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INTRA-CORPORATE CONSPIRACY: AN INTRIGUING PROSPECT

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ABSTRACT. *This paper considers whether unlawful means conspiracy might have a role to play in extending liability from insolvent companies to those who stand behind them. A reason for thinking that the tort might have such a role is that, where an agreement to injure exists, liability can be found not only in those who commit unlawful acts but in any other persons who take steps to further the conspiracy. The paper argues, furthermore, that courts should accept that unlawful means conspiracy might be committed between even the smallest company and its controlling shareholder. This would strengthen the propositions that the company is a separate legal person with its own rights and responsibilities and that it is competent to deal with all comers, including its controller.*

KEYWORDS: *Conspiracy, tort law, liability, small company*

INTRODUCTION

This paper argues that the tort of unlawful means conspiracy has a potentially significant role to play in extending liability for financial losses beyond insolvent companies to entities and individuals that stand behind them. This prospect arises following the decision in *Revenue and Customs Commissioners v Total Network S.L.*,[1] in which the House of Lords extended the scope of the tort to include unlawful acts that are not independently actionable by the claimant against at least one of the conspirators personally, thus breaking the nexus with the doctrine of joint tortfeasance. The House signalled the potential for unlawful means conspiracy to be applied in a range of novel situations. The attractiveness of the tort is that, where an agreement to injure another exists, liability can be found not only in those who commit unlawful acts, but also in those who take steps to further the conspiracy.

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[1] [2008] UKHL 19, [2008] 1 A.C. 1174.

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Developments in unlawful means conspiracy are potentially significant in the insolvency context, given the problems that have been experienced in extending liability for financial losses to shareholders by way of corporate veil piercing doctrine and in using the tort of negligence to create liability in small company directors. The tort would provide a means of redress against a form of harm causation that is justified by reference to the dangers inherent in the use of collective power. The article presses the point further by arguing that courts should accept that unlawful means conspiracy might be committed between even the smallest company and its controlling shareholder.

The potential use of unlawful means conspiracy to extend liability beyond the insolvent company has been raised in a number of jurisdictions. Yet courts have been wary of its use for reasons that go beyond the undeveloped nature of the tort, including the desire to respect the separate legal personality of the small company and concern about deriving a corporate "intention" from a controlling shareholder's own state of mind and calling the resultant "agreement" to injure a conspiracy. The latter concern is that, in order to found liability, there must be agreement between two independent minds and that this cannot be found within the small company. Each of these issues will be addressed.

The paper is structured as follows: In Part I, the problem for discussion is explained. Part II then summarises arguments that veil piercing has failed as a means of extending liability to shareholders and that (statutory provisions aside) the most suitable means of extending liability is through the application of ordinary civil law rules. The applicability of specific tort doctrines is examined briefly. Part III then addresses the tort of unlawful means conspiracy, setting out its elements and its applicability within the company. In Part IV, the paper turns to potential stumbling blocks in the separate legal personality doctrine and the need for agreement between independent minds. It is concluded that courts should take seriously the competence of the company not only to enter into contractual agreements but to conspire with its controlling shareholder as well. Finally, Part V moves from discussion of doctrine to matters of theory and attempts to provide a justification for the tort of unlawful means conspiracy and for its use within the small company context.

I. The Problem

The company is a separate legal person and, in the typical case, will be incorporated so that shareholders enjoy limited liability for corporate debts. This means that shareholders, prima facie, are not liable for corporate debts beyond what they have contributed in share capital.

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The result of limited liability is risk-sharing amongst all those who do business with companies – each is taken to accept that there will be no recourse to shareholders personally should corporate creditors be unable to pay their debts. Risk-sharing is said to encourage investment in business activities and to be important in the functioning of the modern economy.[2]

However, the use of the corporate form has proved contentious in a range of cases where actors engage in practices that fall below acceptable standards of commerce, including standards of risk taking.[3] The problem for creditors arises when the company with which they deal is under-capitalised and becomes insolvent. The law has yet to adequately address this issue. Statutory provisions concerning corporate transactions[4] and directors' duties[5] aimed at ex ante decision-making might be ineffective in preserving corporate assets in a number of scenarios, such as where directors are enthusiastic risk-takers, where companies decline for legitimate business reasons and where the risks of losses arise over a long horizon.

Veil piercing doctrine does not provide a satisfactory mechanism for unpaid creditors seeking to access the assets of controlling shareholders. Its shortcomings are well known and need be the subject of only brief comment here. There are three main grounds for veil piercing. In cases of fraud, liability turns upon proof that controlling shareholders intended to use the company for a fraudulent purpose.[6] The fraud standard is high and requires proof of a subjective intention to injure or recklessness.[7] Given the onerous nature of the requirement, it is no surprise that this is not a frequently successful claim.[8] One might also doubt the logic of a veil piercing argument in such cases, given that fraud (or deceit) can be committed by any legal persons, whether shareholders or not.

The second main ground of veil piercing involves the "sham" company. A sham company is intended to have an existence other than as

[2] See, e.g., D. Goddard, "Corporate Personality – Limited Recourse and its Limits" in R. Grantham and C. Rickett (eds.), *Corporate Personality in the 20th Century* (Oxford 1998), pp 17ff; R. Kraakman et al, *The Anatomy of Corporate Law*, 2nd ed., (Oxford 2009), ch. 1.

[3] Some relevant practices are surveyed in J.M. Landers, "Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy" (1976) 43 U. Chi. L.R. 527, 528.

[4] Companies Act 2006, ss. 190–6 (substantial property transactions), 641 and 645–50 (reductions of capital); Insolvency Act 1986, ss. 238–41 (voidable transactions).

[5] E.g., Insolvency Act 1986, ss., 206–8 (malpractice) and 214 (wrongful trading).

[6] E.g., *Gluckstein v Barnes* [1900] A.C. 240 (share pump and dump case). See J. Payne, "Lifting the Corporate Veil: A Reassessment of the Fraud Exception" (1997) 56 C.L.J. 284.

[7] By analogy with the deceit case of *Derry v Peek* (1889) 14 App. Cas. 337.

[8] This is assuming that the results of an empirical study conducted in Australia are indicative of the English position: see I.M. Ramsay and D.B. Noakes, "Piercing the Corporate Veil in Australia" (2001) 19 Company and Securities Law Journal 250. A study of veil piercing in England, C. Mitchell, "Lifting the Corporate Veil in English Courts: An Empirical Study" (1999) 3 Cfil.L.R. 15, does not provide specific figures about success rates in relation to particular heads such as fraud.

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an independent and substantial entity.[9] This is a problematic ground, given that a 'sham' company is still a real company[10] and that it is difficult to separate out companies operating in this way from run-of-the-mill small or closely-held entities. In the absence of fraud, it is perilous for courts to second guess what the controllers intended to be the substance and operation of legally-constituted entities. Shortcomings in the case law are exemplified by the "leading case", *Gilford Motor Co Ltd. v Horne*,[11] which might have been better decided on the basis of breach of contract by the covenantor[12] or knowing procurement by the company of a breach of contract.[13]

The third ground of veil piercing is agency. A court might pierce the veil where one company is properly to be seen as carrying on the business of another and on behalf of that other.[14] Again, however, this ground has been criticised because, where agency properly-so-called arises, there is no need to pierce the veil. Rather, 'the defendant [shareholder] would simply be liable, *qua* principal, for the acts of its agent'.[15] More fundamentally, this ground of veil piercing undermines an important holding in *Salomon v A. Salomon and Co. Ltd.*,[16] that the company must be treated from its registration as competent to deal with all comers,[17] including its controlling shareholder. This is a matter explored further, below.

In summary, each ground of veil piercing is the subject of either conceptual or practical shortcomings. Modern authority following *Adams v Cape Industries plc*[18] appears set against continued use of the doctrine except in the clearest cases, most usually involving fraudulent conduct.[19] All of this points to the need to explore alternative avenues of extending liability beyond insolvent companies to those who stand behind them. This paper suggests one method of doing so, by use of the tort of unlawful means conspiracy, which would permit the creation of liability in all those who agree to injure and who use unlawful means to do so. Before making this argument, it is first necessary to consider the wider context in which it is to be made.

[9] *Adams v Cape Industries plc* [1990] Ch. 433, 540.
[10] *VTB Capital plc v Nutritek International Corp.* [2012] EWCA Civ 808, at [68].
[11] [1933] 1 Ch. 935.
[12] D. Kershaw, *Company Law in Context: Text and Materials* (Oxford 2009), 56. See also *Garbutt Business College Ltd. v Henderson* [1934] 4 D.L.R. 151.
[13] *Antonio Gramsci Shipping Corp. v Stepanovs* [2011] EWHC 333 (Comm), [2011] 1 Lloyd's Rep. 617, at [18] (Burton J.).
[14] *Inland Revenue Commissioners v Sansom* [1921] 2 K.B. 492, 503 (describing the ground as 'conceivable', but only where the technical elements of agency are present).
[15] A. Muscat, *The Liability of the Holding Company for the Debts of Its Insolvent Subsidiaries* (Aldershot 1996), 120.
[16] [1897] A.C. 22.
[17] *In re Wragg Ltd.* [1897] 1 Ch. 796, 824 (Lindley L.J.). See also discussion at pp. 198–99 below.
[18] [1990] Ch. 433.
[19] R. Kraakman et al, *The Anatomy of Corporate Law*, 2nd ed. (Oxford 2009), 139.

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II. Ordinary Civil Law Principles

A. General

It is submitted that ordinary civil law principles have an important role to play in extending liability beyond the insolvent company to those who stand behind it. Relevant principles include statutory ascriptions and contractual allocations of responsibility and the operation of equitable principles,[20] although the focus of this paper is upon tort law. Liability should be extended to all those involved in wrongdoing, whether they be parent companies, directors (including shadow directors), company officers or others.[21] This would ensure the uniform application to all legal persons of policies including compensation for, and deterrence of, wrongdoing.[22] The extent of liability for financial claims available under ordinary civil law principles might not be as wide as that which is possible under broader conceptions of veil piercing doctrine, given the greater rigour that accompanies application of long-established rules. Arguably, however, this is acceptable *insofar as* corporate risk sharing itself is acceptable when the interests at stake are purely financial.[23] What follows is a brief consideration of relevant tort principles and the doctrine of ordering and procuring.

