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DEFINING THE COMPETITION TORTS AS INTENTIONAL WRONGS

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Breaches of EC and UK competition laws (mainly anticompetitive agreements or concerted practices[1] and the abuse of market power)[2] are punishable by the competition authorities.[3] Individuals, who have suffered loss, particularly trade rivals, can claim damages flowing from antitrust practices, *inter alia*, through the "statutory competition torts". These torts do not seem to require the claimant to prove that the defendant intended to harm her whereas another potential route for claimants, the common-law economic torts, do. This fact may partly explain why commentators have paid little attention to the mental element in antitrust tort liability.

This article argues that the competition torts trigger strict liability for the harm caused to victims but, like the economic torts, presuppose intentional conduct. Competition statutes can only be breached through deliberate acts which, although aimed at indeterminate consumers, often involve the agent's intention to injure identifiable adversaries. Thus, the competition torts neither entail absolute strict liability (*i.e.*, for merely causing damage) nor are based on negligently occasioned harm. The problem can be stated simply. Business competitors owe no duty not to injure each other negligently or intentionally, but they are at liberty to defeat one another as a foreseeable and inexorable side-effect of legitimate commercial battle. However, trade opponents are constrained by the economic or competition torts. These will ordinarily prohibit wrongful means on the one hand and, on the other, acts accompanied by specific forms of intention, *e.g.*, to cause the breach of the claimant's contract in inducing breach of contract,[4] or to harm the claimant in her trade interests, a requirement found in the

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[1] These agreements are in principle forbidden and declared void if they affect trade and have as their object or effect the prevention, restriction or distortion of competition within the EU/UK market: article 101 of the Treaty of the Functioning of the European Union ("TFEU"), formerly article 81 of the EC Treaty, and Chapter I/Prohibition of the Competition Act 1998.

[2] The abuse of dominance by one or more undertakings within the EC/UK market is prohibited under article 102 TFEU (ex article 82 EC) and Chapter II/Prohibition of the Competition Act 1998. In this paper references are made to articles 81 and 82 EC as this is still the conventional numbering.

[3] *I.e.*, the EC Commission (Competition Directorate). In the UK, the Office of Fair Trading ("OFT") or, in the last instance, the Competition Appeal Tribunal ("CAT").

[4] *Lumley* v. *Gye* (1853) 118 E.R. 749 (hereinafter, "*Lumley*-tort").

tort of unlawful interference with business[5] and, this article proposes, in the competition torts as well. Yet, this intention to injure the claimant need not be proved specifically in antitrust tort proceedings. Rather, it is indisputably presumed from the fact that the anticompetitive practice specifically harm the claimant. Likewise, the difficulty in proving causation and actionable damage in itself suffices to restrain liability, in line with the broad rejection of compensation for pure economic loss. As a result, this article will show that tort liability is simply an adjunct to public antitrust enforcement, since it hinges on anticompetitive behaviour being punished by the competition authority. So, the functions that tort law can perform (compensation, deterrence, retribution) are likely to remain modest. Finally, the article will affirm that the peculiar structure of the competition torts need not yield decisions inconsistent with the economic torts. Courts can apply antitrust tort liability with the same circumspection towards competitive freedom as that customarily observed by the judiciary vis-à-vis the economic torts.

Section I introduces the tort of breach of statutory duty because this has been the orthodox way of claiming damages derived from anticompetitive conduct (or, more succinctly here, "antitrust harm/injury/damage"). This tort, which has always generated interpretative hesitations, seems superfluous given that the Competition Act 1998 confers on victims an action for antitrust harm. Nonetheless, unlike the tort of breach of statutory duty, the competition torts should not be understood as strict liability pure and simple. Instead, these torts are inextricably intertwined with the economic torts around intention, which is a decisive limit of tort liability between competitors. Section II postulates that the intention to injure need not be shown to impose antitrust tort liability but it is inferred from the fact that the anticompetitive practice damaged the concrete claimant. Further, this section argues normatively a point that is often overlooked: the requirement of proving causation and damage should serve to keep liability under control. However, this re-arrangement ought to be backed up by exemplary damages as a reasonable form of redressing intentionally caused harm. Section III sets out the central implications of the article.

I. The Nature of Competition Tort Liability

A. Strict Liability for Anticompetitive Harm

Although the European Court of Justice (ECJ) declared that individuals enjoy EC rights directly effective before national

[5] Alternatively called "causing economic loss by using unlawful means" (*OBG* v. *Allan*, *Douglas* v. *Hello!* & *Mainstream* v. *Young* [2008] 1 A.C. 1, at [6], Lord Hoffmann), "three party unlawful interference with another's business or trade" (*ibid*, at [141], Lord Nicholls), "intentional-harm tort" (P. Sales and D. Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999) 115 L.Q.R. 411) or, more concisely here, "unlawful-interference tort".

courts,[6] especially those under the then articles 85/86 EC,[7] English courts took the view that these provisions conferred on individuals the right to damages arising from antitrust conduct. In the UK, compensation for antitrust harms has traditionally been pleaded through the generic tort of breach of statutory duty,[8] rather than through novel causes of action (whether dubbed "undue restriction of competition", "abuse of dominance within the common market"[9] or "Euro-Torts").[10] In *Garden Cottage Foods Ltd.* v. *Milk Marketing Board*,[11] Lord Diplock and a majority of the House of Lords acknowledged the applicant's right to an injunction and damages stemming from the defendant's abuse of dominance in violation of article 86 EC (by forcing the applicant to deal with its competitors who charged higher prices). At first, it was only Lord Diplock's intimation that these remedies should be pursued via the tort of breach of statutory duty,[12] but this opinion was confirmed by the Court of Appeal two years later.[13]

Three features of the tort of breach of statutory duty deserve attention. First, unless the statute expressly bestows on individuals a tort-right to sue other private parties for the injury they occasion by violating such legislation, in principle the breach of a statutory duty does not entail tort liability.[14] Whether the silent statute intended to confer a civil remedy is usually a knotty policy question,[15] with an unpredictable answer. While Lord Denning M.R. recognised a tort action whenever the defendant interfered with the claimant's business by perpetrating a statutory crime against a third party,[16] for Lord Diplock a civil remedy entirely depended on the statutory interpretation,[17] which is the accepted opinion.[18] Thus, courts must examine the text of the statute, the surrounding circumstances and the precedents. A mere causal link between the defendant's breach and the claimant's harm is no indication of that parliamentary intent. Liability can arise if: the statute intends to safeguard through a civil action the relevant class of persons and for the type of injury corresponding to the claimant; the defendant infringes the statutory duty owed to the claimant; and

[6] *Van Gend en Loos* v. *Neder-Landse Tariefcommissie* case 26/62 [1963] E.C.R. 1.
[7] *BRT* v. *SABAM* case 127/73 [1974] 2 C.M.L.R. 238.
[8] *Valor International Ltd.* v. *Application des Gaz S.A.* [1978] 3 C.M.L.R. 87, 100, Roskill L.J.
[9] *Application des Gaz S.A.* v. *Falks Veritas Ltd.* [1974] Ch. 381, 396, Lord Denning M.R.
[10] *Barretts & Baird* v. *Institution of Professional Civil Servants* [1987] I.R.L.R. 3, 5, Henry J.
[11] [1984] 1 A.C. 130.
[12] *Ibid*, 141.
[13] *E.g.*, *Bourgoin S.A.* v. *Ministry of Agriculture* [1986] 1 Q.B. 716, 787, Parker L.J. It is noteworthy that the first instance decision in *Garden Cottage Foods*, restored by the House of Lords, had been the work of the then Parker J.
[14] *X* v. *Bedforshire CC* [1995] 2 A.C. 633, 731, Lord Browne-Wilkinson.
[15] R. Buckley, "Liability in Tort for Breach of Statutory Duty" (1984) 100 L.Q.R. 204.
[16] *Ex p. Island Records* [1978] Ch. 122, 135, 137.
[17] *Lonrho Ltd* v. *Shell Petroleum Co* (No. 2) [1982] A.C. 173, 183, 187.
[18] [2008] 1 A.C. 1, at [57], Lord Hoffmann.

