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Abstract
The recent decision, Ansett Transport Industries (Operations) Pty Ltd & Ors v Australian Federation of Air Pilots & Ors, has kindled interest in civil conspiracy as an independent tort. The repercussions of that interest in particular with respect to restricting the power of organised labour are potentially far-reaching. Yet conspiracy as a cause of action is doctrinally defective. This article argues the case in favour of curtailment of civil conspiracy.

Keywords
civil conspiracy, Australia

CIVIL CONSPIRACY : BETTER DEAD THAN ALIVE?

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The recent decision *Ansett Transport Industries (Operations) Pty Ltd & Ors v Australian Federation of Air Pilots & Ors*[1] has kindled interest in civil conspiracy as an independent tort. The repercussions of that interest in particular with respect to restricting the power of organised labour are potentially far-reaching.[2] Yet conspiracy as a cause of action is doctrinally defective. This article argues the case in favour of curtailment of civil conspiracy.

Conspiracy whether civil or criminal traditionally has been defined as 'the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means'.[3] A tortious conspiracy accordingly consists in the agreement of two or more persons to cause loss or damage to another by doing an 'unlawful' act or by doing a lawful act by 'unlawful' means. Professor Howard[4] has pointed out that 'as a matter of logic the first of these two categories of conspiracy includes the second. If there is an agreement to do an unlawful act there is a conspiracy. It is immaterial whether the act in question is the ultimate object of the agreement or one of the steps along the way to that object. In either case the reason for calling the agreement a conspiracy is that it contemplates the performance of an unlawful act'. Recent Australian decisions nonetheless have affirmed the existence of two types of civil conspiracy. Understanding and analysis of this tort is not facilitated, however, by distinguishing between the two types of conspiracy on the basis of the lawfulness or otherwise of the 'objects' or 'purposes'. Rather the distinction to be drawn is between, one, a conspiracy which requires doing an 'unlawful' act to achieve a purpose and, two, a conspiracy in which no 'unlawful' act is required to effect a result other than the 'unlawfulness' which is implicit in the fact that the result was brought about

1 (1989) Aust Torts Reports 80 290.

2 Damages recoverable for civil conspiracy are potentially large. Thus for example in the

3 *Ansett Transport Industries* case the airlines were awarded $6.48 million in damages.

4 Actions by employers against striking employees are comparatively of less value. In *National Coal Board v Jolley* [1958] 1 All ER 9, it was held that an employer could recover from an employee only the cost of a replacement for the duration of a strike rather than the full amount of the employer's loss which in any event is both difficult to apportion and to recover.
Mulcahy v R (1868) LR 3 HL 306, 317 per Willis J.
Australian Criminal Law (3rd ed) The Law Book Co 1970 p 287

by a combination. Put another way the former category of civil conspiracy requires an act which would be 'unlawful' even if that act were done by one person alone, whereas in the latter category all acts done to achieve the purpose of the parties to the combination would be 'lawful' if done by one person alone. Mindful of the ambiguity implicit in adoption of such a categorisation, in this article the former type of conspiracy will be referred to as an 'unlawful' conspiracy, whereas the latter will be designated a 'lawful' conspiracy.

To satisfy the requirements for an action in tortious conspiracy the following elements must be satisfied:

(i) damage (to the plaintiff) which has resulted from
(ii) an agreement between two or more persons entered into without just cause or excuse
(iii) to wilfully cause harm to another either by 'unlawful' or otherwise 'lawful' acts.

Prima facie it is for the plaintiff to establish each element. The defendants may raise the issue of 'just cause or excuse'. That flows from the fact that a plaintiff cannot be expected to pre-empt all possible 'just causes'. In *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* Lord Wright said that it is for the plaintiffs to 'establish that they have been damnified by a conspiracy to injure, that is that there was a wilful and concerted intention to injure without just cause, and consequent damage... The plaintiff has to prove the wrongfulness of the defendants' object'.[5]

Damage

Unlike criminal conspiracy civil conspiracy is not actionable per se. Damage is the gist of the action. Damage is most commonly economic loss. Economic loss suffered as a consequence of the acts of a combination to cause such harm as a distinct basis of tortious liability was first given the imprimatur of judicial approval in *Mogul Steamship Co v McGregor Gow & Co.*[6] In that case shipowners who were engaged in a tea carrying trade formed an association, the purpose of which was to regulate the terms of trade so that competitors would be excluded. To that end they agreed, inter alia, that a rebate of 5% on freights should be allowed to all shippers who shipped exclusively with members of the association and further, that agents of members should be precluded from acting for shippers other than members of the association.

The plaintiffs were underbid by the defendant shippers who reduced freights to the point where they were unremunerative for all parties in the belief that short-term economic loss would cause the plaintiffs to withdraw from the cargo-carrying trade. The defendants successfully caused the plaintiffs to withdraw. Thereupon the plaintiffs brought action to recover damages and to be granted an injunction claiming that they had suffered economic harm as a result of a conspiracy by the defendants to preclude them by various means

5 [1942] AC 435. Hereafter referred to as the *Crofter Case* of 471-2.
6 [1892] AC 25. Hereafter referred to as the *Mogul Case.*

from obtaining cargoes.