B. Specific actions

1. Strict liability and negligence

One would expect to find both corporate and extended liability for acts and omissions giving rise to financial losses to be straightforward where a rule of strict liability applies (such as vicarious liability for the acts of employees).[24] In such cases, liability arises regardless of fault. More difficulty arises where there is a need to prove

[20] The general argument being made in this section of the paper is not new. It was made long ago – "[T]he corporate capacity is a legal fact, not a fiction. Problems of responsibility for fraud or for acts of a corporation used as an agent are to be solved not by "disregarding" the corporate personality, but by the application of the usual principles of liability for the acts of other persons or for collusion with them": H.W. Ballantine, "Separate Entity of Parent and Subsidiary Corporations" (1925–6) 14 Cal. L.R. 12, 20. See also S.H.C. Lo, "Liability of directors as joint tortfeasors" [2009] J.B.L. 109; C.H. Tham, "Piercing the corporate veil: searching for appropriate choice of law rules" [2007] L.M.C.L.Q. 22; J.W. Neyers, "Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation" (2000) 50 U.T.L.J. 173, 215ff.

[21] See, e.g., *Standard Chartered Bank v Pakistan International Shipping Corp. (No. 2)* [2002] UKHL 43, [2003] 1 A.C. 959 (directors); S.H.C. Lo, "Liability of directors as joint tortfeasors" [2009] J.B.L. 109; *MCA Records Inc. v Charly Records Ltd.* [2002] B.C.C. 650, 668 (The Court) (de facto managing director); R. Flannigan, "The Personal Tort Liability of Directors" (2002) 81 Can. Bar Rev. 247, 259–61 (shareholders).

[22] This argument, as applied to company directors, is made in Lo, note 21 above, [2009] J.B.L. 109, 110.

[23] As opposed to the case where the interests involve bodily integrity: see C. Witting, "Liability for Corporate Wrongs" (2009) 28 U.Q.L.J. 113.

[24] E.g., in cases of "borrowed" employees: *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] Q.B. 510.

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negligence – because of the requirements that a duty of care be owed and that fault be proved. However, negligence is certainly arguable in some cases that might otherwise be the subject of veil piercing pleas. A recent illustration is *Chandler v Cape plc*,[25] where a duty of care was held to be owed by a parent company to its subsidiary's employees for their health and safety.[26] Actions against a parent company might also arise for the causation of financial losses. However, to this point it has been a relatively arduous task to create *personal* liability in negligence in small company directors. This issue is considered below and brief argument is made that this difficulty is surmountable.[27]

2. Intentional tort

So far as intentional torts are concerned, these fall into two broad classes. First there are "intentional" torts which require that relevant conduct be "voluntary" in nature[28] – such as trespass to land. Usually there is little need to go beyond an examination of the external actions of the defendant in order to determine whether this kind of "intention" is present. Liability arises when the defendant walks up to the door of premises upon which he or she is clearly not welcome, but not when he or she is forcibly carried onto those premises.[29] There is no doubt that a company can be liable for those torts requiring voluntary conduct committed by its agents. Those agents are also *personally* liable for the torts that they commit.[30]

Second, there are the "true" intentional torts, which require a more substantive mental element, such as an intention *to injure*.[31] This form of intention can be difficult to prove.[32] It is rarely the case that a court will have access to the subjective intentions of individuals (although this is possible, for example, where they record plans in

[25] [2012] EWCA Civ 525.

[26] [2012] EWCA Civ 525, at [78]–[80]. See also *Connelly v R.T.Z. Corporation plc* [1998] A.C. 854; *Lubbe v Cape plc (no. 2)* [2000] UKHL 41, [2001] 1 W.L.R. 1545; E. McGaughey, "*Donoghue* v *Salomon* in the High Court" (2011) 4 J.P.I.L. 249.

[27] See at pp. 193–94.

[28] This is the minimum requirement in circumstances where, objectively construed, the act was substantially certain to result, e.g., in a contact with the body of another (this being a battery): F. Trindade, P. Cane and M. Lunney, *The Law of Torts in Australia*, 4th ed. (South Melbourne 2007), 38–44.

[29] *Smith v Stone* (1647) Sty 65; J. Murphy and C. Witting, *Street on Torts*, 13th ed. (Oxford 2012), 316.

[30] By analogy with the discussion of *Standard Chartered Bank v Pakistan National Shipping Corporation (No. 2)* [2002] UKHL 43, [2003] 1 A.C. 959, below at p. 194.

[31] This is a typical requirement of the economic torts: see H. Carty, *An Analysis of the Economic Torts*, 2nd ed. (Oxford 2010).

[32] See, e.g., H. Gutteridge, "Abuse of Rights" (1933) 5 C.L.J. 22, esp. 26. Note also the related difficulty that courts of equity have had in determinations of 'dishonesty': see P. Shine, "Dishonesty in civil commercial claims: a state of mind or a course of conduct?" [2012] J.B.L. 29; A. Clarke, "Claims against Professionals: Negligence, Dishonesty and Fraud" [2007] Eur. Bus. L.R. 649.

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a document). "The reality is that a person's subjective state of mind is personal to the [individual] and can only be determined as an adjudicated fact by resort to its objective manifestations".[33] It is found through an examination of the circumstances in which the individual acted and the evidence that has come to light.

The difficulty (or artificiality) experienced in determining true intention is only magnified when it comes to attributing such states of mind to the company. Part III of this paper turns to a discussion of the intentional tort of unlawful means conspiracy, the focus being on conspiracies found "within" the company. A possible advantage of the approach towards the company adopted in this paper (that the company should be treated as legally competent in all of its actions) is that it reduces the need for application of the principles of attribution.[34] It opens up the possibility of creating liability for those actions that are "best described" by reference to an intentional tort. This matter will be examined in some detail.

3. Ordering and procuring

A director or controller is liable as a joint tortfeasor for the torts of the company that he or she "ordered or procured". In *Performing Right Society Ltd. v Ciryl Theatrical Enterprises Ltd.*, Atkin L.J. held that "a managing director is not liable for tortious acts done by servants of the company unless he himself is privy to the acts, that is to say unless he ordered the acts to be done".[35] In cases where it is necessary to prove a fault element, it is necessary to prove that the director or controller shared in the fault of the company.[36] The reason is that "the personal liability of the director in such circumstances cannot be more extensive than that of the individual who personally did the tortious act".[37] The exact boundaries of this form of liability are uncertain.[38] It is not yet clear, for example, whether voting in favour of the commission of a tort at a board meeting would be sufficient to constitute directing or

[33] D. Paciocco, "Subjective and Objective Standards of Fault for Offences and Defences" (1995) 59 Sask. L.R. 271, 272.

[34] See *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 2 A.C. 500; E. Ferran, "Corporate attribution and the directing mind and will" (2011) 127 L.Q.R. 239. This doctrine has rightly been seen as inconsistent with the separate personality of the company: S. Griffin, "The one-man type company and the removal of corporate personality in the context of the attribution rules" (2011) 22 I.C.C.L.R. 158.

[35] [1924] 1 K.B. 1, 14–5; cited with approval in *Wah Tat Bank Ltd. v Chan Cheng Kum* [1975] A.C. 507, 514–5 (PC).

[36] *C. Evans & Sons Ltd. v Spritebrand Ltd.* [1985] 1 W.L.R. 317, 329. Compare the test in Canada, which requires that the director or controller 'make the tortious act his [or her] own': *Mentmore Manufacturing Co. Ltd. v National Merchandising Manufacturing Co. Inc.* (1978) 89 D.L.R. (3d) 195, 203 (Le Dain J.).

[37] *C. Evans & Sons Ltd. v Spritebrand Ltd.* [1985] 1 W.L.R. 317, 329. Note that this qualification does not appear in earlier authority: e.g. *Wah Tat Bank Ltd. v Chan Cheng Kum* [1975] A.C. 507, 514–5 (Lord Salmon).

[38] H. Anderson, *Corporate Directors' Liability to Creditors* (North Ryde NSW 2006), 231.

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procuring the tort.[39] Perhaps this must depend upon the facts. There are good arguments for thinking that a successful vote in favour of action that is clearly wrongful should count as directing or procuring the commission of a tort. But these matters will not be explored here.[40]

III. The Tort of Unlawful Means Conspiracy

The question arises whether the current tort arsenal could be strengthened in the corporate context by application of unlawful means conspiracy. It is submitted that this tort has a potentially significant role to play in extending liability beyond the insolvent company to others, including its controlling shareholder. First, it has been developed to deal with agreements between natural persons and would have a role to play in a liability regime that takes the personhood and competence of the company seriously. Second, unlawful means conspiracy hinges, as adumbrated, on agreement and ensures that liability is extended *beyond the actor who injures* to those who enter into the agreement and do something to further it. This permits access to further sources of compensation for damage. Third, the tort can be brought in circumstances where the unlawful act is not independently actionable by the claimant against at least one of the conspirators personally.[41] Fourth, damages for its commission are at large. The tort and its application in the corporate context will now be considered in detail.

A. History

An action in conspiracy first took a recognisable form in the Third Ordinance of Conspirators,[42] which created a criminal offence concerned with the institution of false and malicious actions at law. It was developed by the Court of Star Chamber so as to extend beyond a concern with the administration of justice to create criminal liability for agreements to commit any of a multitude of crimes.[43] With the abolition of the Star Chamber, the action became a common law misdemeanour.[44] It could also be pleaded as an action on the case for damages, the "gist of the action being that damage was

[39] *C. Evans & Sons Ltd. v Spritebrand Ltd.* [1985] 1 W.L.R. 317, 330. In *MCA. Records v Charly* [2001] EWCA Civ 1441, [2002] B.C.C. 650, at [49], Chadwick L. J. doubts that participation in the constitutional function of voting at a board meeting could suffice. It should also be noted that issues of causation could be significant: N. Foster, "Personal civil liability of company officers for company workplace torts" (2008) 16 Torts L.J. 20, 41–2.