the latter is thereby harmed.[19] Nowadays, however, it is no longer questionable that victims of anticompetitive practices can claim economic losses. In the UK, The Competition Act 1998 confers on any person injured by antitrust acts the right to compensation for damages before the CAT, once the EC Commission or the OFT has found the infringement.[20] Further, under this statute the claimant need not prove that the defendant owed her a duty for the kind of loss suffered.[21] Similarly, in the EU individuals must compensate for losses ensuing from the violation of the directly applicable articles 81/82 EC. A civil action for damages is deemed vital to enforce the principle of effectiveness that these provisions represent.[22] Moreover, in *Courage* v. *Crehan*[23] the ECJ reaffirmed that any person injured by anticompetitive conduct could recover damages even though these treaty articles do not grant such a right. The court acknowledged the standing of the party in the weaker economic position to an anticompetitive agreement within the UK market to sue the other party responsible for harm following the breach of article 81 EC, which arguably also applies to article 82 EC and/or Chapters I/II of the Competition Act 1998. The defence *in pari delicto* could only succeed against a party bearing significant responsibility in the distortion of competition, considering her bargaining power and the economic-legal background of the contract.[24]

Secondly, the tort of breach of statutory duty rests on the infringement of rules that impose "an absolute obligation to perform or forbear from performing a specified activity" and not a duty "to take reasonable care to avoid injuring another".[25] Thus, prominent scholars as Buckley[26] and Stanton,[27] alongside courts,[28] categorise this tort as strict liability. So, anticompetitive injury is taken as recoverable independently of the defendant's negligence or intention.[29] Analogously, the ECJ has rooted antitrust tort liability exclusively in the breach of competition laws, damage and causation.[30] It is argued that since antitrust law imposes unequivocal prohibitions to be respected in absolute

[19] *E.g.*, *Cutler* v. *Wandsworth Stadium Ld.* [1949] A.C. 398, 407, Lord Simonds; *South Australia Asset Management Corporation* v. *York Montague Ltd* [1997] A.C. 191, 211, Lord Hoffmann.
[20] Competition Act 1998, as amended by the Enterprise Act 2002, s. 47A.
[21] *Crehan* v. *Inntrepreneur Pub Co (CPC)* [2004] E.W.C.A. Civ. 637, at [156], [167], Gibson L.J.
[22] *HJ Banks & Co* v. *British Coal Corp.* case C-128/92 [1994] 5 C.M.L.R. 30, at [26], [45], [53], Van Gerven (Advocate-General).
[23] Case c-453/99 [2002] Q.B. 507.
[24] [2002] Q.B. 507, at [32]–[36].
[25] *Smith* v. *Cammell* [1940] A.C. 242, 258, Lord Atkin.
[26] See note 15 above; R. Buckley, *The Law of Negligence*, 4th ed (London 2005), p. 351.
[27] K. Stanton, "New Forms of the Tort of Breach of Statutory Duty" (2004) 120 L.Q.R. 324.
[28] See note 12 above; *R.* v. *Secretary of State for Transport ex. p. Factortame Ltd (No. 6)* [2001] 1 W.L.R. 942.
[29] K. Stanton, P. Skidmore, M. Harris and J. Wright, *Statutory Torts* (London 2003), pp. 269–270, 411 ff.
[30] *Manfredi* v. *Lloyd Adriatico Assicurazioni SpA* Joined Cases C-295/04 through C-298/04 [2006] E.C.R. I-6619.

terms, irrespectively of the defendant's fault, antitrust tort liability should be considered as strict, whether or not it is alleged through the tort of breach of statutory duty. Nonetheless, this article will controvert such conception and instead postulate that intentional conduct has to be taken as the underlying foundation of the competition torts, in the same vein as the economic torts.

Thirdly, the tort of breach of statutory duty was deemed inadequate to establish whether the claimant had been injured by the defendant's infringement or by the claimant's own fall in productivity, or failure to react to market conditions, amongst other causes.[31] Thus, claimants might find it less complicated to show the causal connection between antitrust conduct and damage if the breach has already been declared by the competition authority, which is how the competition torts will probably be sued. However, as this article will argue, proof of causation is a relentless problem with antitrust tort liability whatever the form of action chosen.

B. Intentional Conduct Underpinning Antitrust Tort Liability

Whether anticompetitive behaviour ought to attract strict liability or intention-based liability in tort is debated. The hard proof of a mental element in the defendant is a reason for preferring strict liability. However, in this author's view, the very gist of competition (*i.e.*, a non-dangerous activity from which some of its participants win while others lose), and the supplementary role that tort law is to perform in the enforcement of antitrust law, are solid reasons to define this species of liability as founded on intentional conduct.

Broadly conceived, strict liability is justified by a notion that tort-feasors must assume the undesirable effects of their activities.[32] Specifically in the competition setting, the difficulty of showing the defendant's intention to harm a particular rival offers a practical argument for strict liability. Whish notes that even the objective intention to drive competitors out of the business is hard to prove despite using market analysis.[33] Yet, as Thompson and O'Flaherty suggest, fault liability might deter anticompetitive conduct more efficiently than strict liability even though fault is inferred from the breach of statute.[34] Wrongdoers have an incentive to be careful if the costs of preventing harm are lower than the magnitude of damage multiplied by its probability.[35]

[31] M. Hoskins, "Garden Cottage Revisited: The Availability of Damages in the National Courts for Breaches of the EEC Competition Rules" (1992) 13 E.C.L.R. 257.
[32] P. Cane, *Atiyah's Accidents, Compensation and the Law*, 7th ed (Cambridge 2006), p. 93.
[33] R. Whish, "The Enforcement of EC Competition Law in the Domestic Courts of Member States" (1994) 15 E.C.L.R. 60, p. 65.
[34] R. Thompson and J. O'Flaherty, "Article 82" in P. Roth and V. Rose (eds.), *Bellamy & Child European Community Law of Competition*, 6th ed (Oxford 2008), ch. 10, p. 1447.
[35] *U.S.* v. *Carroll Towing* 159 F.2d 169, 173, 2d.Cir (1947) Hand J.

This "Learned Hand formula" is implicit in the evaluation of the likelihood of causing, the seriousness and the cost of preventing harm carried out by UK courts.[36] The point is that fault liability would encourage potential tortfeasors and victims to achieve the optimal standard of precaution as regards non-dangerous activities. Conversely, strict liability appears a good candidate for controlling the level of abnormally hazardous conduct by fully compensating victims regardless of defendants' blameworthiness.[37] While fault liability might be extended to dangerous activities on the basis that the materialisation of the risk posed by them reveals negligence,[38] it does not seem equally reasonable to impose strict liability for risks created reciprocally by the participants in non-hazardous activities. Strict liability is a justifiable aid to victims exposed to risks higher in degree and different in kind from those they impose on wrongdoers.[39] But it is unprincipled where the risk can only be prevented by prohibiting victims from acting altogether.[40]

However, liability for merely injuring trade adversaries would render commercial life impossible. First, competition is not a dangerous activity but produces social benefit regardless of inexorably leaving individual losers. Secondly, strict liability is coherent with the law's commitment to vindicating victims' personal security over defendants' liberty to act;[41] yet with rivals the problem is precisely one of balancing their clashing freedoms to compete. Thirdly, business competitors naturally harm one another, so claimants are not necessarily passive sufferers. The proposition that, in corrective justice, the defendant should be strictly liable for the injury inflicted on the claimant whenever she would have had to bear the loss had she harmed herself[42] does not work where the harm flows from the interaction between tortfeasors and victims.[43] Likewise, rivals do not owe any duty not to carelessly injure each other. Commercial competition would become inoperative if traders were liable for the losses caused simply because, as any reasonable person, they could foresee them as a likely consequence of their acting.[44] Thus, the requirement of an intentional element diminishes the impact of endless liability and litigation.[45]