In the *Mogul*[7] case it was stated, inter alia, that in order to substantiate their claim the plaintiffs/appellants must show either that the object of the agreement between the shippers was unlawful or that unlawful methods were resorted to in its prosecution. It was found on the facts that the object of the combination, viz the pursuit of free trade was lawful; and, that the means used by way of offering cheaper rates of freight were also lawful. As Lord Morris[8] said, 'It is not illegal for a trade to aim at driving a competitor out of trade provided that the motive be his own gain by appropriation of the trade and the means he uses be lawful weapons'. The existence of civil conspiracy as an in dependent tort was nevertheless affirmed in *Sorrel v Smith* [9] In that case Lord Cave reiterated that 'a combination of two or more persons wilfully to injure a man...is unlawful and, if it results in damage to him is actionable'.[10]

The High Court of Australia has endorsed these early United Kingdom decisions both with respect to the necessity for damage to be caused to the plaintiff to ground liability in civil conspiracy as well as the existence of two categories of this tort. Thus in *Williams v Hursey* [11] Menzies J stated, 'If two or more persons agree to effect an unlawful purpose, whether as an end or as a means to an end, and in the carrying out of that agreement damage is caused to another, then those who have agreed are parties to a tortious conspiracy'.[12]

Economic harm is not the sole form of damage recognised for the purpose of establishing a civil conspiracy. Thus, for example, in *Scala Ballroom (Wolverhampton) Ltd v Ratcliffe and Ors* [13] a musicians' union, the members of which included 'coloured' and 'non-coloured' members, gave notice of intention to boycott the plaintiff's ballroom until a 'colour-bar' was lifted. The plaintiffs claimed that the defendants had wrongly combined to injure them in the way of their trade by preventing members of the union from performing at their ballroom. The Court of Appeal rejected the argument on behalf of the defendants that the interests which can be lawfully protected are confined to material interests in the sense of interests which can be reflected in financial terms.[14]

In that case Morris CJ said that if the defendants, who opposed the 'colour-bar' 'honestly believe that a certain policy is desirable and that it is the wish of their members that that policy should prevail..., it can be said that the welfare of the members is being advanced even though it cannot be positively translated into or shown to be reflected in detailed financial terms'.[15]

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7 Ibid per Watson LJ at 42.
8 Ibid at 49.
9 [1925] AC 700.
10 Ibid at 712.
11 103 CLR 30.
12 Ibid 122.
13 [1958] 3 All ER 220.
14 Ibid per Hodson LJ at 223.

Non-economic purposes, the *Scala* case apart, have been the subject of some obiter judicial comment. In the *Crofter* case[16] Lord Wright noted that the doctrine of civil conspiracy to injure extends beyond trade competition and labour disputes.[17] In the same case Viscount Maughan noted that the following combinations may be actionable; combinations the object of which may be a dislike of the religious views, the politics, the race or the colour of the plaintiff provided that the plaintiff is harmed as a result of the combination.[18]

On the same point Evatt J in *McKernan v Fraser* [19] commented that if an alleged conspiracy had as its purpose the carrying out of some religious, social or political object, the law prefers to examine the motive or object in each case before pronouncing an option.[20]

Proof of damage is a necessary albeit not sufficient requirement to establish civil conspiracy. To constitute civil conspiracy there must be, inter alia, a nexus between the damage suffered by the plaintiff and acts done in pursuant of a combination which resulted in the harm suffered by the plaintiff. Such a combination may bring about damage by 'unlawful' or otherwise 'lawful' acts.

Conspiracy by 'unlawful' acts

If two or more persons agree to effect an unlawful purpose, whether as an end or as a means to an end, and in the carrying out of that agreement damage is caused to another, then those who have agreed are parties to a tortious conspiracy. A conspiracy of this type is 'unlawful' either because the object of the combination is unlawful or because the means used to achieve that object are unlawful independent of and apart from the alleged conspiracy.

What constitutes an 'unlawful' purpose or object?

In the *Mogul* case[21] both the object of the combination and the means used to achieve that object were the subject of judicial analysis. Watson LJ stated that it was settled law that in order to substantiate their claim the appellants (plaintiffs) must show, either that the object of the agreement was unlawful or that illegal methods were resorted to in its prosecution.[22] Similarly, Lord Morris noted that on the facts before him it was not illegal for a trader to aim at driving a competitor out of trade, such as, in the instant case, by offering discounted rates of freight.[23] The *Mogul* case recognised as lawful the short-term infliction of harm by a combination provided the long-term object of the combination was the furtherance or protection of economic interests. Thus analysis of 'purposes' requires that a distinction be drawn between short

15 Ibid per Morris CJ at 224.
16 [1942] 1 All ER 142.
17 Ibid at 166.
18 Ibid at 152.
19 46 CLR 343.
20 Ibid at 400.
21 [1892] AC 25.
22 Ibid at 42.
23 Ibid at 49.

term effects of a combination and long-term objectives. It follows that even though a plaintiff is harmed as the result of a combination, as for example the plaintiff in the Mogul case, the purpose of the combination is not rendered unlawful provided that the ultimate objective of the combination is the protection or furtherance of legitimate interests.

Referring to the difficulties posed by the need to differentiate between short term effects of a combination and long-term objectives, Evatt J in *McKernan v Fraser*[24] said: 'it is almost always possible to regard trade union action to prevent the employment in the industry of non-unionists or rival unionists, from two points of view, first as a combination for the purpose of damaging or injuring the non-unionists, secondly as a combination to protect or advance the interests of the union.'[25]

In the same case Evatt J commented that there have been very few 'pronouncements upon the general principles of liability for combined action taken to the hurt of a plaintiff without the use of unlawful means'.[26]

The most recent Australian decision concerned with unlawful 'objects' or 'purposes' is *Ansett Transport Industries (Operations) Pty Ltd & Ors v Australian Federation of Air Pilots & Ors.*[27] In that case the defendant Federation in the name of its President, issued a directive on 17 August, 1989, that the pilots who were members of the Federation were to work only between 9am and 5pm as from the following day. Such a directive allegedly was in contravention of certified agreements, relevant industrial awards and contrary to s 312 of the Industrial Relations Act 1988 (Cth) which required Federation members to fly at times other than between 9am and 5pm. Brooking J held that the individual defendants who agreed to the issuance of the 9am to 5pm directive on behalf of the Federation as well as the Federation itself had combined to bring about unlawful purposes. Those purposes identified by Brooking J were that the '9am to 5pm directive was the result of a combination entered into with the intention of procuring breaches by the pilots of their contracts of employment and that there was the intention to 'interfere generally with contractual relations'.[28]

What constitutes 'unlawful' means?

