Of Principle and Prima Facie Tort

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INTRODUCTION

This article considers the difficulty experienced by American courts in attempting to translate a general tort principle underpinning various intentional tort actions derived from the action on the case into a free-standing tort itself. The principle in question, termed the 'harm principle',[1] recognises that the intentional infliction of injury without just cause or excuse is tortious. It was formulated by Lord Justice Bowen in *Mogul Steamship Co* v *McGregor Gow and Co*[2], but the House of Lords in *Bradford* v *Pickles*[3] and in *Allen* v *Flood*[4] viewed actual intention as irrelevant to tortious liability and refused to adopt it. The principle commended itself, however, to academic commentators and Oliver Wendell Holmes assisted in enshrining it into Massachusetts law.[5] From there, it was adopted by a small number of other American jurisdictions and applied as the 'prima facie tort'.

The operation of the prima facie tort has been severely restricted by a number of limitations designed primarily to prevent it from 'undermining' established intentional torts. This has followed criticism that the tort is too amorphous in nature and not capable of a consistent and satisfactory application. However, it is submitted that the doctrine is a sound one, taking the presence of an intention to harm as central to the imposition of liability. The presence of such intention is an important moral factor in any liability question.[6] Having said that, courts adopting the tort must be fairly specific in determining what are to be the limits of liability. Those limits will be determined by reference to overall patterns of liability in tort.

The American experience with the prima facie tort is of interest due to the fact that the form of liability that it embodies is mirrored in a number of torts extant in Anglo-Australian jurisdictions. These include liability for the intentional infliction of harm (torts in *Bird* v *Holbrook*[7] and *Wilkinson* v *Downton*[8]) and for conspiracy by lawful means. The question arises whether these torts will eventually coalesce into one or whether a tort analogous to prima facie tort will develop. There are good reasons for liability in the form of the prima facie tort and therefore good reasons for adopting a tort akin to it in England and Australia.

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1 R Epstein, 'The Harm Principle — And How it Grew' (1995) 45 *University of Toronto Law Journal* 369.

2 (1889) 23 QBD 598, 613.

3 [1895] AC 587.

4 [1898] AC 1.

5 *Vegelahn* v *Guntner* 44 NE 1077 (1896); *Plant* v *Woods* 57 NE 1011 (1900); *Moran* v *Dunphy* 59 NE 125 (1901).

6 On the significance of intention, see J Finnis, 'Intention in Tort Law' in D Owen (ed), *Philosophical Foundations of Tort Law* (1995), 229.

7 (1828) 4 Bing 628; 130 ER 911.

8 (1897) 2 QBD 57.

BACKGROUND

By 1889, when *Mogul Steamship* v *McGregor Gow and Co*[9] was decided, the English law of torts recognised an action on the case for the intended infliction of physical harm.[10] Actions also arose for the intended infliction of economic harm[11] and for maliciously inducing a breach of contract.[12] In this climate of growth, a number of cases arose in which damages were sought for economic losses arising from intentional interferences with alleged 'rights' to trade. *Mogul Steamship* was one of them. The difficulty with finding liability in such cases is that trade has its inevitable winners and losers. Even where an intention to inflict injury can be proven, this might be explained as a mere consequence of the desire to profit the injurer. For that reason, liability was denied in *Mogul Steamship*. However, in an important dictum, Bowen LJ stated:

> Intentionally to do that which is calculated in the ordinary course of events to damage and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong.[13]

Unqualified, so broad a statement was not an accurate reflection of English law.[14] However, Bowen LJ was astute in recognising the growing importance of fault in tort law, especially in cases involving the indirect causation of harm. Where harm was indirectly caused, causation was not viewed as sufficient in itself to warrant a finding of liability.[15] Bowen LJ asserted the significance of an actual intention to harm, as the most egregious form of fault, in determining such questions of liability.

The House of Lords moved to quash development of a 'harm principle' in *Mayor of Bradford* v *Pickles*[16] and *Allen* v *Flood*.[17] In *Bradford*, the City of Bradford sought to restrain the defendant Pickles from diverting a stream of underground water which otherwise would have flowed into its catchment. The City alleged that the defendant had diverted the water with an intention to injure it and to force it into purchasing the defendant's land.[18] However, the

9 (1889) 23 QBD 598.
10 *Bird* v *Holbrook* (1828) 130 ER 911.
11 Classic examples are *Keeble* v *Hickeringill* (1706) 11 East 574; 103 ER 1127 (Defendant had fired shots on his own land with the intention of scaring away wild fowl which were attracted to the plaintiff's decoys and which the plaintiff trapped for profit. According to Holt CJ, an action lay 'where a ... malicious act is done to a man's occupation, profession or way of getting a livelihood'); *Tarleton* v *McGawley* (1793) 1 Peake 270; 170 ER 153 (Defendant had fired at natives off the Cameroon coast in order to prevent their trade with the plaintiffs. According to Lord Kenyon, 'Had this been an accidental thing no action could have been maintained, but it is proved that the defendant had expressed an intention not to permit any to trade').
12 *Lumley* v *Gye* (1853) 2 E & B 216; 118 ER 749; *Bowen* v *Hall* (1881) 6 QBD 333.
13 Id 613.
14 See G Fridman, 'Malice in the Law of Torts' (1958) 21 *Modern Law Review* 484, 496.
15 Id 497.
16 [1895] AC 587.
17 [1898] AC 1.
18 [1895] AC 587, 589.

Lords could see no basis for granting an injunction. The defendant was held to have an absolute right to do as he wished upon his own land. Lord Watson stated that no 'use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious'.[19] The Lords emphasised the fundamentality in tort of the external nature of acts divorced from any consideration of malice or intent.[20]

In *Allen* v *Flood*,[21] damages had been awarded to a union of shipwrights, whose members had been denied work by the Glengall Iron Company at the insistence of a union of ironworkers. The ironworkers had objected to the practice of shipwrights doing iron work and sought to eliminate it. Because the shipwrights were on contracts terminable at will, Glengall ostensibly was committing no unlawful act when they were dismissed. The jury found that the ironworkers had 'maliciously induced' Glengall to discharge the shipwrights and the question again arose as to whether that would justify a finding of liability. The House of Lords held that no cause of action arose and affirmed the holding in *Bradford*. It was established that '[a]n act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action'.[22]

In a number of torts extant at the time of the decision in *Allen* v *Flood*, it was apparent that the presence of an intention to harm really did 'make the difference' between a finding of liability and no liability.[23] The House dealt unconvincingly with the authorities. Their lordships dismissed the relevance of inducement of breach of contract cases by pointing out that the breach of a contract was itself an 'unlawful act'.[24] Actions in malicious prosecution were said to be 'anomalous'[25] or an 'exceptional case'.[26] Similarly, conspiracy by lawful means, the clearest case in which intention made the difference, was said to be anomalous.[27] The combined weight of these 'anomalous' rules was not enough to sway their lordships from their intransigent position.