In this author's view, the competition torts have to be considered as involving strict liability for results due to their overriding

[36] *E.g.*, *Wagon Mound (No.2)* [1967] 1 A.C. 617.
[37] S. Shavell, *Economic Analysis of Accident Law* (Cambridge Mass. 1987), pp. 9 ff, 31–32.
[38] E. Weinrib, *Idea of Private Law* (Cambridge Mass. 1995), p. 189.
[39] G. Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 H.L.R. 537, pp. 542, 550.
[40] R. Posner, *Economic Analysis of Law*, 6th ed (New York 2003), pp. 178–179.
[41] D. Owen, "The Fault Pit" (1992) Ga.L.Rev. 703, pp. 719 ff.
[42] R. Epstein, "A Theory of Strict Liability" (1973) 2 J. L.S. 151.
[43] S. Perry, "The Impossibility of General Strict Liability" in J. Feinberg and J. Coleman (eds.), *Philosophy of Law. Part III* (Belmont Calif. 2004), 612–630.
[44] J. Fleming, *The Law of Torts* 9th ed. (Sidney 1998), p. 193.
[45] W. Seavey, "Principles of Torts" (1942) 56 H.L.R. 72, p. 84.

compensatory role. As Cane points out, outcome-based liability is partly explained in that tortfeasors must bear the losses inflicted on others just as they profit from their activities and partly to facilitate compensation by releasing claimants from showing that the defendant intended to harm them.[46] Nonetheless, it is here submitted that antitrust tort liability rests on the deliberate act of preventing, restricting or distorting competition, through which the defendant intends to injure identifiable opponents alongside targeting indeterminate consumers. This intention is presumed from the infringement which has already been punished by the competition authority. As Jones suggests, to demand evidence of a specific intention in antitrust tort litigation seems excessive. Claimants are heavily burdened with proof that antitrust conduct affected them independently of consumers, which in itself restrains liability. Likewise, in the UK antitrust tort claims are still too meagre to be further complicated with such a requirement.[47]

The act of intentionally inflicting harm incorporated into the economic and competition torts can be presumed from the fact that the defendant incurred negative or negligible costs to avoid causing harm.[48] To expend considerably more in injuring the victim than in preventing damage, or even going into debt as to impair the victim, unmasks malice.[49] Yet, the rational attempt to profit at another's expense too discloses interested malice,[50] in which case (as this article proposes) exemplary damages might be awarded.[51] In the primary form of abuse of dominant position, the predator's intention to annihilate identifiable competitors or to prevent future rivals is inferred from the fact that the infringer stopped profiting and started selling at a loss.[52] Moreover, the foreseeable effect of predatory pricing is that one or a few known adversaries are expelled from the market to the dominant firm's benefit.[53] The difficulty is to prove that the defendant sought to eliminate a particular rival.[54] This is partly because unilaterally cutting prices is legitimate competition[55] and partly because striving for efficiency (and consumer welfare) involves a desire to defeat rival traders.

[46] P. Cane, "Justice and Justifications for Tort Liability" (1982) 2 O.J.L.S. 30.
[47] C. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford 1999), p. 118.
[48] W. Landes and R. Posner, "An Economic Analysis of Intentional Torts" (1981) 1 Int'l Rev.L.&Econ. 127.
[49] R. Epstein, "A Common Law for Labour Relations: A Critique of the New Deal Labor Legislation" (1983) 92 Y.L.J. 1357, pp. 1368 ff; D. Ellis, "An Economic Theory of Intentional Torts: A Comment" (1983) 3 Int'l Rev.L.&Econ. 45.
[50] [2008] 1 A.C. 1, at [62], Lord Hoffmann.
[51] See notes 189 ff and accompanying text.
[52] R. Whish, *Competition Law*, 6th ed (Oxford 2008), pp. 189, 731.
[53] *Claymore Dairies Ltd* v. *OFT* [2005] CAT 30, at [270].
[54] *Compagnie Maritime Belge Transports SA* v. *Commission* Cases C-395/95 & C-396/95 [2004] C.M.L.R. 1076 ECJ, at [117], [132] (Advocate General Fennelly).
[55] *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corporation* 475 U.S. 574 (1986), 594, Powell J.

Instead of searching for (or guessing) a psychological mental state, what must be shown is the objectively negative market impact of the abusive practice. Hence McGee hailed the denial of liability in *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.*,[56] since the defendants had caused no social loss and ceased to act before litigation concluded. The defendants had not gained market power in an irrational or expensive way as predatory pricing does.[57] Conversely, in *Tuttle* v. *Buck*[58] the defendant, a rich banker, was held liable for setting up a barbershop and using his personal influence to attract the claimant's clients merely to ruin her. Moreover, the defendant had intended to retire once he achieved this aim. Although for Epstein the defendant had legitimately defeated the claimant,[59] *Tuttle* is conventionally treated as the most legendary illustration of the prima facie tort theory (*i.e.*, that there should be liability for intentionally inflicted harm unless that harm is justified) and as the epitome of malicious unfair competition, which uncovers antitrust conduct.[60] This behaviour is quite opposed to diverting competitors' customers by offering better or cheaper products. Likewise, as Perlman demonstrated, the defendant's intention to harm the claimant can be inferred both from the anticompetitive activity and the defendant's attempt to retire from the market after securing a monopoly.[61] Along these lines, the ECJ has reasoned that the abuse of dominance is implicit in the act of selling products at a loss, below the average variable costs ("AVC"). Such conduct implies a desire to eject rivals from the market.[62] Similarly, the CAT has held that the longer a super dominant firm sells its products below the reasonably anticipated AVC the easier is to surmise the defendant's intention to injure her competitor.[63] As distinguished experts argue, predatory pricing is unlawful *per se*.[64] Thus the defendant's ability to recoup the losses incurred need not be proved directly: it is inferred from the predator's market power.[65]

[56] (1889) L.R. 23 Q.B.D. 598, [1892] A.C. 25.
[57] J. McGee, "Predatory Price Cutting: The Standard Oil (N.J.) Case" (1958) 1 J.L.E. 137.
[58] 107 Minn. 145 (1909).
[59] R. Epstein, "Intentional Harms" (1975) 4 J.L.S. 391.
[60] G. Shapiro, "The Prima Facie Tort Doctrine: Acknowledging the Need for Judicial Scrutiny of Malice" (1983) 63 B.U.L.Rev. 1101.
[61] H. Perlman, "Interference with Contract and other Economic Expectancies: A Clash of Tort and Contract Doctrine" (1982) 49 U.Chi.L.Rev. 61, pp. 95ff.
[62] *AKZO* v. *Commission* Case C-62/86 [1993] 5 C.M.L.R. 215, at [72].
[63] *E.g.*, *Aberdeen Journals* v. *OFT* [2003] CAT 11, at [356].
[64] P. Areeda and D. Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act" (1975) 88 H.L.R. 697. Cf: F. Easterbrook, "Predatory Strategies and Counterstrategies" (1981) 48 U.Chi.L.Rev. 263.
[65] *Tetra Pak International SA* v. *Commission* Case C-333/94P [1997] 4 C.M.L.R. 662, at [44]. Cf: *Carter Holt Harvey Building Products Group Ltd* v. *The Commerce Commission* [2004] U.K.P.C. 37, at [67], Lord Hope (demanding proof that the defendant exercised its market power in the long term); Whish, note 52 above, p. 736.

The point to stress here is that antitrust conduct cannot be perpetrated with simple negligence but involves the agent's intention to injure identifiable competitors. However, in the arguably normal case of tort claims brought after the competition authority has established the antitrust conduct and its effect, litigation will be circumscribed to the issues of damage and causation. The intention to harm, which may not be blatant in other infringements, like hard-core cartels, should be discovered through economic evidence rather than relying on mere judicial intuition. It is a matter of attesting the adverse impact of the abusive practice on the market, where the defendant generated more costs than benefits to consumers and competitors.