The most authoritative Australian decision concerned with 'unlawful' means as an element of civil conspiracy is the decision of the High Court of Australia *Williams v Hursey.* [29]

That case concerned a dispute between a union and two of its members who refused to pay a union levy. As a result of the dispute the plaintiffs were precluded from engaging in their ordinary occupation of registered waterside workers. The means used to achieve that object included picketing by

24 (1931) 46 CLR 343.
25 Ibid at 390.
26 Ibid at 380.
27 (1989) Aust Torts Reprs 80-290. Hereafter referred to as the *Airlines* Case.
28 Ibid 69, 153-4.
29 (1959) 103 CLR 30.

human barricades of members and supporters of the union, assaults, threats and insults by individuals in the picket lines and, after the picketing ceased, refusal by members of the union to work with the plaintiffs so that they were dismissed from their job.

With respect to the 'means' used by the union to achieve its purpose Dixon CJ, Fullager and Kitto JJ held that mass-picketing constituted torts and the plaintiffs therefore were entitled to recover damages from those proved to have been responsible for them;[30] Taylor J held that the 'picket-lines' constituted breaches of s 44(1) of the *Stevedoring Industry Act* 1956,[31] and Menzies J held that the picketing was unlawful independently of whether the picket lines were formed where the Hurseys (plaintiffs) were entitled as of right to go and independently of any particular acts or threats of violence on the part of individuals in the picket lines, because the forming of the picket lines itself amounted to intimidation, preventing, hindering or dissuading the plaintiffs, who were registered waterside workers in stevedoring operations and was therefore contrary to s 44(1)(b) of the *Stevedoring Industry Act* 1956.[32] The plaintiffs, therefore, succeeded in showing that they had suffered damage as the result of the unlawful acts of the defendants performed in furtherance of a common agreement to prevent them, by those means from obtaining employment.

The act which causes harm does not have to be directed at the plaintiff. Thus, for example, in *Southan v Grounds*[33] the unlawful acts which were threats of strike-action were not directed at the plaintiff but at his prospective employer who stated that he was willing to employ the plaintiff but could not do so because to do so would cause industrial unrest. It was held that the plaintiff had an actionable conspiracy because he had a common law right to dispose of his labour according to his will and an interference with that right in the absence of lawful cause or excuse was an unlawful act.

A work boycott which deprives a person of her/his ability to work is recognised as constituting unlawful 'means' to cause harm. In *Coffey v Geraldton Lumper's Union and Ors*[34] a dispute arose between two unions which resulted in a work-boycott being directed against the plaintiff. In 1928 by statute law in Western Australia a refusal to work by any member or a group of workers acting under a common understanding with a view to enforcing compliance with any demand made by them on their employer was made expressly an unlawful act. It followed therefore that the work-boycott directed against the plaintiff constituted unlawful means the purpose of which was coercing the plaintiff into compliance with union policy. On the facts it was found that there was a common understanding among the majority of the union members present not to work with the plaintiff. It was

30 Ibid at 76-77.

31 Ibid at 108.

32 Ibid at 125.

33 [1916] 16 SR (NSW) 274.

34 [1928] 21 WAR 33. Similarly in *Galea and Ors v Cooper and Ors* [1982] 2 NSWLR 411, a breach of a statutory provision, viz the *Trade Practices Act* 1974 (Cth) was held to be an 'unlawful act' or 'unlawful means' for the purpose of tortious conspiracy.

held that the defendant's action in refusing to work with the plaintiff was unlawful and with the intent to deprive the plaintiff of his employment contract and thereby to injure him.

The *Airlines'* case[35] was not only concerned with unlawful 'purposes' or 'objects' but also with unlawful 'means' to achieve or bring about an intended result. As will be recalled several defendants on behalf of the Federation as well as the Federation itself had agreed to the issuance of a directive which required pilots to fly only between 9am to 5pm (known as the '9 to 5 directive'). The 'means' found to be unlawful by Brooking J which were utilised in order to harm the plaintiff/airlines was that there was an agreement by the defendants to commit an offence against the *Industrial Relations Act* (1988) Cth s 312 (1)(a).[36]

Brooking J following *Williams v Hursey* held that with respect to combinations where the purpose of or the means to achieve that purpose involve 'unlawfulness' as in the instant case, the intention or motive of the parties to the combination is irrelevant. Thus his Honour made a finding that 'the result of the conspiracy, its natural probable and intended result was disruption to the airlines which resulted from their having to accommodate themselves to the 9am to 5pm directive'.[37] Subject to his right to challenge the relevance or otherwise of motive where an unlawful act has been committed, counsel for the Federation conceded this point.

The Airlines' case[38] illustrates one of the major anomalies of civil conspiracy. Once parties to a combination are found to have committed an 'unlawful' act, and the plaintiff has suffered damage, it is assumed both that the defendants intended to cause harm to the plaintiff and that therefore there is a nexus between the unlawful acts of the defendants and the harm caused to the plaintiff. In the absence of an 'unlawful' act that assumption does not apply. That situation provides the defendants with the possibility of establishing that their predominant purpose was not to harm the plaintiff but to further their own interests - a plea which of course the pilots would have raised had they been permitted to do so.

The fusion of an 'unlawful' act with the consequences of that act does not rest on logic. If purpose is relevant where there is no 'unlawful' act it does not follow that purpose is necessarily irrelevant where there is an 'unlawful' act. Doing an 'unlawful' act and causing harm intentionally may be two distinct issues. Thus for example workers may combine and act in contravention of an award because of dissatisfaction with safety measures in their work-place. In that event the 'unlawful' act exists yet the act was not committed with the intention of causing harm but to protect personal interests. It follows that to

35 Above p 8.

36 The *Industrial Relations Act* 1988 (Cth) s 312 (1)(a) provides that an officer or agent of an organisation bound by an award shall not advise, encourage or incite a member to refrain from working in accordance with the award or certified agreement and which by virtue of s 312(2) applies to advice, encouragement or incitement in relation to employment or work with or for a particular employer or of a particular kind.