The harm principle fared better in academic circles than it did in the courts. Sir Frederick Pollock observed that a nice symmetry would be established if a general principle of intentional harm were adopted by the courts. The law of negligence already imposed a universal duty to avoid causing harm to others, so that there must also exist 'the negative duty of not doing wilful harm; subject, as all duties must be subject, to the necessary exceptions'.[28] Pollock's close associate, Oliver Wendell Holmes, thought that it was evident enough

19 Id 598.
20 Id 594 per Lord Halsbury and 601 per Lord Macnaghten.
21 [1898] AC 1.
22 Ibid.
23 See, e.g. G Fridman, op cit fn 14, 496. The weakness of the case made out by the plaintiffs on the facts, however, is set out in R Epstein, 'Intentional Harms' (1975) 4 *Journal of Legal Studies* 391, 436-7.
24 [1898] AC 1, 96 per Lord Watson, 123 per Lord Herschell, 154 per Lord Macnaghten, 169 per Lord Shand and 171 per Lord Davey.
25 Id 172 per Lord Davey.
26 Id 125 per Lord Herschell.
27 Id 124 per Lord Herschell. See also 153 per Lord Macnaghten and 172 per Lord Shand.
28 F Pollock, The Law of Torts (1894), 23.

that 'the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause'.[29] He recognised that 'actual malice may make [a defendant] liable when without it he would not have been'.[30] This was due to the fact that actual malice defeated any claim to privilege for harmful conduct.[31]

Why was the House of Lords so intent upon depreciating the role of actual intention in tort law and upon denying the existence of any general principle of liability? Fridman has suggested that utilisation of the actual intention standard would have deprived the judges of much control over liability and would have entangled them in disputes about the misuse of economic power.[32] It might also have been that the House was intent upon the preservation of reasonable freedom over the deployment of labour and property. The line was to be drawn where fair play or fair competition ended, namely where persons induced breaches of contract or conspired to harm. The attitude which emerged in the United States was rather different. The courts in that country seemed more intent upon penalising intentional harm whatever the context in which it arose.[33]

EMERGENCE OF A NEW TORT

Various American jurisdictions had originally adhered to a view of actual intention similar to that propounded in *Allen* v *Flood*. The Supreme Court of California had been adamant that 'malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful'.[34] Acts were defined as lawful or unlawful on the basis of their external qualities. The Supreme Court re-affirmed its position after *Allen* v *Flood* holding that, 'upon an extensive review of the authorities, American and English, ... "an act which does not amount to a legal injury cannot be actionable because it is done with a bad motive"'.[35]

As already mentioned, Oliver Wendell Holmes was one of those academics who rejected the suggestion that actual intention had no role to play in tort law. Upon his appointment to the Supreme Judicial Court of Massachusetts, Holmes was placed in a position where he was able to judicially refute that suggestion. Moreover, Holmes J outlined a general principle in favour of the

[29] O Holmes, 'Privilege, Malice and Intent' (1894) 8 *Harvard Law Review* 1,3, citing *Mogul Steamship Co* v *McGregor, Gow and Co* (1889) 23 QBD 598, 613.

[30] Id 2.

[31] Id 9. See also J Ames, 'How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor' (1905) 18 *Harvard Law Review* 411; G Williams, 'The Foundation of Tortious Liability' (1939) 7 *Cambridge Law Journal* 111

[32] G Fridman, op cit fn 14, 490.

[33] See J Ames, op cit fn 31, 414-5, where the learned author noted that cases involving facts similar to those in *Mayor of Bradford* had been decided 13 to two in favour of plaintiffs.

[34] *Boyson* v *Thorn* 33 P 492 (1893), 494.

[35] *JF Parkinson Co* v *Building Trades Council* 98 P 1027 (1908), 1034. See also, eg, *McMaster* v *Ford Motor Co* 115 SE 244 (1921), 246 (South Carolina); *Amuny* v *Seaboard Bank and Trust Co* 23 SW 2d 287 (1930) 287-8 (Texas).

view that to intentionally harm another without just cause or excuse is tortious, which led to the birth of the prima facie tort.[36] It was not long before his views were adopted as law in Massachussetts, from where he took them to the United States Supreme Court.

In *Plant* v *Woods*,[37] a union made demands on another union, the 'manifest object of the defendants [being] to have all the members of the craft subjected to the rules and discipline of their particular union'.[38] It was found that the defendants had promised 'trouble' for employers if they did not accede to demands to discharge workers who refused to join their union.[39] In determining that a conspiracy had been proven, Hammond J, writing for the majority of the Supreme Judicial Court, rejected the reasoning in *Allen* v *Flood* and adopted an approach similar to that of the academic writers on the subject. He stated:

> In many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone . . . .[40]

In support of this statement, his honour cited Holmes on 'Privilege, Malice and Intent'.[41] He placed a premium upon the right of the plaintiffs to be free from 'molestation' and found no sufficient justification for the defendants' activities.[42] Chief Justice Holmes (dissenting) was satisfied that the court adopted 'the mode of approaching the question' which he believed to be correct.[43] But he disagreed in the result for the reason that there was justification in the defendant's desire to 'strengthen [its] society as a preliminary and [necessary] means to enable it to make a better fight on questions of wages or other matters of clashing interests'.[44] In this respect, Holmes CJ rejected the reasoning in *Allen* v *Flood*, but would have reached the same result in analogous circumstances.

In *Moran* v *Dunphy*,[45] Holmes CJ wrote for a unanimous Supreme Judicial Court that 'motives may determine the question of liability'.[46] It was held that, where a person made false statements so as to cause the discharge of another from his or her employment, the presence of a 'malevolent' purpose required the defendant to answer for his or her acts.[47] With this, the court was almost at a point where a new cause of action, the prima facie tort, had emerged.

[36] Only the most important of events will be recounted here. See K Vandevelde, 'A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort' (1990) 19 *Hofstra Law Review* 447.
[37] 57 NE 1011 (1900).
[38] Id 1012.
[39] Ibid.
[40] Id 1014.
[41] O Holmes, op cit fn 29.
[42] 57 NE 1011 (1900), 1015.
[43] Id 1016.
[44] Ibid.
[45] 59 NE 125 (1901).
[46] Id 126.
[47] Ibid.

However, the crucial aspect of that tort which had not yet been accepted was that liability might arise in circumstances in which the acts in question were not independently unlawful — that is, where intention to harm really 'made the difference'.

In *Aikens* v *Wisconsin*,[48] newspaper proprietors had been prosecuted under a statute which prohibited combinations designed maliciously to injure the trade of another.[49] The defendants had sought to charge higher advertising rates to customers who paid increased rates to competitor newspapers. The intention of the defendants was to damage those competitors. It was argued that the statute was invalid on the ground that it infringed the Fourteenth Amendment to the United States Constitution, which was said to guarantee a right not to contract. Holmes J, writing for the United States Supreme Court, rejected that argument. The actions of the defendants would have been unlawful at common law on the principle that it 'has been considered that, prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, ... requires a justification if the defendant is to escape'.[50] It was no answer to that proposition to say that 'motives are not actionable, and that the standards of law are external'.[51] This was in a context where the actions of the defendants were not capable of independent characterisation as unlawful.