[40] See, e.g., N. Foster, "Personal civil liability of company officers for company workplace torts" (2008) 16 Torts L. J. 20.

[41] *Revenue and Customs Commissioners v Total Network S.L.* [2008] UKHL 19, [2008] 1 A.C. 1174.

[42] (1304) 33 Edw. 1. Prior statute and common law rules provided no reliable definition of the cause of action: T.J. Leach, "Civil Conspiracy: What's the Use?" (1999) 54 U. Miami L. R. 1, 6.

[43] E.g., *Poulterer's Case* (1611) 9 Coke 55b; F. B. Sayre, "Criminal Conspiracy" (1921–2) 35 Harv. L.R. 393, 400 and 403.

[44] *Crofter Hand-Woven Harris Tweed Co. Ltd. v Veitch* [1942] A.C. 435, 443–4 (Visc. Simon L. C.).

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inflicted by defendants who combined together for the purpose of inflicting it".[45] Although the eventual expansion of this form of liability into the civil law was seen as a corruption of the doctrine,[46] it is now firmly established – even if its precise operation is still contested.[47]

B. Description

Tortious conspiracy arises where two or more persons agree upon a course of action with an aim of injuring another and where the latter suffers injury as a consequence of the wrong committed.[48] It comes in two forms.[49] Lawful means conspiracy arises when persons combine to act with the predominant purpose of injuring another and when they do injure that other.[50] The predominant intention element is a substantial hurdle; no action is available for financial losses arising from conduct justifiable on the basis of self-interest.[51] The utility of the tort has been reduced by developments in unlawful means conspiracy, to be examined next. Given that it is unlikely to be an important avenue of redress in a commercial setting, it will be further referred to only to discuss *Gulf Oil (Great Britain) Ltd. v Page*[52] and the ostensible "magic" that inheres in a tort making actionable what is done by a group when the same behaviour is not actionable against individuals alone.[53]

*Un*lawful means conspiracy is obviously related to lawful means conspiracy, but there are some important differences between the two torts. The presence of unlawful means results in a lesser (but still substantial) requirement that the intention to injure be *one of the purposes* of the conspirators in executing their agreement.[54] In long-accepted parlance, the unlawful means must be "aimed at" or "directed" against

[45] Ibid., at p. 444 (Visc. Simon L. C.) (lawful means conspiracy case). See also *Lonrho Ltd. v Shell Petroleum Ltd.* [1982] A.C. 173, 188 (Lord Diplock) (unlawful means conspiracy case).

[46] F. B. Sayre, "Criminal Conspiracy" (1921–2) 35 Harv. L. R. 393, 405–6 (reviewing development of the English law).

[47] It is to be noted that "the tort and the crime have cut loose whatever common origin they had": W. V. H. Rogers, *Winfield and Jolowicz on Tort*, 18th ed. (London 2010), 884.

[48] *Crofter Hand Woven Harris Tweed Co. Ltd. v Veitch* [1942] A.C. 435, 461 (Lord Wright); H. Carty, *An Analysis of the Economic Torts*, 2nd ed. (Oxford 2012), 122.

[49] There is, however, debate about whether this separation is viable; there might simply be a 'spectrum' of liability for 'harmful combinations': H. Carty, *An Analysis of the Economic Torts*, 124.

[50] *Crofter Hand Woven Harris Tweed Co. Ltd. v Veitch* [1942] A.C. 435, 445 (Visc. Simon L. C.); 452 (Visc. Maugham); 478 (Lord Wright); and 490 (Lord Porter).

[51] Ibid. at pp., 446–7 (Visc. Simon L. C.), 456 (Visc. Maugham), 459 (Lord Thankerton) and 471 (Lord Wright); S. Deakin and J. Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519, 552 (table 1). Indeed, the area of permissible action seems to extend beyond cases of economic self-interest to include some which cannot be measured in monetary terms: *Scala Ballroom (Wolverhampton) Ltd. v Ratcliffe* [1958] 1 W.L.R. 1057.

[52] [1987] Ch. 327. See pp. 196–97 below.

[53] See pp. 202–5 below.

[54] *Lonrho plc v Fayed* [1992] 1 A.C. 448, 465–6 (Lord Bridge); *Meretz Investments N.V. v ACP Ltd.* [2007] EWCA Civ 1303, [2008] Ch. 244, 276 (Arden L.J.).

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the claimant[55] and injury must be caused to him or her. Yet this formulation of the required intention has been thrown into a degree of doubt following *Revenue and Customs Commissioners v Total Network S.L.*[56] In that case, Lord Walker spoke of the use of criminal conduct as "the means (what Lord Nicholls of Birkenhead in *OGB Ltd. v Allan*[57] called "instrumentality") of intentionally inflicting harm".[58] Lord Hope spoke in similar terms of an intention to harm by using unlawful means,[59] but also of the unlawful means being "directed at the claimants".[60] Lord Mance spoke of the need for intention in conjunction with the means being "targeted" at the claimant,[61] while Lord Scott merely spoke of an intention to cause economic harm.[62] Finally, Lord Neuberger spoke of the damage in the present case as having been "directly intended" and as a "foreseeable and inevitable consequence" of the success of the agreement,[63] but it is questionable that he was attempting, in the latter respect, to define the elements of the tort.

The potential uncertainty created by the *Total Network* case becomes apparent when one considers Lord Hoffmann's statement in *OBG Ltd. v Allan* equating the phrase " 'targets' the plaintiff" with "a *highly specific* intention".[64] Arguably, this is not the same as intention to injure as means or ends. *A fortiori*, it is not the same as reckless indifference as to the causation of injury. Another problem is that, in the *OGB* case, Lord Nicholls said of "intention" that this could be present in the tort of "interference with the claimant's business by unlawful means" "even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way".[65] One can only assume that Lord Walker did not intend, in *Total Network*, to adopt this understanding of intention as sufficient in unlawful means conspiracy. Of course, the issue for resolution in *Total Network* related to what constitutes unlawful means rather than intention.[66] It might, therefore, be concluded that it should not be taken as having altered the meaning of intention in unlawful

[55] *Lonrho plc v Fayed* [1992] 1 A.C. 448, 467 (Lord Bridge); R. Lewis, "Economic Torts: Where Are We Now?" [2008] Bus. L.R. 216, 217.
[56] [2008] UKHL 19, [2008] 1 A.C. 1174.
[57] [2007] UKHL 21, [2008] 1 A.C. 1, at [159].
[58] [2008] UKHL 19, [2008] 1 A.C. 1174, at [95]. This reference is potentially confusing because Lord Nicholls was, in the *OGB* case, discussing liability for 'interference with the claimant's business by unlawful means', which requires that the defendant harms the claimant 'through the instrumentality of a third party'. Neither form of conspiracy is typified by this kind of 'instrumentality'.
[59] [2008] UKHL 19, [2008] 1 A.C. 1174, at [44].
[60] Ibid. at [44].
[61] Ibid. at [120].
[62] Ibid. at [56].
[63] Ibid. at [223] and [227].
[64] [2007] UKHL 21, [2008] 1 A.C. 1, at [60] (emphasis added). It should be noted that this definition is not accepted as correct by the present author in that it seems to set the threshold too high.
[65] Ibid. at [165].
[66] See, e.g., [2008] UKHL 19, [2008] 1 A.C. 1174, at [216] (Lord Neuberger).

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means conspiracy, which has traditionally been stated as that of "aiming" or "directing" the unlawful means at the claimant.

The *Total Network* case was not even cited in a subsequent decision on unlawful means conspiracy by the Court of Appeal in *Baldwin v Berryland Books*.[67] The court cited *OBG Ltd. v Allan* as the "leading authority on intention … in this context" and quoted from the judgment of Nourse L.J. in *Kuwait Oil Tanker Co. S.A.K. v Al Bader*,[68] who defined conspiracy by unlawful means as requiring an "agreement … to injure [the claimant] by unlawful means".[69] The court in *Berryland Books* remarked that the necessary intention would need to be based on sufficient knowledge of circumstances in which injury could arise. It held that "what is required is actual intention or reckless indifference", where reckless indifference would arise upon "a conscious decision not to inquire into the existence of a fact".[70] The fact that *Total Network* was not cited is further support for the proposition that that case did not alter the intention requirement.

Liability in unlawful means conspiracy arises from the agreement and is primary; the conspirators are liable as joint tortfeasors.[71] This point deserves emphasis. Each of the conspirators is liable for the damage caused, even if only one of their number carries out the unlawful act that directly injures the claimant.[72] With respect to the defendant who does not directly employ unlawful means to injure, his or her act must have a purpose of furthering and must actually further the agreement in some way.[73] In the *Berryland Books* case,[74] for example, there was a conspiracy to divert business from an established bookseller to a new bookseller. A director of the established business, Mr Selvandam, was held liable for breaching his fiduciary duty in the use of confidential information and corporate opportunities and in the destruction of company records.[75] A business manager was also held liable for various actions in breach of her duty of fidelity to the company.[76] But the Court of Appeal accepted that, although

[67] [2010] EWCA Civ 1440.
[68] [2000] 2 All E.R. (Comm) 271, at [108].
[69] *Baldwin v Berryland Books* [2010] EWCA Civ 1440, at [45] and [48]. This was the same approach to intention in unlawful means conspiracy adopted in *Meretz Investments N.V. v ACP Ltd.* [2007] EWCA Civ 1303, [2008] Ch. 244, the difference being that the latter case was decided *before* the *Total Network* case. For this reason, I leave *Meretz* to one side.
[70] [2010] EWCA Civ 1440, at [48], citing *OBG Ltd. v Allan* [2007] UKHL 21, [2008] 1 A.C. 1, at [41] (Lord Hoffmann).
[71] *Revenue and Customs Commissioners v Total Network S.L.* [2008] UKHL 19, [2008] 1 A.C. 1174, at [101]–[102] (Lord Walker); *Credit Lyonnais Bank Nederland N.V. v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep. 19.
[72] *Baldwin v Berryland Books* [2010] EWCA Civ 1440, at [46] (Etherton L.J.).
[73] *Credit Lyonnais v ECGD* [1998] 1 Lloyd's L. R. 19; H. Carty, *An Analysis of the Economic Torts*, p. 129.
[74] [2010] EWCA Civ 1440.
[75] Ibid. at [11].
[76] Ibid. at [37]–[39].