37 *Airlines'* Case ibid at 69.153-4.

38 Ibid 69, 154.

presume intention to harm is not a conclusion arrived at as a result of logic but of policy considerations. Further once that assumption is made a punitive element is introduced. That follows from the fact that if an 'unlawful' act has been committed then the members of the combination are held responsible not only for all the consequences of their act, irrespective of forseeability, but exemplary or aggravated damages may be awarded against them as well.

The approach adopted in the Airlines' case is consistent however with a recent New Zealand decision, *Lintas (SSC & B New Zealand Ltd) v Murphy & Anor.*[39] That case concerned a dispute between former employees who set up an advertising agency and their former employer (the plaintiff) who, inter alia, alleged that the defendants had misused confidential information, induced breaches of contract by the staff and clients of Lintas Ltd and conversion or detention of Lintas Ltd's documents and files.

Pritchard J recognised two forms of conspiracy which he categorised as (i) unlawful purpose conspiracies and (ii) unlawful means conspiracies.

The latter according to Pritchard J is a combination of persons who act in concert so as to intentionally injure the plaintiff in his/her trade or other legitimate interests by an act which is independently unlawful. Conspirators who resort to unlawful means to attain their purpose are liable in tort if actual injury is caused to the plaintiff, notwithstanding that their predominant purpose is to further their own legitimate interests.[40]

It was held that the means adopted by the defendants to achieve their purpose, albeit that purpose was predominantly to further their economic interests, were unlawful and constituted therefore an actionable conspiracy.

Conspiracy by 'unlawful' acts

A combination to cause harm to another which is fact results in damage is prima facie actionable despite the fact that all acts which brought about the damage were 'lawful' if committed by one person alone. Such a combination becomes actionable if the court finds that the predominant purpose of the combiners', irrespective of other purposes, was to harm the plaintiff.

Thus whether a combination to inflict harm on another is actionable depends upon what the court perceives to be the predominant purpose of the combiners. To ascertain that purpose the court embarks upon a dual exercise. First, it ascertains the intention of the combiners in order to make a finding as to the purpose or object of the combination. Second, the court ascertains whether the activity which resulted in harm occurring was justified. Such justification is established if the predominant purpose of the combination is not the infliction of harm but rather the legitimate protection or furtherance of an interest by the combiners such as the pursuit of business or employment advantages.

39 Aust Torts Reports 80-008.

40 Citing as authority *Ware and Dr Freville Ltd v Motor Trade Association* [1921] 3KB 40 CA.

The test to ascertain what constitutes a 'predominant' purpose was elucidated in the *Crofter* case.[41] That case concerned producers of cloth on the island of Lewis (the appellants) who wished to import yarn form the mainland to the detriment of crofters on the island who spun yarn by hand. Union members who were dockers at the port of Stornaway were instructed by union officials to place an embargo on appellants' goods.

It was held that the real purpose of the embargo was to further, protect and improve the legitimate interest of the union members. The appellants' claim therefore failed.

According to Lord Simon in the *Crofter* case, 'The question to be answered, in determining whether a combination to do an act which damages other is actionable even though it would not be actionable if done by a single person, it not: 'Did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action?'. It is: 'What is the real reasons why the combiners did it?' or as Lord Cave LC put it: 'What is the real purpose of the combination?'. The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realise, or should realise will follow, but what is in truth the object in the minds of the combiners when they act as they did. It is not consequence that matters, but purpose'.[42]

The 'predominant purpose' requirement was the subject of judicial comment in *McKernan v Fraser*.[43] In that case seamen informed their employer, the Adelaide Steamship Company that if the plaintiffs who were seeking to promote a rival union were engaged the members of the Federated Seamen's Union would not sign on. The shipping company thereupon refused to sign on the plaintiffs. The plaintiffs brought various actions against the union including an action for damages alleging a conspiracy to cause them injury. By majority judgement (Rich Dixon, Evatt and McTiernan JJ, Gavan, Duffy CJ and Starke J Dissenting) it was held that no illegal means were adopted or threatened at the place of engagement by the Federated Seamen's Union (the defendants) and the refusal by its members to work with the plaintiffs did not constitute an agreement the purpose of which was the infliction of harm.

The High Court of Australia held, inter alia, that for a combination or acts done in furtherance of the combination to be actionable where the end is not in itself unlawful the parties to the alleged conspiracy must have been impelled to combine, and to act in pursuance of the combination, by a desire to harm the plaintiff, and this must have been the sole, the true, or the dominating or main purpose of their conspiracy.

The ambit of civil conspiracies where no independently 'unlawful' act occurs poses problems. Australian decisions which resulted in liability are confined to instances where the 'unlawful' acts were in any event illegal, for example tortious or breaches of statutory duties. There are dicta, however, suggesting that the ambit of civil conspiracy is not so confined; that immoral acts if the

41 [1942] 1 All ER 142.
42 Ibid at 149.
43 46 CLR 348.

result of an agreement may suffice to constitute an 'unlawful' act for the purposes of establishing civil conspiracy. [44]

'Unlawfulness' is open to criticism, therefore, because it is vague. That vagueness and lack of precision has plagued criminal conspiracy as well. Thus Professor Kenny has written: 'The term 'unlawful' is here used in a sense which is unique: and, unhappily, has never yet been defined precisely. The purposes which is comprises appear to be of the following species. ...Agreements to do certain other acts, which (unlike all those hitherto mentioned) are not breaches of law at all, but which nevertheless are outrageously immoral or else are, in some way, extremely injurious to the public...'.[45]

Moreover, acceptance of 'immorality' as constituting 'unlawfulness' forces a court into making choices between conflicting ideologies. Consider the following - Would a court find a combination to be 'lawful' if the parties to that combination were a group of medical practitioners who agreed to refuse to work with another medical practitioner who performed in vitro fertilisation or gave contraceptive advice with the result that the a latter's contract of employment is terminated? Arguably if the medical practitioners who agreed to enforce such policies 'honestly believed' that their legitimate interest in maintaining medical ethics was thereby furthered then their 'object' is lawful and therefore justified. If justification extends to protect such interests then the scope of civil conspiracy would embrace any social, political or religious purpose provided that it furthered the interests of the parties to the agreement irrespective of the public utility of that purpose. That poses the question: Is it for the judiciary to create new categories of wrongs; or should that be the task of the legislature?