Again, in *American Bank and Trust Co* v *Federal Reserve Bank of Atlanta*,[52] the external acts of the defendant bank were ostensibly lawful in nature. It was accumulating cheques to be presented en masse to the plaintiff bank for payment in cash so as to reduce the reserves the plaintiff had available for lending and therefore to reduce its profit opportunities. The defendant argued that 'the holder of a cheque has a right to present it to the bank upon which it was drawn for payment over the counter' and that this right extended to the presentation of a large number of cheques, whatever be the motive. In countering this, Holmes J stated that the 'word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified'.[53] His honour argued that, should a bank in the position of the defendants have acted with 'disinterested malevolence' in creating a run on a bank so as to ruin it, an action would undoubtedly lie.[54] No justification existed for the acts of the defendants.[55]

An illuminating discussion of the then nascent prima facie tort is found in *Tuttle* v *Buck*,[56] a decision of the Supreme Court of Minnesota. The plaintiff barber alleged that the defendant had set up a business of the same nature in

48 25 Sup Ct 3 (1904).
49 Wisconsin Statute 1898, section 4466(a).
50 25 Sup Ct 3 (1904), 5.
51 Ibid.
52 41 Sup Ct 499 (1921).
53 Id 500.
54 Ibid.
55 Id 501.
56 119 NW 946 (1909).

order to ruin him. Mainly concerned in banking activities, the defendant was 'possessed of large means'. He had employed a barber and was active in seeking the plaintiff's clientele 'for the sole and only purpose of injuring the trade of the plaintiff'.[57] Once that was accomplished, he intended to discontinue in that business.[58] The court found that a tort had been committed. The majority rejected the notion that the intention behind a course of action would never be relevant to its characterisation as right or wrong and stated:

> Men cannot always, in civilized society, be allowed to use their own property as their interests or desires dictate without reference to the fact that they have neighbours whose rights are as sacred as their own. The existence and well-being of society requires that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. The purpose for which a man is using his own property may thus sometimes determine his rights . . . .[59]

The defendant's conduct could not be judged separately from the 'motive which actuated him'.[60] The defendant's motives were 'wanton' in nature and his conduct could not be regarded as a legitimate exercise of his rights.[61] In reaching this conclusion, the court stated that *Allen* v *Flood* could not be regarded as good law.[62]

Early in the life of the prima facie tort, it was thought that the harm principle 'had the potential to play a role analogous to that of negligence theory'.[63] Courts were becoming more conscious of their role in providing redress for injury, despite the novelty of the claim.[64] Many tort cases involved the consideration of new harms, including harms to reputation and harms psychiatric and economic in nature. These harms were not caused in ways similar to those in actions for trespass. They arose indirectly. The prima facie tort had the potential to allow recovery for new harms, intentionally caused, through a widening of then current conceptions of responsibility for loss. Why did the tort not thrive?

The trespass torts had required proof of what Forkosch described as 'legal' intention. Such intention went to the commission of the act in question rather than to the causation of injury.[65] Liability in trespass was thus determined according to the external nature of the act committed. By contrast, the prima facie tort was based upon the actual presence of an intention *to harm*. No particular type of act was required as a means of producing injury under the prima facie tort. The importation of such intention to injure into the action

[57] Id 946.
[58] Id 948.
[59] Id 947.
[60] Id 948.
[61] Ibid.
[62] Ibid.
[63] See K Vandevelde, 'History of Prima Facie Tort', op cit fn 36, 484.
[64] E Albertsworth, 'Recognition of New Interests in the Law of Torts' (1922) 10 *California Law Review* 461, 463.
[65] M Forkosch, 'An Analysis of the "Prima Facie Tort" Cause of Action' (1957) 42 *Cornell Law Quarterly* 465, 476

on the case was a modern development.[66] This was a considerable difficulty for judges versed in the strict requirements of trespass. Such judges did not want to be seen as undermining rules which were among the most hallowed in the law. As will be seen in the next section, the more general lack of definition in the emerging tort was also a cause of difficulty for the judges.

ADOPTION AND LIMITATION IN NEW YORK STATE.

After expressing early interest in the harm principle,[67] the New York Court of Appeals explicitly adopted the prima facie tort in *Opera on Tour* v *Weber*.[68] A musicians' union had induced a stagehands' union to withdraw its labour from the plaintiff corporation which presented operas using recorded music. As a result, the company was unable to operate at a profit and sought an injunction against the musicians on the basis of a conspiracy between the unions. The court recited Holmes J's statement that 'prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, ... requires a justification if the defendant is to escape'.[69] It noted that the stagehands had no dispute with the plaintiffs and that '[h]arm done to another or to the public may be countenanced only if the purpose, in the eyes of the law, is sufficient to justify such harm'.[70] There was no lawful objective in seeking to displace mechanical means of sound production in favour of manual production. That issue had no sufficient connection with the terms and conditions of musician union employment — the plaintiffs employed no musicians![71] Without specifying whether the appeal was allowed on the basis of conspiracy or prima facie tort, the court found for the plaintiffs and upheld the grant of an injunction.

The nomenclature 'prima facie tort' was adopted in *Advance Music Corp* v *American Tobacco Co*,[72] where the plaintiff alleged that the defendant had published a ranking of songs not according to their actual popularity but according to caprice and a desire to injure. The plaintiff corporation spent much money in order to promote their songs and claimed damages for loss of profits. On a motion to dismiss, the New York Court of Appeals upheld the validity of the complaint on the sole basis that it alleged 'a prima facie tort and, therefore, is sufficient in law on its face'.[73]

There would be many similar strike out motions on the basis that an allegation of prima facie tort was not good in law. New York courts generally denied

66 See G Fridman, op cit fn 14, 491.
67 *Beardsley* v *Kilmer* 140 NE 203 (1923); *Al Raschid* v *News Syndicate Co* 191 NE 713 (1934).
68 34 NE 2d 349 (1941).
69 Id 352.
70 Ibid.
71 Ibid.
72 70 NE 2d 401 (1946).
73 Id 403.

such motions and began the process of defining a new cause of action. However, definition brought with it limitation. Two requirements, in particular, would deny the tort much of its remedial potential: First, that there be an intention to injure unmixed with any intention to promote the injurer's own interests (the 'sole motivation' requirement) and, secondly, that no other appropriate tort be available as a mechanism for redressing the harm complained of.

A sole motivation to injure became a 'requirement' in *Ledwith* v *International Paper Co.*[74] Justice Church, at special term, stated that an action would lie 'for malicious acts and words where they are calculated to produce and where they produce damage',[75] but that the basis of liability was malice 'unmixed with any other [intention] and exclusively directed to injury and damage of another'.[76] Confirming this, his honour stated that 'if [there] are also legitimate purposes the rule seems perfectly well established that there is no liability'.[77] In *Reinforce Inc* v *Birney*,[78] the New York Court of Appeals affirmed the sole motivation requirement. The plaintiff alleged that the defendant, as head of a union, had conspired to prevent him from running his business successfully by causing union members to refuse to work for him. The case turned on the question of what degree of malice was required in order to convert otherwise lawful acts into tortious acts. The court held that should potential tortfeasors 'by means not in themselves unlawful, of acts not in themselves unlawful, have any proper purpose to serve, they are not liable for the damage they cause'.[79]