C. The Interplay with the Economic Torts

The economic torts can be employed as an alternative to the competition torts although subject to proof of an intentional ingredient. In particular, at a time when the competition torts lacked statutory recognition, the economic torts were valued both as a remedy and as an instrument for keeping liability within manageable boundaries, thus rejecting compensation for harm that is a side-effect of legitimate battle.[66] As Weir has said, the economic torts mainly serve to prevent and compensate for damage arising from unfair practices.[67] Nonetheless, the economic torts are just subsidiary remedies for antitrust harm. In effect, once the competition authority punishes the infringer, claimants would rarely frame their actions on the economic torts since the latter not only demand evidence of the component of intention but also of the very antitrust activity. In turn, the competition torts have the advantage of releasing claimants from proving complex mental states. For instance, the claimant who brings an action for lawful means conspiracy must show a predominant intention to injure on the part of the defendants, while the claimant seeking compensation for damages arising from a cartel already declared by the competition authority need not prove such state of mind.

Interestingly, the prospective claims brought under the heading of an economic tort might still be structured around anticompetitive practices. In particular, antitrust conduct can give rise to the tort of unlawful interference with trade. As Brealey and Hoskins illustrate, this is the case "where a company in a dominant position is engaged in a campaign of predatory pricing, with the specific intention of driving a competitor out of the market or of dissuading a potential competitor from entering that market" or "a supplier gave instructions to his

[66] J. Steiner, "How to Make the Action Suit the Case: Domestic Remedies for Breach of EEC Law" (1987) 12 E.L.Rev. 102.
[67] T. Weir, *A Casebook on Tort Law*, 10th ed (London 2004), p. 598.

distributors not to supply a particular company which wished to undertake parallel imports of the good concerned".[68] Thus, the person using unlawful means to interfere with the contract between a business and a supplier is guilty of anticompetitive conduct but also perpetrates the unlawful interference tort. However, as Jones rightly points out, under this economic tort the breach of competition law must "directly interfere with a known (or foreseeable) firm's business affairs".[69] Although the requirement of proof of the intention to injure certainly limits the impact of this remedy on competition law enforcement, antitrust practices nonetheless do conform to the stringent standards of the three-party unlawful interference tort (and especially to the strict notion of wrongfulness) delineated in *OBG*.[70] In effect, such anti-competitive activities are independently actionable, as statutory competition torts, by the direct victim (unless she is unharmed) against the infringer; they affect the third party's liberty to deal with the claimant; and they are committed with the intention to harm the claimant, by expelling her from the market or preventing her from joining it. Further, antitrust infringement too could serve as ground of the unlawful means conspiracy tort in which wrongfulness is conceived in wide terms.[71] In turn, although the *Lumley*-tort has traditionally been limited to inducing breach of contract, there is judicial support for extending liability to the procurement of the breach of statutory duty provided that the breach is actionable (as a tort) by the claimant.[72] This might include inducing the infringement of competition laws. In fact, the High Court has granted injunctive relief to prevent the abuse by the defendant of her right to terminate a contract aimed at inducing the breach of EC competition law by requiring the claimant to conclude an anticompetitive agreement.[73] But even if the inducer of a breach of statutory duty was not liable under *Lumley* he would nonetheless be liable as a joint-tortfeasor.[74] And if the main wrong is the competition tort, the inducer is genuinely a joint-tortfeasor, as opposed to the inducer of another's breach of contract.

That said, it is noteworthy that the strongest resemblance is between the competition torts and the tort of passing-off. First, passing-off equally triggers strict liability for results. Thus, the defendant is liable inasmuch as she has created the likelihood of confusion amongst the

[68] M. Brealey and M. Hoskins, *Remedies in EC law: Law and Practice in the English and EC Courts*, 2nd ed (London 1998), pp. 126–127.
[69] Jones, note 47 above, p. 121.
[70] [2008] 1 A.C. 1, at [45] ff, Lord Hoffmann.
[71] *Revenue and Customs Commissioners v. Total Network SL* [2008] 1 A.C. 1174.
[72] *Associated British Ports* v. *Transport and General Workers' Union* [1989] 3 All E.R. 796 (overruled by the HL on different reasons: [1989] 1 W.L.R. 939); P. Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 C.L.J. 491, pp. 504–505.
[73] *Holleran* v. *Daniel Thwaites Plc* [1989] 2 C.M.L.R. 917, at [51]–[52].
[74] H. Carty, "Joint Tortfeasance and Assistance Liability" (1999) 19 L.S. 489, pp. 494–495, 506.

claimants' customers. Whether she intended this effect, was reckless or careless is irrelevant; and it is no defence the fact that she had acted in good faith without intending to deceive her competitors' consumers.[75] A second (and for present purposes more important) similarity with the competition torts is that passing-off normally involves the defendant's intention to injure her rivals, by drawing away their customers to the defendant's benefit. Although it is technically *possible* to supply inadvertently the wrong product having been asked for the claimant's, it does not seem *likely* to pass one's goods as though they were one's competitors (as classically defined)[76] acting with mere negligence. Indeed, it is a basic principle of marketing that firms should examine their competitors' products carefully before launching their own. The significant point here is that the defendant's intention to harm the claimant is presumed from the very act of purporting that what the defendant sells is his adversary's product, in the same way as that mental element is deduced from antitrust conduct. Thirdly, the fact that the competition torts and passing-off entail strict liability for results unlike the remaining economic torts manifests an uneven protection of business interests within tort law. Intangible property in goodwill is safeguarded through passing-off regardless of any intentional ingredient; interference with contractual rights is tortious provided that the claimant shows that the defendant intended to procure the breach of the claimant's contract; and liability for unlawful interference with another's trade interests is subject to proof of the defendant's intention to injure the claimant. Yet, the fact that neither passing-off nor the competition torts require evidence of this intention does not signify that such intention is absent. It means that proving intention is unnecessary on the pragmatic grounds underpinning outcome-based strict liability, which Cane has authoritatively promoted in support of his conceptualisation of passing-off,[77] and which, as argued in this article, too render strict liability for results a sensible explanation of the competition torts. In both categories of wrongs the defendant's intention to harm the claimant is likely to be assumed given that proof of it is often complicated and given that these torts involve the infliction of harm upon competitors in an indirect, roundabout fashion – in passing-off by deceiving rivals' customers,[78] and in the competition torts, by undermining consumers.

All in all, although the economic torts differ from the competition torts in origin and rationales, both categories can be focused on

[75] *Montgomery* v. *Thompson* [1891] A.C. 217, 220, Lord Herschell; *AG Spalding & Bros* v. *AW Gamage Ltd* [1914–15] All E.R. Rep.147, 149, Lord Parker; *Cadbury Schweppes Pty Ltd.* v. *Pub Squash Co. Pty Ltd* [1981] 1 W.L.R. 193, 205, Lord Scarman.

[76] *Reddaway* v. *Banham* [1896] A.C. 199.

[77] P. Cane, *The Anatomy of Tort Law* (Oxford 1997), pp. 45 ff, 146.

[78] *J Bollinger SA* v. *Costa Brava Wine Co. Ltd.* [1960] Ch. 262, 274, Danckwerts J.

business practices and compensable damage.[79] More significantly, courts are prone to interpret the competition torts with the same prudence with which they handle the economic torts.[80] As Cane explains, the competition torts form a legislative redress of financial harm for antitrust conduct, whereas the economic torts reflect judicial hesitancy about curtailing the liberty to compete: liability being constrained through intention and generally wrongful means.[81] However, it is worth reinforcing the fact that economic-competition tort liability has a marginal role to play in the control of business rivalry. This is because the infliction of harm is an intrinsic hallmark of competition. Thus, just like antitrust law forbids and punishes only certain types of anti-competitive conduct, tort law serves exclusively to remedy illegitimate commercial harm, as demarcated from the losses produced by effective competition.