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Mr Navaratnarajah *had taken sufficient steps* by incorporating the new company and acting as its initial director, he was not liable for unlawful means conspiracy because he had not acted with the intention of diverting book sales. He had simply tried to assist a friend in establishing a new business.[77]

Being an action on the case, unlawful means conspiracy is complete only upon the suffering of some recognised form of harm.[78] To be actionable, there must be some causal connection between the agreement entered into and the resultant harm to the claimant.[79] The unlawful means must be the means by which harm is caused[80] (although it has been noted that this is a somewhat vague requirement and that the means used might be direct or indirect, the boundary between these possibilities being itself unclear).[81] Another advantage of a successful suit is that, unlike the position in negligence, damages are not limited by the remoteness rule. Damages are available for all financial losses flowing directly from the commission of the tort.[82] The claimant may even be able to recover exemplary damages.[83]

In the *Total Network* case,[84] the House of Lords considerably expanded the scope and application of the tort. It held, as adumbrated, that the unlawful act in unlawful means conspiracy need not be independently actionable by the claimant against at least one of the conspirators personally.[85] Sufficient unlawful means might reside in the commission of a crime[86] – such as the common law crime of cheating the revenue – for which there is no corresponding action in tort.[87] Even a breach of statutory duty might suffice,[88] although it is not

[77] Ibid. at [87].
[78] *Crofter Hand Woven Harris Tweed Co. Ltd. v Veitch* [1942] A.C. 435, 440 (Visc. Simon L. C.), 449 (Visc. Maugham), and 478 (Lord Wright) (lawful means conspiracy).
[79] *Digicel (St. Lucia) Ltd. v Cable & Wireless plc* [2010] EWHC 774, at [295]–[299].
[80] *Revenue and Customs Commissioners v Total Network S.L.* [2008] UKHL 19, [2008] 1 A.C. 1174, at [93] (Lord Walker); *OBG Ltd. v Allen* [2007] UKHL 21, [2008] 1 A.C. 1, at [159] (Lord Nicholls).
[81] P. Edmundson, "Conspiracy by unlawful means: Keeping the tort untangled" (2008) 16 Torts L. J. 189, 197.
[82] Damages are at large: *Lonrho v Fayed (No. 5)* [1993] 1 W.L.R. 1489. They have a "very wide theoretical range" and are not limited to the foreseeable: H. McGregor, *McGregor on Damages*, 18th ed. (London 2009), pp. 1646 and 1111 (including fn. 36) respectively.
[83] See C. A. Banfi, "Defining the competition torts as intentional wrongs" (2011) 70 C.L.J. 83.
[84] [2008] UKHL 19, [2008] 1 A.C. 1174. An attempt at mapping out an appropriate operation for the economic torts as a whole is made in S. Deakin and J. Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519.
[85] [2008] UKHL 19, [2008] 1 A.C. 1174, at [44]–[45] (Lord Craig), [56] (Lord Scott), [95] (Lord Walker), [120]–[121] (Lord Mance), [217] and [227] (Lord Neuberger), over-ruling *Powell v Boladz* [1998] Lloyd's Rep. Med. 116.
[86] Note, however, "[i]t is not … in every case that the use of criminal means gives rise to unlawful means conspiracy. It is not enough that there is a crime somewhere in the story": W. V. H. Rogers, *Winfield and Jolowicz on Tort*, p. 894.
[87] The case has been criticised as not very closely reasoned: ibid., p. 892.
[88] [2008] UKHL 19, [2008] 1 A.C. 1174, at [96] (Lord Walker). It has also been speculated that an omission may be sufficient: *Reaitano v Jones* [2001] NSWSC 1076, at [32] (Young J.); *The Dolphina* [2011] SCHC 273, at [269] (Singapore High Court, Belinda Ang Saw Ean J.). This would seem logical, especially in the case of a breach of statutory duty.

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entirely clear to what extent this is the case. This ensures that the tort has something to offer beyond what is available under the doctrine of joint tortfeasance, with respect to which all those whose combine to commit a tort can be held jointly liable for the commission of the tort.[89] Indeed, the reach of unlawful means conspiracy has been enunciated in wide terms, Lord Walker remarking that "the range of possible conspiracies [is] so wide and varied that it would be unwise to attempt to lay down any general rule" as to the circumstances in which it applies.[90] This dictum indicates the potential for the tort to be of some significance in resolving disputes arising in the corporate context. Perhaps the true limit to liability will be found in the idea, expressed by Lord Scott, that "[t]he circumstances must be sufficiently reprehensible to justify imposing on those who have brought about the harm liability in damages for having done so".[91]

C. Application

Given the inadequacies of veil piercing in permitting access to the assets of controlling shareholders, conspiracy by unlawful means holds the potential to provide a useful alternative means of extending tort liability beyond an insolvent company to controlling shareholders and others. The degree of fault embodied within the tort (agreement with the aim of injuring) is less stringent than that in cases on veil piercing as a result of fraud, but is more stringent than that of negligence. Within the range of existing tort options, this represents a satisfactory midpoint between these two degrees of fault and should permit a widening of the net of liability without overly-deterring future investment. Another attractive feature is that liability does not depend upon a weighing up of various factors; there is no inevitable need to engage in the retrospective standards-setting that occurs in many veil piercing cases.

At present, however, there is some uncertainty as to the combinations of action involving a company that will support an unlawful means conspiracy claim. Conspiracy might arise from agreement between natural persons, such as the corporate controller and another shareholder or legal adviser. In such a case, the potential arises for the company to be vicariously liable for the commission of the tort. Alternatively, conspiracy might arise between a company controller and the company itself,[92] in which case the company is liable as a

[89] *Brooke v Bool* [1928] 2 K.B. 578. See also T. J. Leach, "Civil Conspiracy: What's the Use?" (1999) 54 U. Miami L. R. 1, 13.

[90] [2008] UKHL 19, [2008] 1 A.C. 1174, at [96].

[91] *Revenue and Customs Commissioners v Total Network S.L.* [2008] UKHL 19, [2008] 1 A.C. 1174, at [56]. See also ibid. at para. [119] (Lord Mance) (pizza delivery example).

[92] See pp. 195 ff below for further analysis. It is interesting to note, by way of comparison that the US Supreme Court has ruled that there can be no conspiracy between a parent company and its

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primary tortfeasor. Although the tort is more likely to arise where there are a number of individuals involved in wrongful corporate acts, the attractiveness of the action is its potential to allow for extensions of liability beyond the company to those who stand behind it, even in the case of a small company with a single controlling shareholder.

Scenarios in which the tort of unlawful means conspiracy has a potentially useful role include cases in which a breach of a statutory provision (relevant provisions including the statutory directors' duties) by at least one of the conspirators is alleged, which is unlawful but does not ordinarily sound in a personal action in tort.[93] Such a pleading was successful in the *Berryland Books* case,[94] considered already. In each additional scenario provided below involving the smallest of companies, it is assumed that X Co's sole director-shareholder D has substantial assets and, thus, is worth suing personally.

Illustration 1: D director causes X Co. to commence litigation against C with the intention to financially injure C. The expense prevents C from succeeding in a takeover of a third party company and profiting from this. The litigation has some merit (meaning abuse of process is not available), but causes X Co. to decline into insolvency. Trading while insolvent is a breach of Insolvency Act 1986, s 214 and of statutory duties owed to the company under Companies Act 2006. An action would arise against both X Co. and D in unlawful means conspiracy (although this action might be stayed until it is ascertained that X Co.'s liquidator will not seek contribution from D personally).

Illustration 2: D is the sole director and shareholder of X Co. and the sole director and majority (55%) shareholder of Y Co. The remainder (45%) of the shares in Y Co. are owned by D's spouse, Z. X Co. and Y Co. are in potential dispute with respect to title to certain goods. Prior to D announcing to Z their future divorce, D causes Y Co. to compromise the terms of the dispute with X Co. in a way that is beneficial to X Co. and detrimental to Y Co. This decision involves no deceit, but is a breach of statutory duties owed to the company under Companies Act 2006. The goods are sold to an

subsidiary under Sherman Antitrust Act 15 USC § 1: *Copperweld Corp. v Independence Tube Corp.* 467 U.S. 752 (1984). However, *Copperweld* was not followed in *Cedric Kushner Promotions Ltd. v King* 553 U.S. 158 (2001), which held that a company and its sole shareholder/president were two different legal persons under the Racketeer Influenced and Corrupt Organizations Act 18 USC § 1961.

[93] By contrast, the rule in *Said v Butt* [1920] 2 K.B. 497 prevents actions in conspiracy against corporate agents acting bona fide within the scope of their authority for inducing breach of *contract* between the company and a third party. See *Imperial Oil Ltd. v C & G Holdings Ltd.* (1989) 62 D.L.R. (4th) 261; P. Y. Lee, "The Company and Its Directors as Co-Conspirators" (2009) 21 Singapore Academy of Law Journal 409.

[94] [2010] EWCA Civ 1440.

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innocent third party. An intention of both X Co. and D was financial injury of Z. An action would arise in unlawful means conspiracy against both X Co. and D.[95]

IV. Potential Obstacles to Liability

Despite the apparent cogency of a suit in unlawful means conspiracy in these kinds of case, the tort has not been much used to create liability in those who stand behind the corporate entity, especially where that entity is a *small* company. It is important to examine the reasons for this and to determine whether they are likely to undermine the usefulness of the tort.