Undoubtedly, the inherent difficulties of proving intention to harm are greatest in cases of economic conflict.[80] A case might have existed for raising the intention threshold to that of sole motivation in economic disputes, but it is difficult to see why this should have extended to non-economic claims. Alternatively, the intention standard might have remained as it was, with justification being left to do the work of filtering out the good from the bad claims. The obvious disadvantage of the latter approach is that it would have made for difficulty in striking out baseless claims before trial. The point remains that the Court of Appeals went further than it need have in *Reinforce*. New York courts have *occasionally* indicated since that the sole motivation requirement need not be strictly applied in prima facie tort — an action which was, after all, designed to be remedial in nature.[81] However, the tort has become synonymous with the sole motivation requirement .[82]

74 64 NYS 2d 810 (1946).
75 Id 813.
76 Ibid.
77 Ibid.
78 124 NE 2d 104 (1954).
79 Id 106.
80 The 'special' nature of pure economic loss is dealt with in a brilliant article, P Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in D Owen (ed), *Philosophical Foundations of Tort Law* (1995), 427.
81 See, eg, *Penn-Ohio Steel Corporation* v *Allis-Chalmers Manufacturing Co* 184 NYS 2d 58 (1959), 61-2.
82 See, eg, *Serrano* v *Flight Motel Inc* 408 NYS 2d 198 (1978); *Azby Brokerage Inc* v *Allstate Insurance Co* 681 F Supp 1084 (1988).

It is submitted that the 'sole motivation' approach indicates a conceptual misapprehension on the part of courts which have applied it. The original conception of the harm principle was such that the presence of *any* element of intention to harm permitted the tort to be pleaded. The mere presence of intention was not, however, to be determinative of liability. Liability was to be determined upon a balancing of factors approach. Other motives could be taken into account in determining whether just cause or excuse existed for the infliction of injury.[83] This was clearly recognised upon publication of the *Restatement (Second) of Torts (1977)*.

The more restrictive requirement imposed by New York courts is that no alternative tort action should be open to pleading on the facts of the prima facie tort action. If another action is available, that other action alone must be pleaded. The fear here has been that, if such a requirement were not imposed, then prima facie tort could undermine the limitations governing liability in established tort actions. It is submitted that this pleading requirement is also unwarranted.[84]

In *Ruza* v *Ruza*,[85] the Supreme Court Appellate Division held that 'where specific acts, recognised as tortious in the law, are asserted, the remedies lie only in the classic categories of tort'.[86] The court justified this stance on the basis that prima facie tort's rationale was to fill in gaps left by the 'classic torts'.[87] While there is no doubt that that was a major attraction in the evolution of the prima facie tort, the court failed to recognise that prima facie tort was in fact the manifestation of a more general principle underlying many of the already *established torts*. For this reason, the principle was not susceptible to pre-determined tort boundaries. Be that as it may, it was established that prima facie tort could not be pleaded in the alternative. In fact, it could not be pleaded even where (for whatever reason) the alternative tort was bound to fail.

A sounder approach was taken in cases like *Morrison* v *NBC*,[88] where the Supreme Court Appellate Division recognised that 'the classical categories of torts were merely classifications, and incomplete ones at that'.[89] The court indicated dissatisfaction with 'labels', whether of established or prima facie torts, and observed that 'a rule should stand or fall because of its reason or lack' thereof.[90] This latter approach was followed in *Board of Education of*

[83] See G Shapiro, 'The Prima Facie Tort Doctrine: Acknowledging the Need for Judicial Scrutiny of Malice' (1983) 63 *Boston University Law Review* 1101, 1117-20.

[84] Shapiro has interpreted the cases in a slightly different manner, indicating that the courts have approached the matter by determining whether the 'real action' being pursued lies in the malicious intent to injure or in 'the particular activity that is the gravamen of the complaint: id 1105. It is submitted, however, that New York courts have not generally been so careful in their analysis. The position is taken here that the courts have simply tried to restrict the scope of the prima facie tort. See also K Vandevelde, 'The Modern Prima Facie Tort Doctrine' (1991) 79 *Kentucky Law Journal* 519, 544-546.

[85] 146 NYS 2d 808 (1955).

[86] Id 810.

[87] Id 811.

[88] 266 NYS 2d 406 (1965).

[89] Id 416.

[90] Id 417.

Farmingdale v *Farmingdale Classroom Teachers' Association Inc*,[91] where the New York Court of Appeals held that the prima facie tort could be pleaded in the alternative:

> A modern system of procedure, one which permits alternative pleadings, should not blindly prohibit that pleading in the area of prima facie tort. Of course, double recoveries will not be allowed, and once a traditional tort has been established the allegation with respect to prima facie tort will be rendered academic. Nevertheless, there may be instances where the traditional tort cause of action will fail and plaintiff should be permitted to assert this alternative claim.[92]

The liberal approach was not followed in subsequent cases, where redress was often sought for damage on quite tenuous factual grounds, including a number in which prima facie tort was alleged in actions taken in retaliation for the instigation of prior litigation. It is not surprising to find that New York courts became less enthusiastic about the prima facie tort in this context and re-imposed the condition that there be no other cause of action available — prompting one commentator to write that prima facie tort had been made a 'tort of last resort'.[93]

In *ATI, Inc* v *Ruder and Finn Inc*,[94] the New York Court of Appeals, without substantial discussion of the issue, noted that following the decision in *Ruza* v *Ruza*, 'the key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts *which would otherwise be lawful*'.[95] In *Belsky* v *Lowenthal*,[96] prima facie tort was alleged in retaliation for the institution of prior proceedings by the plaintiffs.[97] The defendant had brought a medical malpractice suit which was subsequently discontinued. In determining whether any cause of action arose, Evans J, writing for the Supreme Court Appellate Division, followed the authority of *ATI* and went on to say:

> It would make little sense to hold that [a] plaintiff may not prevail on a cause of action, having failed to establish certain elements, which are essential thereto, and then in the exercise of flexibility, apply a different name to it, and . . . permit the cause of action (absent some unique quality) to stand.[98]

The court wished to discourage disappointed plaintiffs from the institution of never-ending litigation.[99] While there is obvious sense in this policy, it is submitted that the court was again mistaken in its concern that established torts could be undermined in exercise of a notion of 'flexibility'. It was not sensible

91 343 NE 2d 278 (1975).
92 Id 285.
93 K Vandevelde, 'Modern Prima Facie Tort', op cit fn 84, 537.
94 368 NE 2d 1230 (1977).
95 Id 1232 (emphasis added).
96 405 NYS 2d 62 (1978).
97 See also Serrano v Fight Motel Inc 408 NYS 2d 198 (1978); *Scully* v *Genesee Milk Producers' Coop* 434 NYS 2d 48 (1980); *Ginsberg* v *Ginsberg* 443 NYS 2d 439 (1981); *Howard* v *Block* 454 NYS 2d 718 (1982); *Curiano* v *Suozzi* 480 NYS 2d 466 (1984).
98 405 NYS 2d 62 (1978), 65.
99 Ibid.

to view prima facie tort as a 'catch-all alternative for every cause of action which cannot stand on its own legs'.[100] The intention requirement of the prima facie tort is reasonably onerous and will *not* allow for the easy evasion of the elements of established torts. As will be seen below, the duty of the courts remains that of developing the law in accordance with existing patterns of liability (ie, by taking the 'incremental' approach). For this reason, there should be no bar to pleading the prima facie tort in the alternative.