D. Common Intention

The harm flowing from commercial battle is recoverable exclusively through the economic and competition torts. Beyond these specific civil wrongs the maxim *damnum sine iniuria* governs.[82] Several implications ensue. First, in this terrain compensation for carelessly occasioned pure economic loss is discarded.[83] There is no duty of care incumbent upon rivals, who can only expect their opponents will refrain from intentionally and wrongfully invading their businesses.[84] Undeniably, the requirement of intention responds to the judicial fear for the risk of endless liability and uncontrollable litigation which prompts a policy against negligence. Precisely, a cogent reason for excluding negligence liability in competition is that financial loss is a foreseeable and incidental consequence of the licit exploitation of self-interest.[85]

Secondly, entrepreneurs are at liberty to drive their contenders out of the market, even intentionally, except when they act unlawfully. Whether business rivals are endowed with a "liberty-privilege" to

[79] S. Waller, "The Incoherence of Punishment in Antitrust" (2003) 78 Chicago-Kent Law Review 207.

[80] H. Carty, *An Analysis of the Economic Torts* (Oxford 2001), pp. 39 ff; S. Deakin, A. Johnston and B. Markesinis, *Markesinis and Deakin's Tort Law*, 6th ed (Oxford 2007), p. 603.

[81] P. Cane, *Tort Law and Economic Interests*, 2nd ed. (Oxford 1996).

[82] Sir F. Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (London 1887), pp. 129–130; P. Birks, "The Concept of a Civil Wrong", in D. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford 1995), ch. 1, p. 38.

[83] Conversely, the tort of breach of statutory duty (from which the competition torts stemmed) triggers liability for pure economic loss: *London Passenger Transport Board* v. *Upson* [1949] A.C. 155, 168–169, Lord Wright.

[84] S. Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 U.T.L.J. 247, pp. 263ff; K. Abraham, "The Trouble with Negligence" (2001) 54 Vand.L.Rev. 1187; P. Benson, "The Problem with Pure Economic Loss" (2009) 60 S.C.L.Rev. 823, pp. 867 ff.

[85] J. Stapleton, "Comparative Economic Loss: Lesson from Case-Law-Focused 'Middle Theory'" (2002) 50 UCLA L.Rev. 531.

compete – but not with a "claim-right" – [86] or a "liberty-right" to trade, commercial freedom is qualified by discrete obligations not to compete wrongfully. These obligations are ingrained in the particular economic (and competition) torts rather than in a general canon of liability for intentionally caused damage,[87] such as the aforesaid prima facie tort theory.[88] The intention to harm a competitor, or to procure the breach of contract, is necessary though insufficient to restrain liability. Wrongful means are an essential precondition partly because traders seldom act solely or primarily to hurt competitors (*i.e.*, maliciously) but they often aim at expelling rivals from the market with a view to profit, that is to say, intending to injure them as a means to another end.[89] In fact, even the pioneers of the prima facie tort theory praised the unlawful means imposed in *Allen* v. *Flood*[90] as a pragmatic way of adjusting the balance between the litigants' conflicting interests, thereby enforcing liability in line with competitive freedom.[91] Conversely, motives simply matter to justify wrongful conduct or to rebut justifications.[92] Thus, deliberately caused harm is defensible in policy and social advantage. It is worth paying the costs in order to obtain the benefits generated by competition.[93] Intentionally caused injury is treated as endemic to trade competition, hence justified in the advancement of one's own economic expectations; unless it is found to have been inspired by "disinterested" (pure) malice or as a means to self-enrichment through unfair or unlawful methods.[94] Fair competition involves a struggle for superiority to increase customers and trade, leaving winners and losers:[95] "the philosophy of the market place presumes that it is lawful to gain profit by causing others economic loss".[96] Antitrust law reflects this orientation fundamentally by defending consumers against anticompetitive practices.[97] That some rivals must abandon the business or diminish their market-share is commended as a sign of a healthy economy, rewarding the most efficient or innovative enterprises, if consumers can acquire goods of higher

[86] Third parties owe no duty not to interfere with that freedom: W. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Y.L.J. 16.
[87] H.L.A. Hart, "Bentham on Legal Rights" in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence, Second Series* (Oxford 1973), ch. 7, pp. 180–181.
[88] See note 60 above and accompanying text.
[89] Cane, note 77 above, pp. 57–58, 152.
[90] [1898] A.C. 1.
[91] Pollock, note 82 above, p. 129; O.W. Holmes, "Privilege, Malice, and Intent" (1894) 8 H.L.R. 1.
[92] Sir F. Pollock, "Allen v Flood" (1898) 14 L.Q.R. 129.
[93] *Vegelahn* v. *Guntner* 44 N.E. 1077 (1896), 1080–81, Holmes J.
[94] *Aikens* v. *Wisconsin* 195 U.S. 194 (1904), 204, Holmes J.; W. Landes and R. Posner, *The Economic Structure of Tort Law* (Cambridge Mass. 1987), pp. 111–112.
[95] *U.S.* v. *Aluminium Co. of America* 148 F.2d 416 (1945), 430, Hand J.
[96] *Leigh and Sillivan Ltd.* v. *Aliakmon Shipping Co. Ltd.* [1985] Q.B. 350, 393, Goff L.J. Similarly: *Home Office* v. *Dorset Yatch Co. Ltd.* [1970] A.C. 1004, 1027, Lord Reid.
[97] *Brown Shoe Co.* v. *U.S.* 370 U.S. 294 (1962), 320, Warren C.J.

quality at lower prices.[98] For this reason Bork criticised American decisions which, by shielding minor businesses from competitors, prejudiced consumers.[99] Consumer welfare is also protected from "exploitative abuses", whereby a dominant undertaking imposes excessive pricing and reaps monopoly profits to maintain or increase its market-position instead of naturally responding to the economic conditions. Only secondarily are businesses safeguarded against "exclusionary abuses", such as refusals to supply goods/services, since successful competitors secure monopolistic positions which accrue to consumers' welfare.[100] Therefore, the breaking point is at abusive and wrongful conduct, like predatory pricing targeted at eliminating competitors.

Thirdly, tort law does not mimic ethics completely: neither bad motives render lawful an otherwise wrongful conduct, nor do good motives justify tortious acts.[101] However, the economic and competition torts partly mirror the moral division between intended consequences and side-effect characteristic of the Doctrine of Double Effect ("DDE"): "Nothing hinders one act from having two effects, only one of which is intended while the other is beside the intention ... moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental".[102] The DDE imputes moral culpability for the results intended as ends or as means to other goals, including self-enrichment, because they are the agent's choice and give motives for acting. Merely foreseen, unintended, even though inevitable outcomes neither provide such reasons nor contribute to achieve one's purpose: they are side-effects.[103] Intended consequences are directly and deliberately sought by the agent, who utilises the victim to attain a certain aim; hence, those effects are causally closer to the defendant's conduct.[104] Thus, to foresee that adversaries will be injured as an inexorable by-product of competition is ethically tolerable; to strive for their ruin is not.[105] Similarly, competitors normally foresee their rivals being harmed as a collateral effect of legitimate struggle. Yet, to inflict damage as an end or as a means to another end is socially inefficient and, as confirmed in *OBG*, tortious. The intention in the *Lumley*–tort and in the three-party unlawful-interference tort is

[98] D. Wood, "Unfair Trade Injury: A Competition-based Approach" (1989) 41 Stan.L.Rev. 1153.
[99] R. Bork, *The Antitrust Paradox. A Policy at War with Itself*, 2nd ed (New York 1993), pp. 7 ff.
[100] *Hoffmann La Roche* v. *Commission* Case 85/76 [1979] 3 C.M.L.R. 211; *Albion Water* v. *DG Water Services* [2005] CAT 40, at [262].
[101] See note 90 above.
[102] Aquinas, *Summa Theologica*, II–II, qu. 64, art. 7.
[103] J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1781), edited by J.H. Burns and H.L.A. Hart (New York 1996), ch. 8, §6, p. 86, ch. 9, §17, p. 94; J.M. Boyle, "Toward Understanding the Principle of Double Effect" (1980) 90 Ethics 527.
[104] H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 2nd ed (New York 2008), p. 120; W. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect" (1989) 18 Phil.& Pub.Aff. 334.
[105] K. Gibson, *Ethics and Business. An Introduction* (Cambridge 2007).