A. Separate legal personality

One potential barrier to the use of unlawful means conspiracy in the small company context is that it would undermine separate legal personality. In *Normart Management Ltd. v West Hill Redevelopment Co Ltd.*,[96] Finlayson J. A. of the Ontario Court of Appeal stated:

> a directing mind of a corporation cannot, by causing the corporation to act in a certain way, be said to have made an agreement with that corporation … To conclude otherwise would be to challenge the recognized separate legal identity afforded to corporations under our law and to conclude that every corporate action which may give rise to a breach, by virtue of the decision making authority of the corporate management, is an action of the directing mind personally.[97]

This concern about the personal liability of small company directors reflects that which has arisen in the English law on negligent misstatements. In *Williams v Natural Life Health Foods Ltd.*,[98] franchisees sued a franchisor company in negligence for misleading projections about the viability of a health foods store. The franchisor company proved to be insolvent and the claimants joined the "managing director and principal shareholder" as a defendant. The House of Lords held that an action against the director could only succeed in a case of financial loss upon proof of a special relationship between the parties "giving rise to an assumption of responsibility".[99] This would require proof of positive exchanges between the parties by which the director indicated that

[95] This scenario has an analogy in *Chew Kong Huat v Ricwil (Singapore) Pte. Ltd.* [1999] 3 S.L.R.(R) 1167.
[96] (1998) 37 O.R. (3d) 97.
[97] Ibid. at [19].
[98] [1998] 1 W.L.R. 829.
[99] [1998] 1 W.L.R. 829, 838.

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he accepted personal responsibility for any failure in care giving rise to damage.

The ostensible aim in the *Williams* case was to preserve the legal separation between company and director.[100] This explains the use of the "device" of the "assumption of responsibility" conception of duty of care,[101] which is more difficult to satisfy than ordinary proximity. Arguably, the result was to create an area of immunity from liability[102] for the controlling shareholder of a small company.[103] This is highly problematic. The concept of an "assumption of responsibility" has been vociferously attacked in the literature.[104] It is indeed a strange concept for tortious liability to depend upon what the claimant could reasonably have perceived the defendant's attitude to personal liability to be.[105] Ordinarily, actors are liable for their wrongful acts. This would entail that directors are liable for their wrongful acts (including where the act "as the company"),[106] at the same time as passive shareholders[107] are protected by limited liability.[108] Moreover, there is an inconsistency between the immunity extended to small company directors and the position of others, such as company agents and employees, who are held personally liable for *their* tortious conduct.[109] These points aside, there is reason to doubt the cogency of the reasoning in the *Williams* case following the House of Lords' decision in *Commissioners of Customs and Excise v Barclays Bank*.[110] The effect of the latter case is, arguably, to relegate the "assumption of responsibility" test to the status of a type of proximity to be found in the three-stage test for

[100] Ibid. p. 835. See also *Trevor Ivory Ltd. v Anderson* [1992] 2 N.Z.L.R. 517 (doubted in *Body Corporate 202254 v Taylor* [2009] 2 N.Z.L.R. 17, at [44] (The Court)); D. Goddard, "Corporate Personality – Limited Recourse and its Limits" in R. Grantham and C. Rickett (eds.), *Corporate Personality in the 20th Century* (Oxford 1998), 45–55.

[101] The term "device" comes from *Body Corporate 202254 v Taylor* [2009] 2 N.Z.L.R. 17, at [144] (Chambers J.).

[102] The term "immunise" (and cognates) has long been used in association with the *Williams* case: e.g,. F. Reynolds, "Personal Liability of Company Directors in Tort" (2003) 33 H.K.L.J. 51, 63; R. Flannigan, "The Personal Tort Liability of Directors" (2002) 81 Can. Bar Rev. 247, 248 and 264 (directors being subject to "special treatment").

[103] Liability arises only in "rare" cases: J. Freedman, "Limited Liability: Large Company Theory and Small Firms" (2000) 63 M.L.R. 317, 348. This is not only an English practice; it is one found in other jurisdictions as well: B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Melbourne 1993), 14; S. H. C. Lo, "The liability of directors as joint tortfeasors" [2009] J.B.L. 109, 109.

[104] E.g., K. Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 L.Q.R. 461.

[105] See, e.g., *Smith v Eric S. Bush* [1990] 1 A.C. 831 (attempted exclusion of liability).

[106] *Standard Chartered Bank v Pakistan Shipping Corporation* [2002] UKHL 43, [2003] 1 A.C. 959, 968 (Lord Hoffmann, all of their Lordships agreeing) and 974 (Lord Rodger). For fuller argument, see H. Anderson, *Corporate Directors' Liability to Creditors* (North Ryde NSW 2006), ch. 7; S.H.C. Lo, "Liability of directors as joint tortfeasors" [2009] J.B.L. 109, 127–30 and 138.

[107] Managerialist theory assumes shareholder passivity. But this belies a more variegated reality: see, e.g., J. Hill, "Changes in the Role of the Shareholder" in R. Grantham and C. Rickett (eds.), *Corporate Personality in the 20th Century* (Oxford 1998), ch. 10.

[108] R. Flannigan, "The Personal Tort Liability of Directors" (2002) 81 Can. Bar Rev. 247, 248.

[109] H. Anderson, *Corporate Directors' Liability to Creditors* (North Ryde NSW 2006), 242.

[110] [2006] UKHL 28, [2007] 1 A.C. 181.

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duty of care.[111] This would revive the applicability of ordinary proximity in cases arising between small company directors and corporate creditors.

Of course, these points do not deal with the underlying policy concern in the *Williams* case about the need to recognise the separate legal personality of the small company. There are acknowledged tensions in the operation of company law protections for those who own and operate small companies.[112] In general, such companies are less likely to be bastions of entrepreneurship and economic growth than to be the means of minimising taxation, minimising personal liability and ensuring perpetual existence.[113] It is submitted that common law courts should recognise the artificiality of incorporation in such cases by ensuring the proper availability of civil actions against corporate controllers. This is all the more necessary, given the absence of any remedy of shareholder removal of wrongdoing directors from office[114] or of share market expressions of disapproval of wrongdoing.[115]

The House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corporation (No. 2)*[116] drew a line under the application of the "assumption of responsibility" test in the case of a director making fraudulent representations. The approach taken in that case to liability for an intentional tort would be entirely consistent with the application of unlawful means conspiracy to small company directors. Indeed, Lo believes that the courts are moving away from the practice of immunising directors from tort liability and that they are "back on the correct course" in applying tort rules to company directors.[117] Such a change in direction might only be strengthened by recent perceptions of managerial recklessness in financial institutions large and small and the need to ensure better standards of corporate governance.

[111] See ibid. at [5] (Lord Bingham), [35] (Lord Hoffmann) and [73] (Lord Walker). See J. Murphy and C. Witting, *Street on Torts*, 13th ed. (Oxford 2012), 52. Consistently with this, the Court of Appeal in *Chandler v Cape plc* [2012] EWCA Civ 525, at [64] accepted that the "word 'assumption' is [ ] something of a misnomer. The phrase "attachment" of responsibility might be more accurate".

[112] The policy arguments in favour of a zone of immunity for directors are considered and rejected in R. Flannigan, "The Personal Tort Liability of Directors" (2002) 81 Can. Bar Rev. 247, 310–21. Compare M. Petrin, "The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law" (2010) 59 Am. U.L.R. 1661.

[113] J. Freedman, "Limited Liability: Large Company Theory and Small Firms" (2000) 63 M.L.R. 317, 321–2 and 334.

[114] H. Anderson, *Corporate Directors' Liability to Creditors* (North Ryde NSW 2006), 248.

[115] Against this is the distinct possibility that the controlling shareholder of a wrongdoing and insolvent small company is likely to have put most of his or her assets into it and not be worth suing: see R. Kraakman et al, *The Anatomy of Corporate Law*, 2nd ed. (Oxford 2009), 135. In such cases, disqualification proceedings are more apposite than a suit for damages: ibid. at p. 137.

[116] [2002] UKHL 43, [2003] 1 A.C. 959.

[117] S. H. C. Lo, "The liability of directors as joint tortfeasors" [2009] J.B.L. 109, 111. See also N. Foster, "Personal civil liability of company officers for company workplace torts" (2008) 16 Torts L. J. 20, esp. 34.

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B. Two independent minds

Another conceptual barrier to the application of unlawful means conspiracy in the corporate context exists in judicial wariness about deriving a corporate "intention" from a controlling shareholder's own state of mind under the identification doctrine and calling the resultant "agreement" to injure a conspiracy. This is seen as a kind of "double counting". Once again, the problem is especially acute with respect to *small* companies.

The identification doctrine works on the assumption that, just as natural persons have minds, so too must a mind be found in the company in determining the intentional torts for which it is to be held responsible. This is not difficult when the corporate constitution specifies how corporate decisions are to be made. It is more difficult, for companies of any real complexity, with respect to actions taken out of the boardroom and other constitutionally-defined circumstances.[118] One reason for this is that knowledge within the company is diffused.[119] Full knowledge about a subject matter might not lie with any single person, but within a collective. Decisions might be contributed to by a number of persons, final approval for a proposal only coming "from the top" after a long gestation period.