The Requirements of Predominant Purpose: United Kingdom Developments

Predominant purpose to cause harm appears to be a requirement to ground liability in all civil conspiracies in the United Kingdom. In *Lonrho Ltd and Others v Shell Petroleum Co Ltd and Others*[46] the appellants were the owners of a crude oil pipeline running from the ocean port of Beira in Mozambique to a refinery near Umtali in Southern Rhodesia. The respondents owned the shares in a refinery which was owned and operated by a Rhodesian company. The appellants operated the pipeline under an agreement with the major oil companies which included the respondents. After the regime of Southern Rhodesia in 1965 made a unilateral declaration of independence the UK parliament prohibited the supply or delivery of crude oil or petroleum products to Southern Rhodesia. As a result, from December, 1965, no oil was shipped to the Beira terminal of the pipeline and it ceased to be used. The appellants in the House of Lords contended, interalia, that the

44 See supra Evatt J's comments in *McKernan v Frazer* at p 4.

45 *Outlines of Criminal Law*, 1st ed [1902] quoted by Lord Simon of Glaisdale in *DPP v Withers* [1975] AC 842 at 859. See too *Crofter* Case [1942] AC 435 at 439 where Viscount Simon states a conspiracy may be actionable where 'the purpose aimed at though not perhaps specifically illegal, was one which would undermine principles of commercial or moral conduct'.

46 [1981] 2 All ER 456 [1982] AC 173. Hereafter referred to as the *Lonrho* Case.

respondent major oil companies who continued to supply their products by-passing the oil terminal had acted in breach of their statutory duty with the result that the appellants suffered economic loss. That contravention of the UK prohibition therefore constituted an 'unlawful means' thus giving the appellants a cause of action in tort, or quaere a conspiracy by the respondents.

Lord Diplock in the *Lonrho* case considered whether the House of Lords ought to confine the civil action of conspiracy to the narrow field established by what he termed the 'authorities'. Those 'authorities' according to his Lordship required as an element of that tort that the predominant purpose of the agreement between the defendants and of the acts done in execution of it, caused damage to the plaintiff as distinct from the predominant purpose being the self-interest of the defendants.[47] Thus since the purpose of the oil companies in entering into an agreement with the Southern Rhodesian regime to contravene the sanctions orders of the UK parliament would have been to further their own commercial interests rather than to injure the appellants, there could be no claim against the respondents in conspiracy.

By requiring that defendants have as their predominant purpose an intention to injure the plaintiff before civil conspiracy is established, even where unlawful means have been used, the House of Lords has effectively curtailed the ambit of this tort.

That curtailment is confirmed by two other UK decisions *Allied Arab Bank Ltd v Hajjar and Others (No 2)*[48] *and Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc and Anor.*[49] At the core of the former case was a fraud committed on the bank whereby the defendants after defaulting to the bank conspired by setting-up a judgement-proofing scheme to prevent the bank from being able to enforce any claim against the defendants. It was said in that case that a major point of principle arose, namely whether the tort of conspiracy was now restricted exclusively to cases where the predominant purpose of the combination is to injure the plaintiffs' interests. It was held that there was no reasonable cause of action in conspiracy despite the fact that the means used were tortious because one the tortious means have been put into operation (in the concerted action which is an essential ingredient) the prior agreement merges in the tort. Moreover the scope of the tort of conspiracy was limited exclusively to cases where the predominant purpose of the combiners' agreement was to injure another person's interests.

Similarly in the *Metall und Rohstoff* case it was held that predominant purpose to injure the plaintiff is an essential ingredient of the tort of civil conspiracy irrespective of whether the damage was achieved by legal or illegal means.[50]

47 [1982] AC 173 at 188-189.

48 [1988] 2 All ER 103.

49 [1989] 1 WLR 702; [1989] 3 All ER 14.

50 That approach has not been followed in Australia.
In *Carlton and United Breweries Ltd and Anor v Tooth & Co Ltd and Ors* (unreported SC of NSW 13886 No 4146 of 1985) Young J distinguished actionable conspiracies into two categories (a) a conspiracy to do an unlawful act; and (b) a conspiracy to do an act which would otherwise be lawful.
His Honour held that both types of conspiracy were still available in Australia and once it is established that the defendant had committed an unlawful act it is not necessary to further establish that the predominant motive of the defendant was to injure the plaintiff.

Civil Conspiracy: The Mental Element

The fundamental criterion of conspiracy whether tortious or criminal is the element of combination. Implicit in the notion of 'combination' is the requirement that at least two persons agree with one another to effect a particular purpose or purposes. A mere coincidence of the intentions of two persons to bring about such a purpose does not constitute a conspiracy. As Dr Gillies puts it: 'What is needed is a community of purpose, a joint resolution of the two or more parties that either one or more of their number should effect the object on behalf of each of them'.[51]

Both the existence of the combination and the members thereof must be identified, albeit, that requirement may be satisfied by inferences drawn from words and deeds of the parties. Once the existence of a combination or a common design is established each participant therein is the authorised agent of the others for the purpose of carrying into effect what has been agreed upon.

In addition to proving the agreement, the plaintiff must prove a nexus between the overt acts done in pursuance of the agreement and the damage suffered.[52] Incidental harm therefore does not suffice.