identified with the result sought as an end *or* as a means to another end: the breach of another's contract or the claimant's harm, respectively. It therefore suffices that the claimant is undermined as a result of the defendant advancing his own economic interest:[106] "The injury which [the defendant] inflicted on [the claimant] in order to achieve the end of keeping up his sales was simply the other side of the same coin ... the means of attaining [the] desired end and not merely a foreseeable consequence of having done so".[107] Moreover, the harm recklessly caused also meets the intentional element of the unlawful-interference tort,[108] just like in the tort of misfeasance in public office.[109] The line is blurred between recklessly caused harm and injury done as a means to profit at the claimant's cost. Inexplicably, however, recklessly inflicted damage has been ruled out of the *Lumley*-tort.[110] Even so, merely foreseen harm or breach of contract is not enough in either tort. Thus, the intentionally breaking of a contract anticipating that the contractor would breach its agreement with the claimants is not tortious without the intention to harm coupled with unlawful means.[111]

Fourthly, Carty has argued for defining the intention of the unlawful-interference tort as the harm "aimed at the claimant". Her concern is based on the fact that in *OBG* Lord Hoffmann rejected an "artificially narrow meaning of intention" reduced to "targeting". For Lord Hoffmann, the mental element of this tort consists of the defendant's intention to harm the claimant as an end or as means to another end.[112] Yet, in Carty's view, this notion would make even more diffuse the line between the damage intended as a means and the harm which is a merely foreseen, incidental effect of the wrongful conduct. Courts might thus end up imposing liability for unintended injury suffered as the inevitable consequence of unlawful, deliberate and positive acts, which lack the intention to harm.[113] The expansive liability Carty fears was proposed well before *OBG*, in *Beaudesert Shire* v. *Smith*.[114] However, commentators rapidly condemned this anomalous decision, which had imposed strict liability without a statute conferring a civil action on victims.[115] Eventually, the *Beaudesert Shire* judgment was overruled and liability subjected to the defendant's unlawful acts directed at the claimant or at her legitimate activity.[116] The intention to

[106] [2008] 1 A.C. 1, at [62]–[63], Lord Hoffmann; at [164]–[165], Lord Nicholls.
[107] *Ibid*, at [134], Lord Hoffmann.
[108] *Ibid*, at [166]–[167], Lord Nicholls.
[109] *Three Rivers DC* v. *Bank of England (No. 3)* [2003] 2 A.C. 1, 192, Lord Steyn; 235, Lord Millett.
[110] [2008] 1 A.C. 1, at [191], Lord Nicholls.
[111] *Ibid*, at [43], Lord Hoffmann (overruling *Millar* v. *Bassey* [1994] E.M.L.R. 44).
[112] *Ibid*, at [59]–[60], [134]–[135].
[113] H. Carty, "The Economic Torts in the 21st Century" (2008) 124 L.Q.R. 641, pp. 653ff.
[114] (1966) 40 A.L.J.R. 211.
[115] G. Dworkin and A. Harari, "The Beaudesert Decision – Raising the Ghost of the Action upon the Case" (1967) 40 ALJ 296, p. 347.
[116] *Northern Territory of Australia* v. *Mengel* (1995) 69 A.L.J.R. 527.

harm and wrongful means prevent the undue extension of the tort of breach of statutory duty.[117] Analogously to Carty's formulation, Deakin and Randall have also redefined the mental state of the unlawful-interference tort as "targeting the claimant's economic interests by directly interfering with them". Thus conceived, they contend, the intentional ingredient can be proved objectively, through market assessment, and hence more easily than if the mental element is associated with the consequences pursued as ends or as means to further goals.[118]

In this author's opinion, however, "aiming/directing/targeting" at the claimant in her trade interests and "harm being intended as an end or as a means to another end" are synonymous or alternative linguistic forms of describing the same theme. This is conspicuously patent in the judgments delivered by the Court of Appeal and the House of Lords in *OBG*. So, although Lord Hoffmann disliked the term "targeting",[119] he understood that "intended" squares with "aiming at".[120] Lord Hoffmann stretched the mental element of the *Lumley*-tort and the intention of the unlawful-interference tort to the breach of contract and the claimant's damage caused as a means to another end, respectively. He nonetheless left out the breach of contract or the claimant's harm which is a merely foreseen consequence of the defendant's act.[121] His position is thus reminiscent of a jurisprudential school that equates the harm done instrumentally with the injury inflicted intrinsically.[122] Yet, the real difficulty lies in disentangling the nuance between deliberately caused harm and the damage that is an unintended, foreseeable and inescapable side-effect of legitimate competition. This boundary is obscure, to a large extent, because rivals cannot succeed without injuring their competitors.[123]

Moreover, a shared concept of intention is no guarantee of agreement on whether the concrete defendant acted with the requisite mental element. Consider *Douglas* v. *Hello*. Here Michael Douglas and Catherine Zeta-Jones granted OK! magazine the exclusive right to publish pictures of their wedding, prohibiting all other photography. Hello! magazine published pictures in the UK knowing they had been taken clandestinely by an unauthorised photographer. OK! sued Hello!, among others, for unlawful interference with its business. The House of Lords reasoned that Hello! had not interfered by independently wrongful means with the Douglases' liberty to deal with

[117] See note 17 above, at 188, Lord Diplock.
[118] S. Deakin and J. Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519.
[119] [2008] 1 A.C. 1, at [59]–[60], [134]–[135].
[120] *Ibid*, at [43].
[121] See notes 118–119 above.
[122] J. Salmond, *Jurisprudence*, 9th ed. by James Parker (London 1937), pp. 518 ff; J. Finnis: "Intention and Side-effects', in R.G. Frey and C. Morris (eds.), *Liability and Responsibility. Essays in Law and Morals* (Cambridge 1991), ch. 2; "Intention in Tort Law", in Owen, note 82 above, ch. 10.
[123] *Sorrell* v. *Smith* [1925] A.C. 700, 742, Lord Sumner.

OK! and to perform the obligations under their contract. Hello! owed a duty of confidence towards the Douglases, not to OK! Likewise, the paparazzo, not Hello!, had invaded the Douglases' equitable right to confidentiality. However, whereas the Court of Appeal dismissed this claim because Hello! did not intend to injure (or "aimed at") OK!,[124] Lord Hoffmann estimated that Hello! had acted with such intention as a means of protecting its publication in the UK market.[125] The fact that these judges defined intention in the same mode did not prevent them from advancing divergent opinions on whether that intention lacked or existed in the instant case. Similarly, while Carty argues that Hello! did not target at OK! but sought to profit from the curiosity of the public,[126] Deakin and Randall endorse Lord Hoffmann's finding that Hello! aimed at OK! because the defendant's gain corresponded to the claimant's loss.[127]

Nor does the alignment of recklessness with intention in the unlawful-interference tort solve the ends-means conundrum either. Indeed, the overt acts are generally identical whether their consequences are intended or unintended.[128] Proof of intention can be remarkably byzantine: "the thought of man is not triable, for the devil himself knoweth not the thought of man".[129] Moreover, *OBG* severely abridged the principle that "people are presumed to intend the reasonable consequences of their acts".[130] The intention to harm the claimant and that of procuring the breach of contract can no longer be inferred from the fact that the defendant anticipated either result as a likely or natural effect of his conduct.[131] Conversely, in some crimes as murder the prohibited result has been deemed to be intended if the defendant foresaw it as a probable or natural aftermath of the wrongful act[132] or as a consequence almost certain to occur.[133]

Which is then the actual importance of intention in economic-competition tort liability? Howarth has argued for abandoning the intentional torts altogether. The touchstone of liability, he notes, is wrongfulness, whether the tortfeasor acts negligently or intentionally. On the one hand, there are no compelling moral or economic reasons to deny compensation for carelessly inflicted financial losses. On the other hand, courts can limit liability through a prudent assessment of the