In *Tesco Supermarkets Ltd. v Nattrass*, Lord Reid spoke of the need to identify the person who acts as the company, whose mind "is the mind of the company".[120] This remains the core test within the wider set of attribution rules considered by the Privy Council in *Meridian Global Funds Management Asia Ltd. v Securities Commission*.[121] Under present law, "particular circumstances" must be demonstrated that confer the position of directing mind and will to a person who is not a director of the company[122] or a named office-holder. Thus, it was said in a criminal case that there is "no warrant for imposing liability by virtue of the intentions of one who cannot be said to be the directing mind and will of" the relevant company.[123] The effect of the *Meridian* case is to acknowledge the difficulty attending the use of ordinary rules of attribution and to permit the "fashion[ing of] a special rule of attribution" where a law, including a tort rule, "was intended to apply to companies".[124]

[118] P. Cane, *Responsibility in Law and Morality* (Oxford 2002), 159; M. Dan-Cohen, *Rights, Persons, and Organizations* (Berkeley 1986), 36.
[119] P. Cane, *Responsibility in Law and Morality* (Oxford 2002), 159.
[120] [1972] A.C. 153, 170.
[121] [1995] 2 A.C. 500, 511. See, also, to this effect *St Regis Paper Co. Ltd. v R.* [2011] EWCA Crim 2527, at [11] (The Court); *Attorney-General's Reference (No. 2 of 1999)* [2000] 2 Cr. App. Rep. 207, 216 (Rose L. J.).
[122] *El Ajou v Dollar Land Holdings plc* [1994] B.C.C. 143, 154 (Rose L. J.).
[123] *St Regis Paper Co. Ltd. v R.* [2011] EWCA Crim 2527, at [11].
[124] [1995] 2 A.C. 500, 507. Lord Hoffmann gives the example of a statute-based rule but clearly intends this as but one possible instance in which a rule of attribution is necessary.

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The court will use the identification doctrine to determine whether *the company* entered a conspiracy with the requisite intention. The company will be identified with the person(s) "who could cause it to combine with others" so as to harm the claimants(s).[125] This has been seen as an unsatisfactory means of establishing *criminal* conspiracy. In *R. v McDonnell*, it was held that a charge of criminal conspiracy could not be sustained "where the sole responsible person in the company is the defendant himself [as] it would not be right to say that there are two persons or two minds".[126] This approach was followed by the Supreme Court of Canada in *Canadian Dredge & Dock Co. Ltd. v The Queen*, which held that the person who is the directing mind of the company, on the basis of whose acts the company is found to have committed a *crime*, "is not guilty additionally of the offence of conspiring with the [company] to commit the wrongful act … because in the identification theory there is only one entity, the natural, and legal person having merged into one identity, and hence the basic requirement of two persons in a conspiracy is not met".[127] Finally, in *Stone & Rolls Ltd. v Moore Stephens* Lord Walker said that a company "has the mind of its human embodiment, though that is not treated as a separate mind for the purposes of the crime of conspiracy".[128]

Needless to say, reservations expressed by courts in applying criminal conspiracy to small companies need not impede the development of the civil law. The civil law embodies a wider conception of liability[129] that includes vicarious liability of employer companies for the intentional acts of its employees.[130] Moreover, there is no reason to think that the identification doctrine should immunise wrongdoers from personal liability. Identification doctrine is "not strictly relevant when looking at the liability of individuals".[131]

In *Gulf Oil (Great Britain) Ltd. v Page*,[132] the Court of Appeal upheld the possibility of directors' liability in lawful means conspiracy, the tort being alleged against a company and its controlling shareholders. The defendants had engaged a third party to exhibit from behind an aeroplane a sign which read "Gulf exposed in

[125] *The Dolphina* [2011] SCHC 273, at [254] (Singapore High Court, Belinda Ang Saw Ean J.)
[126] [1966] 1 Q.B. 233.
[127] [1985] 1 S.C.R. 662, at [20] (The Court); L. Leigh, "The Criminal Liability of Corporations and Other Groups" (1971) 9 U. Ottawa L. R. 247, 247–302. See to like effect *Union Pacific Coal Co. v United States* 173 F. 737 (8th Cir., 1909), esp. p. 745.
[128] *Stone & Rolls Ltd. v Moore Stephens* [2009] UKHL 39, [2009] 1 A.C. 1391, at [159], citing *R. v McDonnell* [1966] 1 Q.B. 233, 245.
[129] P. Cane, *Responsibility in Law and Morality* (Oxford 2002), 162.
[130] *Lister v Hesley Hall Ltd.* [2002] UKHL 22, [2002] 1 A.C. 215.
[131] S. H. C. Lo, "The liability of directors as joint tortfeasors" [2009] J.B.L. 109, 127. See also N. Campbell and J. Armour, "Demystifying the Civil Liability of Corporate Agents" [2003] C.L.J. 290, esp. 293; P. Y. Lee, "The Company and Its Directors as Co-Conspirators" (2009) 21 Singapore Academy of Law Journal 409, 413.
[132] [1987] Ch. 327.

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fundamental breach". No action in defamation was available because the statement was true.[133] Although the point was not subject to detailed analysis, the court found that the allegation of conspiracy (including the allegation of predominant purpose to injure) was sufficient to permit the granting of an interim injunction against them prohibiting the continuation of the offending activity.

Similarly, the Irish Supreme Court held in *Taylor v Smyth*[134] that there can be an actionable conspiracy between a controlling shareholder and his or her company despite specific argument that the controlling shareholder could not be liable for conspiring "with himself".[135] McCarthy J. saw "no reason why the mere fact that one individual controls the company of limited liability, should give immunity from suit to both that company and that individual in the case of an established arrangement for the benefit of both company and individual to the detriment of others".[136]

Finally, the Singapore Court of Appeal held in *Chew Kong Huat v Ricwil (Singapore) Pte. Ltd.*[137] that there can be unlawful means conspiracy between a controlling shareholder and his or her company. The court found liability in the managing director and 50% shareholder of Sintalow Hardware Pte. Ltd.[138] in diverting to that company a contract for the supply of pipes, the opportunity for which had arisen in contractual negotiations between another company of which he was managing director and shareholder (Ricwil)[139] and a third party. The diversion of the business opportunity was a breach of fiduciary duty owed to Ricwil. The court was satisfied that there was an intention to injure Ricwil[140] and did not indicate any concern with how the company had formed its intention to injure.[141]

[133] This has been a reason for finding, subsequently, that there can be no action in lawful means conspiracy for intention to injure through the making of true statements where the loss is to reputation: *Lonrho plc v Fayed (No. 5)* [1993] 1 W.L.R. 1489. This has been challenged in G. K. Y. Chan, "Never Say 'Never' for the Truth Can Hurt: Defamatory but True Statements in the Tort of Simple Conspiracy" (2007) 31 M.U.L.R. 321. Note, however, that the specific application to reputation of the holding in the *Gulf Oil* case is not important for the purposes of general argument made in this paper.

[134] [1991] 1 I.R. 142.

[135] Ibid., p. 163.

[136] [1991] 1 I.R. 142, 165.

[137] [1999] 3 S.L.R.(R) 1167.

[138] The other 50% of the shares were owned by his wife.

[139] This company was a joint venture vehicle.

[140] [1999] 3 S.L.R.(R) 1167, 1182.

[141] Two later Singapore cases have determined that there can be an unlawful means conspiracy between a company and its director(s): *Lim Leong Huat v Chip Hup Hup Kee Construction Pte. Ltd.* [2009] 2 S.L.R.(R) 318 and *Nagase Singapore Pte. Ltd. v Ching Kai Huat* [2008] 1 S.L.R.(R) 80. However, both involved actions inducing breach of contract, which arguably should have been decided by application of *Said v Butt* [1920] 2 K.B. 497. See P. Y. Lee, "The Company and Its Directors as Co-Conspirators" (2009) 21 Singapore Academy of Law Journal 409.

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C. The issue of corporate intention

Although courts have been prepared to find intention and agreement between a company and its controlling shareholder, this is not to say that the analysis of corporate intention has been entirely satisfactory. The identification doctrine, as it is applied to companies, has a number of known defects.[142] In small companies, there is the danger that it will be applied in a way that is over-inclusive, all actions involving corporate participants being attributed to the company.[143] In such a case, the small company is in danger of becoming an insurer of all individual interactions with it. In large companies, the identification doctrine is apt to be under-inclusive because the vast majority of corporate actors will not be acting "as the company".[144] The doctrine does not suitably accommodate decision-making that is cumulative, where later decisions build upon earlier decisions, or decision-making that is "the product of corporate procedures and policies rather than individual decisions".[145] Corporate policies and systems for implementation might have been introduced prior to the appointment of senior managers in office during the commission of a wrong.[146] Decisions might, thus, have been "pre-programmed" without the active participation of those managers. These characteristics make it inherently difficult to identify corporate intentions. There is no scope under the identification doctrine for considering management and control of the company "generally or in the round".[147]

Another problem with the identification doctrine is that it "treats A and B [Co], for certain purposes, as the same legal person".[148] This undermines a core assumption of company law that the company is itself – and without reference to the actions of others – competent. One might recall that, in *Salomon v A. Salomon and Co. Ltd.*,[149] Lord Macnaghten observed that "[t]he company attains maturity on its birth. There is no period of minority – no interval of incapacity".[150] Moreover, Lord Davey noted that "a company may contract with the

[142] Indeed, it has been said that "[t]here nowhere exists a convincing defence of identification either as a theory or in terms of its practical effects": G. R. Sullivan, "The Attribution of Culpability to Limited Companies" [1996] C.L.J. 515, 540. It has also been said that "[i]n a theory of corporate transgression, concepts other than intentionality must assume greater importance": I. B. Lee, "Corporate Criminal Responsibility as Team Member Responsibility" (2011) 31 O.J.L.S. 755, 761.

[143] E. Ferran, "Corporate attribution and the directing mind and will" (2011) 127 L.Q.R. 239, 246.

[144] Ibid., p. 242. See also B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Melbourne 1993), pp. 8 and 47. This is not to say that there is no inconsistency in the cases – because there is: G. R. Sullivan, note 142 above, pp. 519–20.

[145] C. M. V. Clarkson, "Kicking Corporate Bodies and Damning Their Souls" (1996) 59 M.L.R. 557, 561.

[146] Ibid., p. 568.

[147] *El Ajou v Dollar Land Holdings plc* [1994] B.C.C. 143, 151 (Nourse L. J.).

[148] *The Dolphina* [2011] SCHC 273, at [231] (Singapore High Court, Belinda Ang Saw Ean J.).

[149] [1897] A.C. 22.

[150] Ibid., p. 51.