THE RESTATEMENT POSITION

Given the early academic enthusiasm for the recognition of a harm principle, it comes as little surprise that the American Law Institute adopted such a principle in section 870 of the *Restatement (Second) of Torts (1977)*, largely free of the restrictions imposed by New York courts. The late adoption of the principle by the Institute ensured that it had a minimal impact upon the development of the law in New York, the law in that jurisdiction having more or less ossified. However, the *Restatement* has had an impact upon more recent developments in other states.

Section 870 of the *Restatement* was drawn up with the intention of providing a 'unifying principle' to 'serve as a guide for determining when liability should be imposed for harm that was intentionally inflicted'.[101] The Institute was not attempting to 'establish precise and inflexible requirements', for that would have been antithetical to the nature of the principle.[102] Rather, it laid down 'general guidelines' and employed words 'expressing standards that vary with the circumstances to which they are applied'.[103] The section reads as follows:

> One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

In proclaiming this principle, the Institute recognised that it embodies elements underlying the development of 'torts arising out of the action on the case.'[104] It is based on the presence of an actual intention to cause harm or knowledge of the substantial certainty that harm will follow[105] and on the causation of such harm, defined as the 'existence of loss or detriment in fact of any kind'.[106]

[100] Ibid. It should be noted that not all of the cases decided after *ATI* v *Ruder* and *Belsky* v *Lowenthal* have insisted that prima facie tort is unavailable in circumstances where a traditional tort ostensibly covers the field. See, eg, *Sadowy* v *Sony Corp of America* 496 F Supp 1071 (1980), 1076; *Freihofer* v *Hearst Corp* 490 NYS 2d 735 (1985), 741; *Western Meat Co Inc* v *IBP Inc* 683 F Supp 415 (1988), 416-7.

[101] *Restatement (Second) of Torts (1977)*, section 870, comment (a).

[102] Ibid.

[103] Ibid.

[104] Id comment (b).

[105] Ibid.

[106] Id comment (e). See also id comments (l) and (m).

The fact that an intention to harm may be but one motive in the commission of the act does not preclude liability.[107] Recovery is limited, though, 'to those cases in which the plaintiff's harm is of such a nature and seriousness that legal redress is appropriate'.[108]

The presence of an intention to injure makes necessary a balancing of interests in order to determine whether justification exists or whether liability should be imposed upon the defendant.[109] The *Restatement* acknowledges that, in respect of the established intentional torts, 'this balancing process has already been worked out and developed in the form of a set of rules'.[110] However, this is not to deny the potential application of section 870 in circumstances where an established tort can be pleaded and where such an established tort may be unsuccessful:

> The new tort may be closely related to an established tort and thus allow tort recovery when a restrictive rule of the traditional tort would not permit it . . . In determining whether a new tort can appropriately eliminate a restrictive feature of a traditional tort it is important to give careful consideration to the nature of the restriction. If it came about as a historical accident or for reasons that no longer have real significance, the new tort without it may serve a useful purpose. If the restriction expresses an important policy of the law against liability, however, the significance of that policy should continue regardless of the name of the tort involved or the date of origin.[111]

These comments are guarded in their tenor and do not anticipate the redundancy of established intentional torts. Rather, they point to the existence of a principle which may assist in the judicial development of new torts or the expansion of established torts after careful consideration of old limitations and policy factors. This cautious approach is evident in the statement that 'there are many harms that individuals must bear as the price of living in a society composed of many individuals'.[112]

It is undoubted that the conception of the harm principle evinced by section 870 of the *Restatement* is truer to its origins in the writings of Bowen LJ and Holmes J than is the prima facie tort doctrine currently applied in New York.[113] There is no requirement that the defendant be motivated solely by an intention to harm. Moreover, there is no prohibition against pleading the harm principle in the alternative to an established tort action. However, the *Restatement* sees the place of the principle as a catalyst for the development of specific torts — that is, torts tailored to particular types of injury arising in particular circumstances. It does not expressly advocate a general tort as a counterpart to negligence. Have any states recognised such a general tort following its publication?

[107] See discussion, id comment (i).
[108] Id comment (e).
[109] Id comment (c).
[110] Ibid.
[111] Id comment (j).
[112] Id comment (f).
[113] See, eg, J Ginn, 'Prima Facie Tort' (1980) 11 *Cumberland Law Review* 113, 124; K Vandevelde, 'History of Prima Facie Tort', op cit fn 36, 493.

RECENT DEVELOPMENTS

The main developments in recent years have taken place in Missouri and New Mexico. Missouri adopted the prima facie tort in *Porter* v *Crawford and Co*,[114] a decision which has been very influential in post-*Restatement* developments. In that case, the plaintiff had received a cheque in settlement of an insurance claim and deposited it in a bank. Upon an assumption of the cheque's validity, the plaintiff himself wrote out cheques which were dishonoured because the defendant loss-adjuster stopped payment on the first cheque. The plaintiff claimed an 'intent to cause actual injury and damage' on the part of the defendants (which included the insurer). The defendants filed motions to dismiss and these were granted at trial.

In discussing the principles, the Court of Appeals noted a then recent relaxation of the sole motivation requirement in New York.[115] This relaxation, in its view, was based upon a contradiction between such a requirement and the presence of a justification limb to the tort — a purpose other than the malevolent desire to injure the plaintiff was said to be the crux of the justification limb.[116] The court stated:

> Modern authority seems to agree that what is involved in the two concepts of malevolence and justification is that the plaintiff's cause of action must include proof of an actual intent to injure and if another purpose appears in the actor's conduct which amounts to a justification, then the wrongful act and the justification will be weighed to determine whether the justification in terms of societal value outweighs the wrongful motive of the defendant in attempting to injure the plaintiff.[117]

This is a substantially accurate statement of what is submitted to be the correct approach. The court decided that, as a policy matter, Missouri would adopt a prima facie tort based on the principle formulated in the *Restatement*. This on the basis that the 'concept is consistent with the mandate of our organic law that there be a remedy for every [legally recognised] injury'.[118] Applying the new tort, the Court found that the plaintiff's claim stated a good cause of action.[119]

In subsequent cases, however, inevitable concerns were raised about prima facie tort becoming a 'catch-all' with the potential to undermine established causes of action. Thus, in *Bandang of Springfield Inc* v *Bandang Inc*,[120] the Missouri Court of Appeals stated that 'the broad generality of the concept demands careful formulation and limitation of the constitutive elements ... if it is to be useful in any way or respect except as a "catch-all" action sounding in tort'.[121] This is no doubt true. However, instead of undertaking this task, the

[114] 611 SW 2d 265 (1980).
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Id 272.
[119] Ibid.
[120] 662 SW 2d 546 (1983).
[121] Id 552.

court held that if, at the close of the evidence in a case, it was apparent that another cause of action existed under a nominate tort, the prima facie tort could not be continued with.[122]