[124] *Douglas* v. *Hello!* [2006] Q.B. 125, at [159], [166], [213]–[214], [223]–[225], [236], Lord Phillips M.R.
[125] [2008] 1 A.C. 1, at [130]–[136].
[126] See note 113 above.
[127] See note 118 above.
[128] G.E. Anscombe, *Intention* 2nd ed (Oxford 1963), pp. 44–45.
[129] Brian C.J., Y.B.17 Edw.IV, 1.
[130] Lord Halsbury L.C., *South Wales Miners' Federation* v. *Glamorgan Coal Company Ltd.* [1905] A.C. 239, 244.
[131] See note 118 above, pp. 539–540.
[132] Bayley J., *R* v. *Harvey* (1823) 107 E.R. 379 (1823).
[133] G. Williams, "Oblique Intention" [1987] C.L.J. 417.

costs and benefits of competition.[134] Subsequently, Howarth has proposed to confine the *Lumley*-tort to specific fact-situations involving contracts for personal services (as Ms Wagner's herself) and to enhance the scope of justifications by applying the principle of "fair, just and reasonable", which is widely accepted in negligence.[135] Likewise, Weir said that courts could recognise duties of care between competitors and the tort of negligence might displace intentional torts such as malicious falsehood.[136]

However, not only has *OBG* ratified the centrality of intention to make traders liable in tort but it defined intention in terms altogether analogous to morally objectionable conduct. In the law's eyes this act is certainly more obnoxious than simple negligence. First, as an irrational form of competition, deliberately inflicted harm is worth compensating. Secondly, the difficulty to prove intention does help to constrain liability consistently with competitive freedom. Thus, the economic and competition torts remain a valuable part of the spectrum of tort liability. Surely, the requirement of intention can be challenged from other angles. For example, if the unlawful-interference tort is justified in that the claimant suffers a loss which is not too remote a consequence of the defendant's act (although the wrong is done to a third party) *a fortiori* a negligent interference should give rise to liability.[137] Yet, the argument advanced here is that carelessly beating rivals is an inevitable side-effect of competition, which is socially justified in the benefits that this activity conveys to consumers. In contrast, deliberately targeting adversaries, whether as the ultimate or immediate purpose of the agent's act, does disclose unfair or antitrust practices.

II. Private antitrust enforcement

A. Subsidiary Contribution

The fact that the competition torts involve intentional wrongs immediately discards negligence and strict liability as possible ways of dealing with the harm following anticompetitive conduct. The width of tort liability is therefore very tight. In addition, as will now be argued, the influence of tort on competition law enforcement is and should remain modest. Tort law only secondarily promotes compliance with antitrust legislation. In effect, whereas competition policy concentrates on deterring and punishing breaches, tort law is limited by intention

[134] D. Howarth, "Is There a Future for the Intentional Torts?" in P. Birks (ed.), *The Classification of Obligations* (Oxford 1997), ch. 9.
[135] D. Howarth, "Against Lumley v. Gye" (2005) 68 M.L.R. 195.
[136] T. Weir, "The Staggering March of Negligence" in P. Cane and J. Stapleton (eds.), *The Law of Obligations. Essays in Celebration of John Fleming* (Oxford 1998), ch. 5, p. 117.
[137] J. Neyers, "Rights-based Justifications for the Tort of Unlawful Interference with Economic Relations" (2008) 28 L.S. 215, pp. 224–225.

and used basically for compensatory purposes. The implementation of antitrust law is entrusted to the competition authorities, their task being to prosecute, prevent and punish anticompetitive practices through penalties, imprisonment and directors' disqualification.[138] Tort law simply assists those bodies by dissuading potential infringements via injunctions and by compensating identifiable traders for their losses. But its influence can be significant. For instance, the "Georgetown Private Antitrust Litigation Project", which reviewed over 2,000 tort actions filed in US district-courts between 1973 and 1983, concluded that the threat to initiate tort proceedings and to seek injunctions or compensation served to deter anticompetitive practices.[139]

It is submitted that tort law is not an adequate vehicle for identifying and judging anticompetitive conduct. Proving the latter is highly complex, even for the competition authorities. Whether an enterprise behaved independently of its competitors, excluded them from the business and exploited consumers, demands an evaluation of the share of the dominant firm as well as of its rivals in the relevant market, the entry barriers or costs and the impact of the abuse on that market. Whether the dominant company committed predatory pricing, or efficiently reduced prices to attract consumers, is often contentious.[140] The inquiry is further complicated with anticompetitive agreements, particularly those concerning persons situated at the same level in the production or supply chain, aimed at fixing prices, restricting outputs or allocating markets. Cartels entail the most pernicious effects for consumers,[141] so the ECJ regards them as intrinsically unlawful and almost irrefutably presumes that they encumber competition.[142] Likewise, under section 1 of the Sherman Act 1890 cartels are *per se* illegal, and case law considers them as unreasonable and unlawful regardless of the specific damage they bring about.[143] This somehow reflects the principle that intended outcomes are more likely to occur than merely foreseen ones.[144] There is no need for claimants to prove that the agreement distorted competition: this consequence is inferred from the very purpose of the agreement. Nonetheless, where the objective of the arrangement is unclear, a market becomes crucial to demonstrate that the agreement did hamper competition.[145] In virtue of

[138] R. Whish, "Control of Cartels and other Anti-competitive Agreements" in V. Dhall (ed.), *Competition Law Today: Concepts, Issues, and the Law in Practice* (Oxford 2007), ch. 1, pp. 50–51.
[139] S. Salop and L. White, "Economic Analysis of Private Antitrust Litigation" (1986) 74 Geo.L.J. 1001.
[140] See note 55 above.
[141] Whish, note 52 above, pp. 115 ff, 335–336.
[142] *Consten and Gruding* v. *Commission* Cases 56/64 & 58/64 [1966] C.M.L.R. 418.
[143] *Northern Pacific Railway Company* v. *U.S.* 356 U.S. 1 (1957), 5, Black J.
[144] A. Kenny, "Intention and Purpose" (1966) 63 J.Phil. 642.
[145] *Compagnie Royale Asturienne des Mines S.A.* v. *Commission* Cases 29-30/83 [1985] 1 C.M.L.R. 688, at [26].

the "rule of reason", courts have to balance the positive and negative economic consequences of the covenant against[146] and they must also evaluate each party's market power along with the structure of the market.[147] To avoid this troublesome proof of antitrust effects through market assessment, Odudu suggests that the object of the agreement is presumed from the parties' subjective intention, which in turn is inferred from external circumstances.[148] This procedure has actually enabled US courts to predict the anticompetitive impact of cartels.[149]

Directly connected with the preceding issue is the fact that tort disputes normally follow the assertion of anticompetitive conduct by the competition authorities.[150] Just as the verdicts in US federal antitrust investigations are *prima facie* evidence in tort proceedings,[151] UK claimants can also rely on the binding force of the declaration of infringement by the OFT or the CAT.[152] Waiting to sue until after the breach is established allows tort claimants to concentrate on showing damage and causation, and this can drastically diminish the cost and uncertainty of litigation.[153] Claimants can thus make use of the evidence gathered by the competition authorities, who possess wide inspection and correctional faculties, frequently exercised by "dawn raids". In addition, the competition authorities have the ability to appraise the economic impact of antitrust conduct through market evaluation. Nothing of this is easily attainable in adversarial tort proceedings. However, political and budgetary concerns direct public prosecutions at the most serious offences, and thereby reduce the volume and intensity of private enforcement.[154] Of course, litigants can sue for damages stemming from trivial infringements with minimal public impact.[155] Yet, stand-alone claimants not only must discharge the always hard burden of proving causation and harm but too have to show antitrust conduct afresh in the first place, often through sophisticated market assessments, with little prospect of succeeding. For instance, an allegation of predatory pricing was dismissed because the claimant failed to prove that the defendant had intended to expel her from