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holder of the bulk of its shares, and such contract will be binding though carried by the votes of that shareholder".[151] This was affirmed by the Privy Council in *Lee v Lee's Air Farming Ltd.*, where Lord Morris stated that "the capacity of the company to make a contract with the [controlling shareholder] could not be impugned merely because the [controlling shareholder] was the agent of the company in its negotiation".[152]

There might be little need to resort to the identification doctrine, if one were to adopt Viscount Maugham's view in *Crofter Hand Woven Harris Tweed Co. Ltd. v Veitch* that, when determining the intentions of persons (in that case, a natural person), one assumes that they are "to be taken as intending the direct consequences of their acts".[153] In the same case, Lord Wright said that intention is "generally determined by reference to overt acts and to the circumstances in which they are done".[154] These statements are entirely apposite to the artificial person that is the company. Where it is proved that the company's co-conspirator acted with a certain intention, and where actions taken on its behalf are consistent with the presence of intention, why is it not sufficient to conclude that the company had that intention? In his study of complicity in the criminal law, Kutz found this holistic approach to be the best available for justifying punishment.[155] Although there is no space here to recount the steps to this conclusion, they include the observation that findings of intention in the criminal law often are "a construct teetering upon a scaffolding of circumstantial evidence and psychological inference".[156] Kutz concluded:

> When we can best make sense of someone's individual actions by relating those actions to a collective project – that is, when we ought to attribute to him or her a participatory intention – then we have a basis for individual moral accountability for collective acts.[157]

D. Fraud on the company

The liability of the company is entirely justified where it is acting consistently with its wrongdoing corporate controller. However, there are cases in which the corporate controller (or some other individual within

[151] [1897] A.C. 22, 58.
[152] [1961] A.C. 12, 26. See also *Lim Leong Huat v Chip Hup Hup Kee Construction Pte. Ltd.* [2009] 2 S.L.R.(R) 318, 329 (noting that contractual competence denotes competence to conspire). Compare P. Cane, *Responsibility in Law and Morality* (Oxford 2002), 151 (capacity condition of responsibility cannot be satisfied by companies).
[153] [1942] A.C. 435, 453.
[154] Ibid., p. 468.
[155] C. Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge 2000), 226.
[156] Ibid., p. 206.
[157] Ibid., p. 226.

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the company) acts *to defraud it*. In such cases, the question arises whether the company can be treated as a conspirator liable to third parties. According to the reasoning adopted above, the answer would be "no". The company's own actions would be seen as consistent with its position as a 'victim" of a fraud rather than a party to it. Indeed, under the identification doctrine, corporate liability to third parties generally is precluded where directors were acting to defraud the company itself.[158] However, liability will arise in "single actor" cases – that is, where no-one but the fraudulent director constituted the company.[159]

In *Belmont Finance Corporation Ltd. v Williams Furniture Ltd.*,[160] Belmont (through its receiver) brought an action in conspiracy against two of its three directors for causing it to purchase at a gross over-valuation the shares in another company. The consideration for the purchase consisted of all the issued shares in Belmont. The allegation was that the directors knew of the over-valuation and conspired to commit an offence under the Companies Act 1948, s. 54 in providing financial aid for the purchase of Belmont's own shares.[161] Foster J. dismissed the action in conspiracy on the basis that Belmont had been a party to the agreement and thus could not sue its co-conspirators. On the face of it, this might appear a reasonable decision – if one assumes that the two directors, in initiating the purchase, were acting as the company. However, the decision was over-turned on appeal. Buckley L. J. held that the key issue was whether Belmont "can sensibly be regarded as a party to the conspiracy".[162] He held that it could not, because the knowledge of wrongdoing of the two directors

> should not be imputed to the company, for the essence of the arrangement was to deprive the company improperly of a large number of its assets … [T]he company was a victim of the conspiracy … [I]t would be irrational to treat the directors, who were allegedly parties to the conspiracy, notionally as having transmitted this knowledge to the company; and indeed it is a well-recognised exception from the general rule that a principal is affected by notice received from his agent that, if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal.[163]

[158] See principles discussed in *In re Hampshire Land Co.* [1896] 2 Ch. 743, as interpreted in *Stone & Rolls Ltd. v Moore Stephens* [2009] UKHL 39, [2009] 1 A.C. 1391, [145] (Lord Walker). This interpretation is criticised in P. Watts, '*Stone & Rolls (In Liq.) v Moore Stephens (A Firm)*: audit contracts and turpitude' (2010) 126 L.Q.R. 14, 19. See also *J. C. Houghton & Co. v Nothard Lowe & Wills Ltd.* [1928] A.C. 1, 19 (Visc. Sumner affirming principles in *Hampshire Land* case).

[159] *Royal Brunei Airlines Sdn. Bhd. v Tan* [1995] 2 A.C. 378. See also *Stone & Rolls Ltd. v Moore Stephens* [2009] UKHL 39, [2009] 1 A.C. 1391.

[160] [1979] Ch. 250.

[161] Ibid., p. 259.

[162] [1979] Ch. 250, 261.

[163] Ibid., pp. 261–2.

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Orr and Goff L. J. J. agreed.[164] In the result, the company was not debarred from its suit against the defendants for damages for conspiracy.[165]

The essential problem with the decision in the *Belmont* case is that it could be regarded as arbitrary. Ordinarily, under the identification doctrine, the company would be regarded as having been the principal in the transaction, having the knowledge of its directors. However, this was not a convenient analysis when the company was itself defrauded. The result would have been better explained by use of a more objective test, such as has been suggested, which treats the external acts of the company as evidence of any relevant "intention".

Matters become more complicated when a small company is both the means of defrauding third parties *and* a victim of fraud by the corporate controller. In *Stone & Rolls Ltd. v Moore Stephens*,[166] S & R (through its liquidator) brought an action in negligence against its auditor for failing to identify the fraudulent transactions to which S & R had been party when under the control of one Stojevic. The relevant issue was one of attribution of Stojevic's fraud to S & R in circumstances where the company's assets were paid away to third party fraudsters and where it had a substantial unpaid judgment debt. By a bare majority, the House held that the company was to be treated as a principal in the fraud and was barred *ex turpi causa* from suing its auditors. This was despite the holding in *In re Hampshire Land Co.*[167] that "knowledge of the agent will not be attributed to the principal when the knowledge relates to the agent's own breach of duty to his principal"[168] because such a person cannot be expected to "make a clean breast of their delinquency".[169]

The diverse reasoning employed in the *Moore Stephens* case is indicative of the difficulties they had in applying various rules,[170] including the identification doctrine. Lord Walker (arguably the key judge) was of the view that Stojevic was the "persona of S & R", its directing mind and will.[171] It was thus primarily liable for the frauds committed.[172] His Lordship was prepared to treat in the same way any small company "where there is a single dominant director and shareholder … even if there are other directors or shareholders who are subservient to the

[164] Ibid., pp. 270 (Orr L. J.) and 270–1 (Goff L. J.).
[165] Ibid., p. 264.
[166] [2009] UKHL 39, [2009] 1 A.C. 1391.
[167] [1896] 2 Ch. 743.
[168] [2009] UKHL 39, [2009] 1 A.C. 1391, at [43] (Lord Phillips' summary).
[169] *J. C. Houghton & Co. v Nothard, Lowe and Wills Ltd.* [1928] A.C. 1, 19 (Lord Sumner).
[170] The case has been said to have left 'a series of unsightly dents in some aspects of company law and agency law': P. Watts, note 158 above, 126 L.Q.R. at p. 14.
[171] [2009] UKHL 39, [2009] 1 A.C. 1391, at [134].
[172] Ibid. at [136]. See also P. S. Davies, "Auditors' liability: no need to detect fraud?" [2009] C.L.J. 505. But there might not have been any need for this step in the reasoning: P. Watts, note 158 above, 126 L.Q.R. at p. 20.

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dominant personality".[173] S & R was precluded from bringing an action even where brought on behalf of an innocent creditor.[174] If the law were otherwise, "it would create a very large gap in the public policy defence, since most fraudsters (individual and corporate) become insolvent sooner or later and have liabilities to those they defrauded".[175]

It is to be admitted that there is no easy way in which to deconstruct *Moore Stephens* and to allocate liability for the underlying wrongs. Part of the difficulty lies in the ambiguity of the company as a legal person. The majority's analysis – and its use of the rules of attribution – might be seen as coherent, if the company is treated merely as a means to an end and not as an end in itself.[176] The company is reduced to a medium through which the rights and obligations of natural persons are determined. This seems to be Davies' conception, when he writes:

> It is entirely proper to use different rules to govern the liability of the company to the third party, on the one hand, and of the agent or employee to the company, on the other. There is no reason why rules developed to protect third parties against losses caused by fraudulent agents should also operate to protect those same fraudulent agents against the company.[177]

One does not have to agree with the notion that the company is an end in itself to see the point that this manipulation of concepts in order to reach the "right" result does tend to hollow out the legal personhood of the company. The company has no inherent responsibility for wrongs; it might be treated as wrongful or not according to who is suing and who is being sued.[178] Rules of attribution are applied in ways that are result-driven rather than principled.

V. Justification of Intra-Corporate Conspiracy

Authority establishes that unlawful means conspiracy might arise in the corporate context and beyond. Obviously, liability is based on both the unlawfulness of the means utilised *and* in the fact of agreement to injure. The reasons for imposing liability upon such agreements need to be explored. What is the significance of *combinations* to injure? Perhaps

[173] [2009] UKHL 39, [2009] 1 A.C. 1391, at [161].
[174] Ibid., at [184].
[175] Ibid.
[176] E.g., M. Dan-Cohen, *Rights, Persons, and Organizations* (Berkeley 1986), 61, noting that organisations "are not equal members in the Kantian kingdom of ends". This is because only natural persons – and not organisations – have interests in autonomy and dignity that inherently deserve protection. These conceptions of the company may well be right. However, for this author, they are also largely irrelevant when considering the position of an entity which has full legal personhood.
[177] P. L. Davies, *Gower and Davies' Principles of Modern Company Law*, 8th ed. (London 2008), 183.
[178] It has been said that the law concerning the company's knowledge of the acts of a fraudulent agent has been (for nearly two hundred years) 'at sixes and sevens': P. Watts, note 158 above, 126 L.Q.R. 14, 18.