Kiphart v *Community Federal Savings and Loan Association*[123] is confirmation of a restrictive view being adopted in Missouri, consonant with the reimposition in New York of the requirement that prima facie tort cannot be pleaded in the alternative. The plaintiff bank teller was accused of having stolen $225 from her cash draw. There was no proof of such theft and the bank's internal investigator set out in his self-confessed attempt to 'break' her. After two weeks of confrontational questioning which revealed nothing, the bank dismissed the plaintiff who thereafter suffered 'emotional distress' but without permanent injury.[124] No remedy was made available to the plaintiff in circumstances similar to those in which a remedy had been made available in a Canadian case.[125] In determining that the bank was not liable, the Missouri Court of Appeals made reference to cases arising after *Porter* which indicated that no plaintiff had yet succeeded in establishing prima facie tort and that the viability of the tort was doubtful.[126] More problematic, though, was the fact that Missouri courts had begun to adopt the limitations imposed by New York courts. The court noted that 'where the plaintiff has a claim within a well-defined nominate tort, then such a claim cannot be submitted under prima facie tort theory'.[127] The court held that a nominate tort was applicable, in the form of the intentional infliction of emotional distress action, so that the plaintiff could not succeed.[128] The poor outlook for the prima facie tort in Missouri recently was confirmed in *Riley* v *Riley.*[129]

New Mexico adopted the prima facie tort in *Schmitz* v *Smentowski.*[130] The Mocks had purchased adjacent ranches as part of a three-party land exchange. In turn, they sold a farm to the plaintiff Schmitz in exchange for cash and a promissory note. The Mocks used the promissory note to pay the vendors of one of the ranches. The note was made payable to the defendant Smentowski, an accountant who was acting as straw-man to facilitate the transaction. Smentowski used it to secure a personal loan to himself. Yet all parties to the latter transaction had actual knowledge that Smentowski had no beneficial interest in the note. Upon default, the bank sought payment on the note so that the Mocks were forced to borrow in order to prevent foreclosure. In a multi-party action, the Mocks cross-claimed in prima facie tort against the bank. The

[122] Ibid.
[123] 729 SW 2d 510 (1987).
[124] Id 517.
[125] See *Rahemtulla* v *Vanfed Credit Union* (1984) 29 CCLT 73. A remedy would also have been available in both England and Australia provided the requisite damage could be shown: C Witting, 'Tort Liability for Intended Mental Harm' (1998) 21 *University of New South Wales Law Review* 55.
[126] See *Costello* v *Shelter Mutual Insurance Co* 697 SW 2d 236 (1985), 237; *Brown* v *Missouri Pacific Railroad Co* 720 SW 2d 357 (1986), 361.
[127] 729 SW 2d 510 (1987), 516, citing *Guirl* v *Guirl* 708 SW 2d 239 (1986), 248.
[128] 729 SW 2d 510 (1987), 517.
[129] 847 SW 2d 86 (1992), 87-8.

court found that a jury could have been satisfied that 'in ruthlessly and recklessly pursuing its own interest, the Bank acted with disregard for the interests of others and should have known that its actions would inflict injury'.[131]

The Supreme Court of New Mexico Appellate Division had to determine whether to recognise an action in prima facie tort. In so doing, it acknowledged that the concept underlying the tort 'had been utilized without denominating the theory as prima facie tort throughout recent jurisprudence' in various states.[132] The court then noted the adoption of the prima facie tort in New York and the restrictions placed upon the tort by courts in that jurisdiction, which were not subsequently incorporated into section 870 of the *Restatement*: 'It is apparent ... that, although [the *Restatement*] considers the same factors as do the New York courts, it does so in a more flexible way, by balancing the factors rather than by creating stylized requirements'.[133] The court rejected the sole motivation limit, reasoning that such a requirement was not consistent with the presence of a justification limb:

> A sole intent to injure is, by definition, unjustifiable — a purpose other than to injure the plaintiff is a justification for the act ... To allow a defendant to escape liability solely because he can demonstrate some economic benefit to himself from the complained of act would defeat the policy behind our recognition of prima facie tort — to allow a plaintiff to recover for intentionally committed acts that, although otherwise lawful, are committed with intent to injure.[134]

The court also accepted that 'prima facie tort may be pleaded in the alternative'.[135] However, it held that if, at the close of the evidence, it was apparent that the facts supported the pleading of an 'accepted' category of tort,[136] 'the action should be submitted to the jury on that cause and not under prima facie tort'. This is unfortunate. Withdrawal of the prima facie tort issue would mean withdrawal of jurisdiction to fashion a remedy suitable to the wrong, tying the hands of a court otherwise unwilling to extend the boundaries of an existing tort. This would belie the fact 'that tort law is not static — [that] it must expand to recognize changing circumstances that our evolving society brings to our attention'.[137]

The court in *Schmitz* next determined whether prima facie tort could be proven on the facts — in particular, whether the bank, acting with knowledge that by calling for payment upon the note it would certainly injure an innocent party, had acted with an intention to harm. The court found that it did. Acting with sufficient certainty was enough. The bank's actions, furthermore, were not justifiable in circumstances where it knew that Smentowski had no interest in the note.[138] But the argument remained that an alternative cause of action

[130] 785 P 2d 726 (1990).
[131] Id 731.
[132] Id 734.
[133] Id 735.
[134] Ibid.
[135] Id 736.
[136] Ibid.
[137] Id 736.
[138] Id 738.

could have been pleaded. The court agreed with the proposition that 'prima facie tort should not be used to evade stringent requirements of other established doctrines of law'. No other torts were, however, appropriate on the facts of the case. Prima facie tort was accepted in New Mexico and liability was established under that tort.

Prima facie tort succeeded also in *Beavers* v *Johnson Controls World Services*.[140] The plaintiff Beavers had been assigned to work for the defendant DaSilva as his secretary. DaSilva's attitude toward her was extremely vindictive and he engaged in conduct which 'belittled and denigrated her to co-workers [resulting] in her becoming extremely depressed, suffering acute mental distress necessitating her hospitalization'.[141] There was evidence that DaSilva knew that Beavers had attended a mental health clinic and that his conduct was a deliberate attempt to harm her.[142] Beavers claimed in prima facie tort and the defence argued that the Workers' Compensation Act provided the exclusive remedy for a claim of emotional distress. Beavers had pursued a claim under that statute which had been dismissed. The New Mexico Court of Appeals held that this was no bar to recovery, given that the statute was directed to accidental rather than to intentional injuries incurred in the workplace.[143] It went on to state:

> Acts which the fact finder could reasonably conclude are offensive to reasonable community standards of right conduct and which are intended to cause harm are properly submitted to the fact finder for evaluation of Plaintiff's prima facie tort claim. [On the facts,] the jury could reasonably conclude that Appellant's acts transcended mere lack of tact and insensitivity and fell outside the ambit of legitimate employer behaviour, because DaSilva, despite his knowledge of her stressed condition, continued to use his power and position as Plaintiff's supervisor to humiliate and demean her before other employees.[144]

Most importantly, though, the court refused to rule that the existence of an alternative common law action (the intentional infliction of emotional distress) barred recovery.[145] The court found that the latter action could not have been made out because the means used were not 'extreme and outrageous' as required by that tort.[146] The court noted that prima facie tort covered not only positive acts (whether individually outrageous or not) but also failures to act.[147] This, again, is proof that the tort has a useful role in supplementing existing causes of action, the outrageous conduct tort itself being artificially narrow in its scope.[148]

[139] Ibid.
[140] 901 P 2d 761 (1995).
[141] Id 763.
[142] Id 765.
[143] Ibid.
[144] Id 768.
[145] Id 769-70.
[146] Id 770.
[147] Ibid.
[148] See *Restatement (Second) of Torts (1977)*, section 46; D Givelber, 'The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct' (1982) 82 *Columbia Law Review* 42, 56-7.