Each conspirator to qualify as such must have knowledge of all the facts and agree with the purpose of the combination. It is not necessary, however, for all the conspirators to join at the same time. *Huntley v Thornton*[53] is illustrative. That case concerned a dispute between a union and one of its members who was expelled from union membership. After the plaintiff's expulsion one of the defendants who was a branch secretary, wrote to the secretary (T) of a neighbouring branch of the union with the purpose of having the plaintiff dismissed from his employment. The defendant T and defendant NL, who was the convener of shop stewards at the plaintiff's place of employment, co-operated in activity which resulted in the plaintiff's dismissal from his employment. T and NL were joined in an action for civil conspiracy together with the secretary and 10 members of the branch committee which dismissed the plaintiff from the union. In their defence T and NL argued that they were not partners to the conspiracy. Against that it was contended that they lent themselves to the design of the other defendants and so joined the conspiracy to injure the plaintiff. The plaintiff succeeded in establishing the conspiracy to injure on the part of the branch secretary and its committee members who were responsible for his dismissal from the union. Although it was held not to be necessary that all the conspirators join at the same time, it is necessary that they know all the facts and entertain the same object. On the facts it was found that the defendants T and NL did not participate in the conspiracy of the other defendants to injure the plaintiff because their motive was not proved to be injure the plaintiff as compared with to further the interests of the union.

As well as proving the existence of an agreement and dependent upon

51 Gillies P, *The Law of Conspiracy*, the Law Book Co 1981 p 15.
52 *McKernan v Fraser* (1931) 46 CLR 348 at 407. *Ward v Lewis* [1955] 1 WLR 9.
53 [1957] 1 WLR 321.

whether Australian or United Kingdom authorities are followed it may be necessary to show an intention by the parties to the combination to injure the plaintiff. Yet even though such an intention is found too exist with respect to short-term effects and damage results from the acts of the combiners, there may be no actionable wrong. That conclusion flows from the fact that the intention to cause harm may co-exist with an ultimate intention to further legitimate personal interests. The problem of ascertaining the necessary intention is compounded by the fact that both intentions may exist contemporaneously. It follows that a distinction needs to be drawn between 'intention' and 'motive' or ultimate 'purpose'. Thus the immediate intention of parties to a combination may be to cause harm; the ultimate 'motive' or 'purpose' may be the furtherance of interests. Liability therefore is dependent upon the answer to the question: why did the defendants injure the plaintiff rather than did the defendants cause harm to the plaintiff?[54]

According to Evatt J if the agreement to cause injury to the plaintiff is made 'solely with the object or motive of causing such damage' or if the agreement is 'stamped with wantonness', the necessary intention to injure will be presumed. If the common 'purpose' or 'object' is the 'satisfaction of a personal hatred or grudge by means of the ruin or impoverishment the plaintiff, liability is clear' but if the common 'purpose' or 'object' is 'the protection or advancement of trading, professional or economic interests common to the defendants, there is no liability'.

An inquiry into the 'motive' or 'purpose' of a combination may reveal that the combiners had more than one purpose, or put another way that there was not a sole common intention among the combiners. For example, the combiners may perceive protection of their interests to be their main purpose for combining and at the same time some or all of the parties to the combination may relish the thought of harming the plaintiff. On that point Simon LC said: 'The combiners may feel that they are killing two birds with one stone, and, even though their main purpose may be to protect their own legitimate interests notwithstanding that this involves damage to the plaintiffs, they may also find a further inducement to do what they are doing by feeling that it serves the plaintiffs right. ... It is enough to say that, if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose'.[55]

Parties to a combination may not all share the same 'motive' for joining. Thus for example A & B may have lawful motives whereas C & D's motives may not be justifiable. On that point Evatt J said that if A & B did not know of the malicious motives of C & D they would not be liable; the intention of C & D cannot be imputed to A & B: ' hatred or grudge does not, on any principle of law, become a motive imputable to those who are either unaware of it or who, being aware of it, condemn'.[56] Of course this does not preclude C & D being found liable for conspiracy.

54 *McKernan v Fraser* (1931) 46 CLR 343 at 399.

55 *Crofter Hand Woven Harris Tweed Co Ltd and Others v Veitch and Others* [1942] All ER 142 at 149.

56 *McKernan v Fraser* (1931) 46 CLR 343 at 408.

Merger of conspiracy when tort is committed

In 'unlawful' conspiracies not infrequently a tort has been committed. In such situations the court may assert that the prior agreement 'merges' in the tort.

Thus, for example, in *Ward v Lewis and Others* Denning CJ[57] held that when a tort has been committed by two or more persons, an allegation of a prior conspiracy to commit the tort, adds nothing. A similar statement was made in *Allied Arab Bank Ltd v Hajjar and Others (No 2)* as well as in *Galland v Mineral Underwriters Ltd.*[58] In the latter case the original plaintiff Mineral Underwriters, alleged that the defendants Deloughery and Murray had converted their property. They further alleged that other named defendants including Galland, the present appellant, had 'conspired and agreed' to convert the property. Galland appealed on the ground that the alleged conspiracy disclosed no reasonable cause of action and should therefore be struck out. The appellant argued, inter alia, that it was superfluous to seek to make him liable in damages for conspiracy. That conclusion derived from the following facts: if the appellant was a party to commit the tort of conversion alleged to have been committed by D and M, and that, pursuant to an agreement the tort was committed with the result that the plaintiff suffered damage, then the appellant would be a joint tortfeasor.

Burt CJ and Wallace J, Jones J dissenting, held that where there is a conspiracy to commit a tort and the tort has been committed, then there are not two torts but only one. According to Burt CJ': [o]nce an agreement to commit a tort is found and it is found that the tort has been committed pursuant to an in the execution of that agreement then all the parties to that agreement, ...are joint tortfeasors and it matters not that one party was not actively engaged in the commission of the tort'.[59]

The doctrine of 'merger' is flawed. If civil conspiracy is available as a cause of action and a tort has been committed by parties to a combination then provided all the elements of each tort have been established there are two distinct causes of action. Recourse to the doctrine of merger so-called, is illustrative of a desire by some members of the judiciary to curtail the ambit of civil conspiracy. As such legislative intervention to preclude actions for civil conspiracy where other wrongs have been committed would clarify the present unsatisfactory situation wherein some judges assert the 'merger' doctrine whereas others in similar circumstances do not.

