliction of harm motivated by malice justifies the imposition of liability, both at the level of the individual and at the level of combination. If this were the case, as seems plausible on the basis of the reasons in *Mogul Steamship* set out above (not to mention the court in *Gregory*, a majority of the High Court judges summoned to assist the House of Lords in *Allen*, and three members of the House of Lords in that case), this explanation of conspiracy to harm liability would resolve much of the confusion relating to the apparent "magic of plurality"[122] at work in that tort. Rather than anything specific to concerted conduct, liability for conspiracy to harm is revealed as nothing more than the post-*Allen* remains of a broader motive-oriented basis of private liability.

It would be neither good nor bad, from a legal perspective, if conspiracy to harm were understood as founded upon an understanding of maliciously-inflicted harm as wrongful. It is simply a different basis of liability from any other significant component of contemporary tort law, flowing from a distinct conception of justifiable interpersonal conduct. It is no more, and no less, than a different understanding of what constitutes interpersonal wrongdoing than those now accepted by judges (and most tort theorists) as common sense after a century of repetition.

Conclusion

This paper has demonstrated that the anomalous nature of liability for conspiracy to harm has allowed an understanding to take hold that it is inexplicable and conceptually empty. That the tort came to be understood in this way should not be surprising—considered exclusively against the backdrop of the post-*Allen* common law of torts, conspiracy to harm seems to lack much of what one might consider to be essential in the assignment of tort liability. As a conceptually empty anomaly, conspiracy to harm posed little danger to the justifiability and coherence of the balance of private law so long as courts exercised due caution in the application of the tort's anomalous principles to novel circumstances. However, as the subject of more cavalier approaches, such as Lord Neuberger's in *Total Network* and Estey J's in *LaFarge*, the understanding of conspiracy to harm as conceptually empty poses a real threat to whatever coherence the private law (and tort law in particular) has, as courts eschew substantive analyses in favour of trite comparisons of form. *Total Network* represents the beginning of an age in which unlawful means conspiracy will be shaped to look more like the inexplicable conspiracy to harm. Canadian conspiracy jurisprudence, on the other hand, remains mired in the post-*Lonrho* haze, in which judicial inability to distinguish form from substance has rendered all conspiracy liability dependant on the presence of intent, and unlawful means conspiracy has withered to the point of irrelevance. Treating like cases alike is one of the defining features of common law

[122] See Guy & Del Gobbo, *supra* note 45 at 150.

reasoning, and the rule of law in general. It is not, however, sufficient to rely on superficial structural coincidences, such as the presence of concerted conduct as a component of two distinct causes of action, as a heuristic for their normative likeness and compatibility. Such a system of classification has no more value than one which organizes books according to the colour of their spines: it may appear to be coherent in form, but in reality it is devoid of pertinent substance.

With the demise of individual liability for malicious harm in *Allen*, motive no longer plays a role in rendering combinations unlawful by virtue of the *means* by which they are advanced, as many of the judges in *Mogul Steamship* seem to have thought possible; rather, it can only impact the lawfulness of the combination's *object*. If, as I have argued, conspiracy to harm is recognized as an echo of an understanding of malicious interpersonal conduct as wrongful, the fact that both conspiracy to harm and unlawful means conspiracy address conduct undertaken in concert with others will be recognized for the normatively insignificant coincidence that it is. The problem this paper has identified is that lawyers are, for the most part, accustomed to thinking of principles of private liability as fungible, particularly in the context of torts which employ similar structural elements, as both of the conspiracy torts do. In other words, we see a familiar mechanism, a tort doctrine, without imagining the possibility of it being animated by the distinctive norms of justifiable interpersonal conduct of a different era, rather than those of our own time. It should not, then, be surprising that, when violation of these norms in contemporary society results in liability, it is not easily recognized for what it is: steampunk liability.