COMPARISON WITH ANGLO-AUSTRALIAN LAW

A number of tort actions extant in England and Australia are related to prima facie tort in that their elements substantially overlap. The Anglo-Australian torts are, however, more specific manifestations of that principle. For example, there is the tort imposing liability for 'intentional injury to the person'.[149] This type of liability arose in *Bird* v *Holbrook*,[150] where a cause of action for battery had not been available to a boy, who had entered the defendant's walled garden and had been injured by the spear of a spring gun, due to the fact that the injury had been caused indirectly. Even though there was no direct contact with the body, Best CJ was adamant that there would be a remedy. The defendant had 'intended that the gun should be discharged, and that the contents should be lodged in the body of his victim'.[151] The presence of the intention to cause injury provided strong justification for a finding of liability, no matter the want of authority.

An identical form of liability is to be found in those cases which derive from the decision of Wright J in *Wilkinson* v *Downton*.[152] That was the well-known case in which the defendant, as a practical joke, had told the plaintiff that her husband had been involved in a 'smash-up' and that he was lying in wait for her assistance. This was untrue and yet the plaintiff suffered a 'shock to the system' and fell seriously ill. A remedy was granted despite an earlier holding, in *Victorian Railways Commissioner* v *Coultas*,[153] that damage flowing from a 'nervous shock' was too remote in law. Wright J stated that the 'defendant has . . . wilfully done an act calculated to cause physical harm to the plaintiff', which when combined with the resulting injury, gave rise to a cause of action.[154]

Wilkinson v *Downton* has been followed in a number of English cases[155] and has been approved of by the High Court of Australia.[156] The cases suggest that there will be a remedy where the defendant intends to cause the plaintiff a recognised psychiatric illness (or is reckless as to the causation of such) and where harm actually results. A narrow range of excuses may be available to negative liability, although the presence of an intention to injure reduces that likelihood in any particular case.[157] Recent English cases have affirmed the utility of this type of action. They have permitted the granting of injunctions in cases where a mental harm would be the likely result of a continued campaign of harassment.[158]

[149] As it is described in H Luntz and D Hambly, *Torts: Cases and Commentary* (4th ed, 1995) 678.
[150] (1828) 130 ER 911.
[151] Id 916.
[152] [1897] 2 QB 57.
[153] (1888) 13 App Cas 222.
[154] [1897] 2 QB 57, 58-9.
[155] See, eg, *Burnett* v *George* [1992] 1 FLR 525; *Pidduck* v *Malloy* [1992] 2 FLR 202; *Khorasandjian* v *Bush* [1993] 3 All ER 669; *Burris* v *Azadani* [1995] 4 All ER 802.
[156] *Bunyan* v *Jordan* (1937) 73 CLR 1.
[157] See C Witting, op cit fn 125, 66-7.
[158] See *Khorasandjian* v *Bush* [1993] QB 727; *Burris* v *Azadani* [1995] 4 All ER 802.

Liability for conspiracy by lawful means adopts the same essential form. Conspiracy was already a venerable cause of action[159] when re-discovered by the House of Lords in *Quinn* v *Leatham*.[160] Conspiracy consists of an agreement between two or more persons whereby each intends (at least predominantly) to harm another and where that agreement is acted upon to the damage of the plaintiff.[161] There may be liability under this tort 'even though the ends were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong'.[162] The House of Lords in *Quinn* failed to reconcile satisfactorily the existence of an action in conspiracy by lawful means with the ratio of *Allen* v *Flood*.[163] This was due to the obvious need for subjective intention to harm. In fact, *Quinn* is a testament in itself to the incorrect nature of the ratio decidendi in that case.

Conspiracy by lawful means has been of most importance in cases involving the infliction of economic harm. Courts have not yet exploited the potential of this tort, which Lord Wright explained in *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch*[164] 'extends beyond trade competition and labour disputes'.[165] There is no reason why it could not be invoked in cases of intended personal injury. Furthermore, there is an obvious potential for coalescence between conspiracy and the action on the case for intended mental harm. Lord Wright in *Crofter* gave the example of *Gregory* v *Duke of Brunswick*[166] as a 'striking illustration of what might be held to constitute a conspiracy to injure'.[167] In that case, persons had agreed beforehand to commit certain acts, including booing and hissing, in order to discredit an actor, without any regard to the merits of the performance. These actions can be compared with those committed by the defendant in a recent case of intended mental harm, viz *Khorasandjian* v *Bush*.[168] If Bush had agreed with another to carry out the campaign of harassment, he might well have been liable to an action in conspiracy.

In a related development, academic writers frequently have argued that there exists a tort denominated by the term 'unlawful interference with trade', which subsumes most of the economic torts, including conspiracy by *un*lawful means.[169] This follows from certain statements by Lord Reid and Viscount

[159] See P Winfield, 'The Writ of Conspiracy' (1917) 33 *Law Quarterly Review* 28.
[160] [1901] AC 495.
[161] See *Crofter Hand Woven Harris Tweed Co* v *Veitch* [1942] AC 435; *Lonrho Plc* v *Fayed* [1991] 1 AC 448.
[162] *Quinn* v *Leatham* [1901] AC 495, 510 per Lord Macnaghten.
[163] [1898] AC 1.
[164] [1942] AC 435.
[165] Id 478.
[166] (1844) 6 M & G 205; 134 ER 1178.
[167] [1942] AC 435, 478.
[168] [1993] QB 727.
[169] See, eg, J Fleming, *The Law of Torts* (8th ed, 1992), 699ff; F Trindade and P Cane, *The Law of Torts in Australia* (2nd ed, 1993), 231ff; G Fridman, 'Interference with Trade or Business — Part I' (1993) 1 *Tort Law Review* 19; G Fridman, 'Interference with Trade or Business — Part II' (1993) 1 *Tort Law Review* 99.

Radcliffe in *JT Stratford and Son Ltd* v *Lindley*,[170] which have been repeated in other judgments on a number of occasions.[171] In *Acrow (Automation) Ltd* v *Rex Chainbelt Inc*,[172] Lord Denning MR outlined the essential elements of the tort as being a 'deliberate' interference with the trade or business of another through the commission of an independently unlawful act without just cause or excuse.[173] A tort in this form was recognised by Brooking J in *Ansett Transport Industries (Operations) Pty Ltd* v *Australian Federation of Air Pilots*.[174] His honour held that a federation of air pilots had committed a wrong in issuing a directive stipulating that its members should work to rule, the intention being to put financial pressure on airlines in order to ensure their accession to requests for improved wages and conditions.