Conspiracy in cases such as the above-cited is used in an attempt to obtain advantages for the plaintiff. Examples thereof include both procedural and substantive advantages, for example, with respect to discovery of documents,

57 [1955] 1 All ER 55 see too *Rubinstein v Truth and Sportsman Ltd* [1960] VR 473. In *Midland Bank Trust Co Ltd and Another v Green & Others* (No 3) [1981] 3 All ER 744 it was held that there was no place in the modern law for the medieval fiction of the merger of the wife's legal personality into that of her husband. Accordingly, there was no doctrine that for the purposes of the law of tort a husband and wife could not conspire together. It followed that a husband and wife could be liable in damages for the tort of conspiracy even though they were the only parties to the conspiracy.

58 [1977] WAR 116.

59 Ibid at 123.

or obtaining otherwise inadmissible evidence, or as in *Ward v Lewis* to overcome the substantive rule of law with respect to republication of slanders. [60]

Where a wrong has been committed the main use of civil conspiracy is to make the parties to the combination liable as joint tortfeasors. In *O'Brien v Dawson* Williams, J said 'since it is unlawful for an individual wilfully and knowingly to induce and procure a breach of contract, the allegation that more than one person acted in combination to do so is mere surplusage except to make them liable as joint tortfeasors'.[61] Establishment that parties are joint tort feasors has pecuniary advantages. Aggravated or exemplary damages may be awarded to a plaintiff who establishes a conspiracy to commit a wrong as well as the wrong itself.[62]

Justification

According to Australian law if the combination executes its object by lawful acts it is possible to avoid liability by showing that the 'motive', 'intent' or 'purpose' of the combination was predominantly the protection or advancement of legitimate interests.

An inquiry into the 'motive', 'intent' or 'purpose' of the combination involves consideration of evidence which reveals the reasons which prompted the defendants to act as they did. Self-interest of the combining parties as the overriding factor will dispose by implication of substantial desire to injure. Once the defendants establish that the overriding factor which motivated them was self-interest then this is described by the courts as justification of the combination. The motives of the parties to the combination therefore may be determinative. As Speight J said in *Pete's Towing Services Limited v Northern Industrial Union of Workers* 'Motives must be examined as well as intention'.[63] Thus, for example, if the parties to the combination were motivated by dislike of the religious or political views, or by the race of colour of the plaintiff, or their acts were a 'mere demonstration of power by busybodies',[64] then a combination of such persons the acts of which cause damage to a plaintiff, cannot be justified.

In Australia the position with respect to conspiracy in which an unlawful act has been committed is in need of clarification. *William v Hursey* [65] is still authoritative.

Damages

Once a plaintiff can establish that he/she has sustained some damage which is provable an award for damages is not limited to special damage

60 [1955] 1 WLR 9 at 11.
61 (1942) 66 CLR 18 at 41.
62 Per Haslam J Pty *Homes Limited v Shand and Others* [1968] NZLR 105 at 111.
63 [NZLR] 32 at 48.
64 *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] All ER 142 at 152.
65 (1959) 103 CLR 30. See too *Nauru Local Government council v New Zealand Seamen's Industrial Union of Workers* [1986] 1 NZLR 466.

that can be proved.

Aggravated an exemplary damages may also be recovered in an action for civil conspiracy. Thus, for example, in *Denison v Fawcett* [66] where the plaintiff was deceived by the defendant over a business agreement, it was held that the element of conspiracy is an aggravating circumstance which can be taken into account when assessing damages in the ordinary action of deceit. While it is not possible to recover two sets of damages with respect to the same tortious act however, one for the acts themselves and another for the conspiracy to commit them, it is nonetheless possible that a proven conspiracy may be a basis for an award of aggravated damages.[67]

The Rationale of Civil Conspiracy

Before embarking on an analysis of the rationale of civil conspiracy it is instructive to note the purpose of this tort. That purpose was referred to by Bowen CJ in the *Mogul* case. His Lordship said: 'In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the *protection of individuals*, or of the *public*'.[68]

Fundamental to the existence of civil conspiracy as an independent tort is the necessity of attaching special significance to plurality. Heffey[69] has identified three reasons which attempt to justify that necessity: one is historical, the other two reasons presuppose the validity of the 'strength in numbers argument'.

History does not offer a justification for conspiracy. It merely provides an explanation of its genesis. Thus it is generally accepted that the tort of conspiracy derived from the crime of conspiracy. The latter was developed during the 16th century by the Court of Star Chamber; a development explicable on the ground of public policy and according to some historians prompted into existence in an attempt to stop duelling. Another view holds that in its original sense conspiracy as a tort was a combination to abuse legal procedure. Upon it abolition the common law courts assumed the jurisdiction of Star Chamber. Thereafter just as Star Chamber had developed conspiracy as a crime the common law courts developed the notion that in a

66 (1958) 12 DLR (2d) 537 Ontario C of A. See too *Klein v Jenoves and Varley* [1932] 3 DLR 571 Ontario C of A.

67 *Jervois Sulphates (NT) Ltd v Petrocarb Explorations NL and Others; Jervois Sulphates (NT) Ltd and Others v Johannsen and Others* 5 ALR 1. As well is is worthy to note that civil conspiracy may provide the means to get an award for damages which his otherwise not available. Lord Denning MR in *Midland Bank trust Co Ltd v Green* (No 3) [1982] 1 Ch 529 at 539 with respect to civil conspiracy said:
'It is of use primarily when the act which causes damage would not be actionable if done by one alone (as in *Bradford Corporation v Pickles* [1895] AC 587 ACT), because it is then the only way in which the injured person can recover damages for the wrong done to him'.

68 *Mogul* case ibid (1889) 23 QBD at 610.