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the best place to begin consideration of this issue is with the tort of *lawful* means conspiracy.

There has long been a debate about the defensibility of the tort of lawful means conspiracy. This stems, in part, from its perceived inconsistency with the holding in cases like *Mayor of Bradford v Pickles*[179] that a "bad intention" does not alter the lawfulness of acts that one otherwise has a right to undertake.[180] The fact of combination is a key reason for imposing such liability (along with a predominant intention to injure). Yet, in *Crofter Hand Woven Harris Tweed Co. Ltd. v Veitch*, Lord Wright noted that "[t]he rule may seem anomalous, so far as it holds that conduct by two may be actionable if it causes damage, whereas the same conduct done by one, causing damage, would give no redress".[181] And in *Lonrho Ltd. v Shell Petroleum Co. Ltd. (No. 2)*, Lord Diplock asked: "Why 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?"[182]

Commentators have wondered at the ostensible "magic" of such liability,[183] commentators noting that a single company might be capable of doing much more damage than even a large group of sole traders acting in combination. Thus, in *Crofter Hand Woven Harris Tweed Co. Ltd. v Veitch,* Lord observed that "the power of a big corporation or trader may be greater than that of a large number of small fry in the trade".[184] These statements assume the contrary of what this paper attempts to argue. They assume that actions taken by the company do not involve multiple potentially liable individuals. They assume that there is no such action as an intra-corporate conspiracy.

In what follows, some of the problematic aspects of group behaviour are identified. These may well provide a justification for liability in lawful means conspiracy *and* strengthen the reasons for liability in *un*lawful means conspiracy. Specific reason is then provided for recognition of intra-corporate conspiracy, even in the case of the small company where the agreement to injure is made between the controlling shareholder and the company he or she controls.

[179] [1895] A.C. 587. See also *Allen v Flood* [1898] A.C. 1.

[180] "Perceived" because the point seems to have been exaggerated: E. Reid, "The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction" (2004) 8 E.J.C.L. available at http://www.ejcl.org (last accessed 15 November 2012).

[181] [1942] A.C. 435, 462.

[182] [1982] A.C. 173, 188.

[183] E.g., H. Carty, *An Analysis of the Economic Torts*, 2nd ed. (Oxford 2010), 140; R. Stevens, *Torts and Rights* (Oxford 2007), 250; and F. Pollock, Note (1925) 41 L.Q.R. 25, 25.

[184] [1942] A.C. 435, 468. See also *Lonrho Ltd. v Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173, 188–9 (Lord Diplock); S. Deakin and J. Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519, 550–1.

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It has been observed that "groups cultivate a special social identity. This identity often encourages risky behavio[u]r, leads individuals to behave against their self-interest, solidifies loyalty, and facilitates harm against non-members".[185] Larger groups are able to enjoy the functional advantages gained by the diffusion of responsibility for tasks necessary to carry out a common goal. Groups thus permit the subversion of social norms "through strategies that disaggregate" complex tasks, "playing on the idea that little bad acts are excusable".[186] Successful group endeavours have the potential to cascade into multiple such endeavours.[187] This is because the "very formation of a joint enterprise generates a mutual commitment to [wrongdoing], supplementing and reinforcing the resolve of an individual were he acting alone".[188]

A reason for state (including judicial) concern about combinations is the potential threat that they present to the power and stability of the state and its various components;[189] and the weight and authority that they create in their dealings with those outside the group. The "law takes a particularly censorious view where conspiracy is involved".[190] This explains, at least in part, why the crime (but not the tort) of conspiracy resides in the agreement and why there need be no action taken to further the agreement.[191] It also explains why Lord Hope in the *Total Network* case could say that "it is in the fact of the conspiracy that the unlawfulness resides".[192] In similar terms, Lord Scott noted that "[t]he essential ingredient of this type of action is the combination of people all intent on causing harm to the victim …"[193] The features of group behaviour that have just been noted are present in the corporate context. It almost goes without saying that "the collective intentionality associated with a corporate organisation can be an extremely powerful

[185] N. K. Katyal, "Conspiracy Theory" (2003) 112 Yale L. J. 1307, 1312. See also B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Melbourne 1993), 22; T. J. Leach, "Civil Conspiracy: What's the Use?" (1999) 54 U. Miami L. R. 1, 28–9.

[186] N. K. Katyal, "Conspiracy Theory" (2003) 112 Yale L. J. 1307, 1327. This practice can also work against the achievement of the common end because of the bounded knowledge of individuals about the overall nature of the enterprise: ibid at p. 1353.

[187] N. K. Katyal, "Conspiracy Theory" (2003) 112 Yale L. J. 1307, 1335.

[188] A. Simester, "The mental element in complicity" (2006) 122 L.Q.R. 578, 599–600.

[189] Expressed, e.g., in Public Order Act 1986, s. 1 (offence of riot). See also *Revenue and Customs Commissioners v Total Network S.L.* [2008] UKHL 19, [2008] 1 A.C. 1174, at [78] (Lord Walker hypothesising an underlying concern in *Allen v Flood* [1898] A.C. 1 about "potential threats to the constitution and the framework of society").

[190] *Revenue and Customs Commissioners v Total Network S.L.* [2008] UKHL 19, [2008] 1 A.C. 1174, at [221] (Lord Neuberger).

[191] *Crofter Hand Woven Harris Tweed Co. Ltd. v Veitch* [1942] A.C. 435, 439–40 (Visc. Simon L. C.), citing *Mogul Steamship Co. v McGregor, Gow & Co.* (1888) 21 Q.B.D. 544, 549 (Lord Coleridge C. J.).

[192] *Revenue and Customs Commissioners v Total Network S.L.* [2008] UKHL 19, [2008] 1 A.C. 1174, at [41], citing *Sorrell v Smith* [1942] A.C. 435, 462 (Lord Wright).

[193] *Revenue and Customs Commissioners v Total Network S.L.* [2008] UKHL 19, [2008] 1 A.C. 1174, at [56]. See also ibid. at para. [100] (Lord Walker), citing *Crofter Hand Woven Harris Tweed Co. Ltd. v Veitch* [1942] A.C. 435, 444 (Visc Simon L. C.).

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social force".[194] Although this is especially true of the corporate behemoths, this same kind of power can be found, to a lesser degree, in even the smallest of companies.

Corporate controllers have at their call enhanced bargaining power when able to invoke the name and organisational capacity of a company.[195] This power extends beyond the financial might and (perceived) reputation of the company to encompass the advantage of limited liability which shareholders enjoy – and which acts as an inducement to having the company engage in their chosen activities and fight their chosen battles. Limited liability creates an asymmetric regime of risk exposure. If we take the example of a lawsuit between an incorporated business and a sole trader, the company's controlling shareholder faces a lower risk of personal financial loss than does the sole trader. The law suit, viewed as a "risky asset", "is more valuable for shareholders than [ ] for individuals or partnerships".[196] It follows, perforce, that the whole range of activities that might be conducted in business and subject to legal suit is less risky to shareholders than to individuals or partnerships. The likelihood of risk externalisation is increased as a company nears insolvency because shareholders have nothing (much) left to lose. In such situations, there is a greater likelihood that the company will take high stakes gambles.[197] In summary, individuals acting through their companies enjoy a degree of protection not available to sole traders.

Unlawful means conspiracy has the potential to provide compensation for harm in cases of illegitimate combination, including illegitimate use of the power of incorporation. Application of the tort would, no doubt, be most controversial in cases involving small companies, especially one person companies. However, its application in that setting would be a sound development, given the doubtful economic (and social) justifications of such incorporations.[198]

VI. Conclusions

This article has taken the recent "resuscitation" of the tort of unlawful means conspiracy as the cue for examining its applicability in the corporate context. It argues that the availability of the tort in that context

[194] G. R. Sullivan, "The Attribution of Culpability to Limited Companies" (1996) 55 C.L.J. 515, 539.
[195] Consistently with this point, Carty finds that the rationale for lawful means conspiracy resides in the 'gross abuse of power': H. Carty, *An Analysis of the Economic Torts*, p. 144. "What the common law appears to have done, mistrusting group power, is use conspiracy/combination as a crude (and arbitrary) method of attacking an abuse of market power (in its widest sense)": ibid at p. 147.
[196] T. Rapakko, *Unlimited Shareholder Liability in Multinationals* (Boston 1997), 166.
[197] Ibid., pp. 172, 348 and 351–2. This explains the enactment of a provision such as Insolvency Act 1986, s. 214 (wrongful trading).
[198] See p. 194 above.

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would serve to strengthen rather than weaken company law precepts of separate legal personality and competence to enter into agreements with all comers. It would also provide a means of redress against a form of harm causation that is justified by reference to the dangers inherent in the use of collective power.

This is not to say that the application of unlawful means conspiracy within the company is free from difficulty. Current rules of attribution prove to be clumsy tools in determining *intention* and some courts have rejected the claim of conspiracy where the intention of a corporate decision-maker is the basis for finding intention in the company, because this would ostensibly subvert the need for two "independent minds". Attribution rules are also open to manipulation where fraud has been committed by a corporate controller against the company. This paper argues that there is a need to reconsider the doctrine of attribution and suggests the use of a more objective form of intention.

Unlawful means conspiracy has been recognised to exist in the corporate context, but uncertainty surrounds the issue of what *combinations* will be sufficient to support a claim. However, it is clear that unlawful means conspiracy is no mere "barren iteration" of the doctrine of joint tortfeasance and that its attractions are that it is capable of extending liability beyond the person who has actually committed an unlawful act to those who entered into the agreement and did something to further it and that it allows for a liberal measure of damages, unconstrained by any rule of remoteness. For these reasons, unlawful means conspiracy presents an intriguing prospect in the small company and beyond.

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