A question has arisen whether there need be a predominant intention to cause harm. Following the decision of the House of Lords in *Lonrho Plc* v *Fayed*,[175] it appears that the tort of unlawful interference with trade is available whether the defendant's intention was to injure the plaintiff or merely to protect his or her own interests.[176] This is the view which the High Court preferred in obiter remarks made in *Northern Territory* v *Mengel*.[177] The gravamen of the tort lies in the commission of an unlawful act. 'The emerging tort [simply] requires that the unlawful act be directed at the person injured . . .'[178] In the *Ansett* case, the relevant act was the circulation of a work directive which was intended to and actually resulted in breaches of contract.[179]

Given this coalescence of economic torts, unlawful interference with trade is now seen as the '*genus*' from which the other torts derive.[180] The question arises whether it is possible to formulate a similar principle that does not rely on the presence of unlawful acts. The action on the case for intentional injury to the person and conspiracy by lawful means *are* explicable in terms of such a principle. That principle is embodied in the *prima facie* tort. The essential elements of each tort are: (i) an actual intention to injure, (ii) the causation of

[170] [1965] AC 269, 324 and 328 respectively.
[171] See summary in F Trindade and P Cane, op cit fn 168, 231-5.
[172] [1971] 1 WLR 1676.
[173] Id 1682 and 1683 respectively. See G Fridman, 'Interference ... Pt II', op cit (fn 168), 103-15.
[174] [1991] 1 VR 637. Note also, *Sid Ross Agency Pty Ltd* v *Actors and Announcers' Equity Association of Australia* [1970] 2 NSWR 47, 52 per Else-Mitchell J.
[175] [1992] 1 AC 449.
[176] See G Fridman, 'Interference ... Part II', op cit fn 168, 113.
[177] (1995) 185 CLR 307, 343 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ.
[178] Ibid. See G Hiley and A Lindsay, who note the use of the word 'directed' and state that this indicates something less than an intention to harm: 'Tort Liability Clarified: *Northern Territory of Australia* v *Mengel*' (1995) 18 *University of Queensland Law Journal* 334, 335.
[179] Note that the same facts were found to have established a conspiracy by unlawful means. The difference between the torts lies in the fact that a predominant intention to harm is not a requirement of conspiracy by unlawful means: [1991] 1 VR 637, 668.
[180] *Merkur Island Shipping Corporation* v *Laughton* [1983] 2 AC 570, 609-10 per Lord Diplock, (Lords Edmund-Davies, Keith, Brandon and Brightman agreeing).

harm (iii) in the absence of just cause or excuse. The presence of a just cause is determined by weighing the interests asserted by the various parties to the action in question.

It is for this reason that the recent history of the prima facie tort is of interest. The potential exists for the coalescence of several Anglo-Australian intentional torts derived from the action on the case into a more general tort. Such a tort would be an obvious counterpart to the general tort of negligence. However, difficulty has attended the acceptance of such a tort, the prima facie tort, in America. This should not be a cause for concern, though, in that it has been demonstrated that most of the difficulties encountered with the prima facie tort have been of spurious origin and are capable of easy resolution.

LOOKING AHEAD

Historically, the action on the case from which the prima facie tort sprang, performed a role in allowing for the award of new remedies as new wrongs appeared.[181] Why it should not continue to perform that role, by way of prima facie tort, is difficult to fathom once it is recognised that, just as the new actions on the case were created by analogy, so too does the prima facie tort allow for new instances of liability where an analogy exists with established torts.

Shapiro has argued that one of the problems with the prima facie tort, evident from the foregoing discussion, is that it is too elastic. That is, it is elastic to the point that 'there are no standards for defining justification, nor are there guidelines that would enable courts to impose the requirement uniformly'.[182] This is both true and false. Certainly, there are few prima facie tort cases from which any distinctive pattern of liability can yet be ascertained. But the development of prima facie tort must conform to the broad patterns already established in existing tort actions.[183] It does not permit the sweeping aside of vast tracts of law as many New York judges have assumed.[184] What the tort is designed to do, rather, is to assist in the development of liability rules necessary to redress the creation of new kinds of harm — to 'supplement, not to supplant common law substantive rules'.[185]

One of the real difficulties with the use of such a broad-ranging tort in the commercial sphere is that competition has its inevitable winners and losers. The courts often encourage this kind of competition and could not, without

[181] See M Forkosch, op cit fn 65, 473. Winfield wrote: 'If the judges thought that a new remedy was necessary, they invented it, unless the invention of it would have shocked the public . . ., or unless they considered that the community did not need it, or that it would seriously upset some other branch of law': P Winfield, 'The Foundation of Liability in Tort' (1927) 27 *Columbia Law Review* 1, 4.

[182] G Shapiro, op cit fn 83, 1106.

[183] See J Ginn, op cit fn 113, 130.

[184] See, eg, *Ruza* v *Ruza* 146 NYS 2d 808 (1955), 811; *Knapp Engraving* v *Keystone Photo Engraving Corp* 148 NYS 635 (1955), 638.

[185] J Ginn, op cit fn 113, 130.

considerable embarrassment, compensate the losers. In *Vegelahn* v *Guntner*,[186] Holmes J stated that 'the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of damage is privileged'.[187] Thus, the prima facie tort must be applied with discretion. Courts must be fairly specific about the reasons why infliction of some losses might be justifiable (and therefore remain where they fall). There will be cases in which justification will be difficult to establish (especially where injuries occur to the person or to property) and cases where justification will be less difficult to establish (such as in cases of pure economic loss).[188] The interim uncertainty must be tolerated, rather than used as a ground for denying the hard judicial task.

But still the question might be asked, why develop the prima facie tort when more specific actions on the case can be developed? Why opt for a general tort? One of the problems with reliance upon the growth of more specific torts is that the instances in which liability is recognised might be so various, that nothing will be left but a proverbial wilderness of single instance decisions. It is in those single instance decisions that prima facie tort has its greatest attraction. Should the number of cases in any particular area multiply, sub-rules can be created without necessarily removing causes of action into the domain of new torts. This, indeed, has been the history of negligence. The sub-rules which exist in negligence reflect the fact that the different ways in which harms are caused give rise to different moral judgments; and that harms to different interests give rise to different compensation priorities. However, the general tort remains useful in facilitating a consistency of approach in deciding cases. Such consistency is just as desirable in intentional tort as it is in negligence.

CONCLUSION

American courts, perhaps, have missed a valuable opportunity to uncover an important principle underlying many recent developments in tort law and to re-shape that principle, embodied in the prima facie tort, into a recognised and viable cause of action. Yet recent New Mexico decisions have demonstrated that existing torts might be inadequate in supplying a remedy for real wrongs. Prima facie tort has been recognised in that jurisdiction and applied without any hint that the fabric of the law of torts has been hastily torn. However, the questions that remain are many. These include whether a number of intentional torts deriving from the action on the case will eventually coalesce into a single tort based on the harm principle so as to give rise to an Anglo-Australian prima facie tort or whether such a tort will develop of its own accord.

[186] 44 NE 1077 (1896).

[187] Id 1080. Tony Weir has put the point in these terms: 'Economic life is bound to be a race, and a principle as broad as [the harm principle] cannot be applied to it; if it were, the winner in the race, who satisfies its requirements . . . could not keep the prize without being put to his defence': 'Chaos or Cosmos? *Rookes, Stratford* and the Economic Torts' [1964] *Cambridge Law Journal* 225, 226.

[188] See P Halpern, 'Intentional Torts and the Restatement' (1958) 7 *Buffalo Law Review* 7, 12.