69 Peter G Heffey *The Survival of Civil Conspiracy: A question of magic or logic* Monash Univ Law Review Vol 1 March 1975 pp 153-155. See too IH Dennis *The Rationale of Criminal Conspiracy* 93 LQR 39.

case of conspiracy, an action in the nature of an action on the case would lie for damages at the suit of an injured party.[70]

The 'strength in numbers' argument is the principal rationale advance to justify conspiracy. That argument focuses on the fact that the presence of a number of persons in combination purportedly increases the potential harm that may occur and that the degree of risk that harm will be caused is increased. The essence of that argument was expounded by Bowen LJ in the *Mogul* case. His Honour said: 'The distinction [ie. between the infliction of harm by one compared with a combination] is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise'.[71]

The only other argument put forward to justify civil conspiracy holds that a wrongful motive is implicit in a combination. Thus according to Wright CJ any combination to injure involves an element of deliberate concert between individuals to do harm.[72] The fact is however, that it has long been held that an act otherwise lawful, albeit harmful to another, does not become actionable by virtue of its having been done maliciously in the sense of with a bad motive or with intent to injure another.[73] If then one person's motives for harming another are irrelevant but a combination's motive is relevant then that conclusion is derived solely because special significance is attached to plurality.

If historical reasons for justifying the existence of civil conspiracy are inadequate then it follows therefore that the continuance of this tort rests upon the 'strength in numbers' argument. That argument is no longer sustainable assuming that it ever was. It is not the mere fact of numbers that is potentially oppressive; oppression is the product of protean factors. Thus, for example, the relative power of the parties to a dispute vis-a-vis one another as well as the means at their disposal to bring about a result may outweigh the significance of plurality. As Lord Diplock has said: '... to suggest today that acts done by one street-corner grocer in concern with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership...is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II...'.[74]

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70 For a comprehensive history of the origins of criminal conspiracy see Diplock LJ in *Knuller (Publishing, Printing and Promotions) Ltd and Other v Director of Public Prosecutions* [1972] 2 All ER 898 at 918-921.

71 *Mogul* case ibid [1889] 23 QBD 598 at 616 See too, *Quinn v Leathem* [1901] AC 495 to 530 In that case Lord Brampton said: 'Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison'.

72 *Crofter* case [1942] AC at 468.

73 *Bradford Corporation v Pickles* [1985] AC 587 and *Allen v Flood* [1898] AC1.

74 *Lonrho Ltd and Ors v Shell Petroleum Co Ltd and Ors* (No 2) [1982] AC 173 at 189.

Such sentiments are borne out in contemporary Australia where it has become not uncommon for one person or a small group of persons to control, for example, virtually and entire industry and/or large numbers of employees. In that event the dubious rationale upon which civil conspiracy is premised becomes totally eroded.

In any event as referred to above the sole purpose of civil conspiracy is protection of the individual or the pubic vis-a-vis the activities of combinations. Today in some situations, in particular industrial disputes, the situation is reversed. As far as actions for civil conspiracy are concerned employees, that is 'pluralities', may be seriously disadvantaged compared with 'individuals' such as employer(s). That disadvantage stems primarily from the fact that industrial action is discussed, planned and brought to fruition in public. An employer or small group of employers can plan in private. The *Airlines* case[75] is illustrative. In that case four companies, Ansett Transport Industries Pty Ltd, East-West Airlines, Australian Airlines and Ipec Aviation employed circa 1,500 pilots. All the pilots were members of the Australian Federation of Air Pilots. Evidence presented before the court suggested that at least one of the plaintiffs entertained a plan to provoke industrial action with a view to damaging or destroying the Federation or reducing the number of employed pilots in anticipation of the deregulation of the airlines' industry in 1990.[76]

Evidence was also presented of a meeting between the directors of the Airlines with the Prime Minister of Australia and other Ministers of the Crown. That meeting took place on 15 August, 1989. On 18 August, 1989, after the Federation had issued its '9am to 5pm' directive all the plaintiffs sought cancellation of all industrial awards and certified agreements applicable to Federation members. On 24 August all the airlines began filing writs claiming damages against individual pilots. On 26 August, Ansett, Australian and East-West inserted and advertisement in four Australian and six overseas newspapers seeking recruits.[77]

Notwithstanding the similarity in procedures adopted by the Airlines, Brooking J accepted the evidence of one of the plaintiffs denying any suggestion that any of the airlines engineered the dispute in order to get rid of pilots and to get rid of the Federation.[78]

The evidence presented against the Federation by comparison consisted of freely-available and clearly documented officials directives issued by the President of the Federation, on its behalf. That evidence revealed a concerted plan to achieve, inter alia, substantial salary increases for the member of the Federation as well as the means whereby that purpose was to be achieved. It is unsurprising therefore that the court found the defendant Federation and some of its office bearers had combined to achieve specific purposes and were therefore liable in civil conspiracy.

75 (1989) Aust Torts Reports 80-290.
76 Ibid at 69, 145.
77 Ibid at 69, 125.
78 Ibid at 69, 146.

Thus far in this article the salient features of civil conspiracy have been outlined. A critique has been offered of specific aspects of this tort such as the anomalies inherent in the notion of 'unlawfulness'. As well the fundamental rationale, viz the significance of plurality has been found wanting. The question then is posed: What ought to be the ambit of civil conspiracy?

The House of Lords in the *Lonrho*[79] case made clear their belief that the civil action in conspiracy is anomalous. They sought to restrict the ambit of the tort. This their Lordships did by requiring that predominant purpose to injure the plaintiff be made out in a case even where it appears that unlawful means were used by the defendants.

With respect to 'unlawful means' conspiracies there is clearly a divergence between the United Kingdom decision on the one hand, and Australian and New Zealand decisions, on the other. The entirety of actionable civil conspiracies in the United Kingdom appear to be confined to conspiracies where it can be shown that the predominant purpose of the defendant was to harm the plaintiff. Moreover since short-term harm to the plaintiff is frequently held to be justifiable because of long-term furtherance of interests of the defendant, the ambit of the tort is extremely restricted.

There are compelling reasons indeed why the example set by the House of Lords should be followed in Australia.

79 [1982] AC 173.