[146] *Standard Oil Company of New Jersey* v. *U.S.* 221 U.S. 1 (1911).
[147] *E.g.*, *Institute of Independent Insurance Brokers* v. *DGFT* [2001] CAT 4, at [169]–[171].
[148] O. Odudu, *The Boundaries of EC Competition Law. The Scope of Article 81* (New York 2006), pp. 114 ff.
[149] *Board of Trade of City of Chicago* v. *U.S.* 246 U.S. 231 (1918), 238, Brandeis J.
[150] W. Van Gerven, "Private Enforcement of EC Competition Rules in the ECJ-Courage v. Crehan and the Way Ahead" in J. Basedow (ed.), *Private Enforcement of EC Competition Law* (Netherlands 2007), 19–38.
[151] Sherman Act 1890, s. 5(a).
[152] Competition Act 1998, s. 58A.
[153] J. Lever, "Effective Private Enforcement of RC Antitrust Rules substantive Remedies: The viewpoint of an English Lawyer" in C–D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford 2001), 109–117.
[154] K. Holmes, "Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK" (2004) 25 E.C.L.R. 25.
[155] F. Jacobs, "Civil Enforcement of EEC Antitrust Law" (1984) 82 Mich.L.Rev. 1364.

business and the claimant could not mitigate its own losses by leaving the market or seeking injunctive relief.[156] Problems of this kind can be prevented if tort proceedings are stayed until the ongoing antitrust investigation finishes. So, stand-alone lawsuits are useful merely as defences or counterclaims against actions for breach of anticompetitive agreements.[157] Thus, it seems improbable that tort liability develops beyond the infringements prosecuted by the competition authorities.

In fact, the paucity of antitrust tort actions is also due to the absence of adequate incentives. While in the aggressive American litigation culture tort claimants lead the enforcement of competition law and are called "private attorney-general",[158] antitrust tort litigation remains sparse in Europe, revealing a state-dependent mentality on the part of competitors.[159] In the last four decades until 2008 there were no more than fifteen final judgments entered in the UK, the claimant succeeding on only one occasion.[160] Cases are often settled out-of-court on confidential terms, probably because private parties are averse to initiating litigation with uncertain prospects.[161] Claimants cannot recover "treble damages" (*i.e.*, the triple in damages plus litigation costs and reasonable lawyers' fees),[162] whose punitive component is two-thirds of the award.[163] Likewise, the loser-pays rule,[164] however efficacious for impeding the abuse of tort actions to which the claimant-never-pay-costs rule drives,[165] can inhibit from suing at all.[166] Similarly, the prohibition on "contingency fees agreements" may be justified to prevent bad-faith litigious behaviour and lawyers from giving partisan advice;[167] but it dissuades prospective claimants even if their lawyers are offered "conditional fees agreements".[168]

B. Limiting Tort Liability through Harm and Causation

As stated above, the intentional constituent of the competition torts has to be presumed from the fact that the infringement injured a particular victim. In the normal case of tort actions being brought after

[156] *Arkin* v. *Borchard Lines* [2005] EWCA Civ. 655.
[157] R. Nazzini, *Concurrent Proceedings in Competition Law* (New York 2004), pp. 79 ff.
[158] Frank J., *Associated Industries of New York State, Inc.* v. *Ickes* 134 F.2d 694 (2nd Cir. 1943), 704.
[159] E. Paulis, "Policy issues in the Private Enforcement of EC Competition Law" in Basedow, note 146 above, 7–16.
[160] *I.e.*, in *Inntrepreneur Estates Ltd.* v. *Mason* [1993] 2 C.M.L.R. 293.
[161] B. Rodger: "Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000–2005" (2008) 29 E.C.L.R. 96, p.115; "Competition Law Litigation in the UK Courts" (2006) E.C.L.R. 241, 279, 341.
[162] Clayton Act 1914, s. 4, §§ 12–27.
[163] Posner, note 40 above, p. 328.
[164] Civil Procedure Rules, 44.3.(2)(a).
[165] E. Snyder and T. Kauper, "Misuse of the Antitrust Laws: The Competitor Plaintiff" (1991) 90 Mich.L.Rev. 551, pp. 596 ff.
[166] *Wireless Group Plc* v. *Radio Joint Audience Research Ltd.* [2005] U.K.C.L.R. 203, at [53], Lloyd J.
[167] *Callery* v. *Gray* [2001] EWCA Civ. 1117.
[168] Courts and Legal Services Act 1990, ss. 58, 58A.

antitrust conduct is found, litigation will revolve around causation and damage. However, the need for proving both conditions fulfils other material functions. First, it retains liability within strict bounds and thereby lessens the risk of tort claims being abused by irresponsible litigants. Secondly, it reduces legal standing to those able to show that they were personally impaired by the anticompetitive practice at stake. A narrow range of claimants can make private enforcement more efficient. Further, in the absence of class actions, the limited standing rules make tort law not the best form of redressing consumers as a whole. Compensation for antitrust harm is thus likely to be claimed between competitors alone. Lastly, the prospect of succeeding largely depends on proof of causation and damage, which is difficult though not necessarily more complex than showing pure economic loss in other contexts. These aspects are briefly commented.

First, although the abuse of tort claims does not seem to be a real problem in the UK, at least currently, it is a potential danger. There is persuasive evidence in the US about the difficulty in identifying antitrust behaviour and about the malleability of competition laws. More often than not, unmeritorious tort lawsuits are brought against minor offences, with the intent to secure monopolistic positions at the expense of legitimate competitors. Tort actions are repeatedly employed as a business strategy to intimidate and force risk-averse rivals to conclude confidential settlements in exchange for claimants not modifying their own antitrust methods.[169] The results of these practices include: lengthy, costly and convoluted trials, particularly for measuring, tracing and apportioning damages; multiple payments diluted among numerous claimants; and inconsistent or erroneous decisions.

Secondly, through procedural and substantive techniques *locus standi* can be limited to those who are in the position of proving that their losses directly flowed from the antitrust conduct. In America, claimants must show that they belonged to the class of persons or the economic sector that the legislator intended to protect.[170] Standing is hence reserved for those straightforwardly experiencing financial losses, namely: direct purchasers[171] and competitors.[172] Direct purchasers can prove antitrust injury because they are permanently and closely related to wrongdoers, as opposed to indirect purchasers.[173] As Crane demonstrates, identifying and compensating indirect purchasers (in

[169] See, *e.g.*, A. Austin, "Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy" (1978) Duke L.J. 1353; W. Baumol and J. Ordover, "Use of Antitrust to Subvert Competition Antitrust and Economic Efficiency" (1985) 28 J.L.E. 247.

[170] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477 (1977).

[171] *Illinois Brick Co.* v. *Illinois* 431 U.S. 720 (1977).

[172] *Associated General Contractors of California* v. *California State Council of Carpenters* 459 U.S. 519 (1983).

[173] W. Page, "The Scope of Liability for Antitrust Violations" (1985) 37 Stan.L.Rev. 1445.

particular downstream consumers) is usually unfeasible. In turn, competitors can often recover their economic losses because these are not too remote a consequence of the infringement.[174] And because indirect purchasers lack standing antitrust infringers cannot allege the "passing-on defence" against direct purchasers: defendants cannot plead a reduction in damages proportional to the overcharges that claimants paid to them and then transferred to indirect purchasers.[175] Likewise, it is argued that a circumscribed standing can help to prevent antitrust conduct at optimal level. Direct purchasers have the incentive to decrease (rather than relocate) the higher costs incurred, so indirect purchasers would end up paying lower prices.[176]

However, the principle of direct effect upheld in *Courage* and *Manfredi* favours wider standing and the passing-on defence which discourages claimants from enriching themselves by transferring losses to indirect purchasers.[177] Nonetheless, the passing-on defence is difficult to implement in overall terms as the calculation of the losses passed by direct purchasers on indirect purchasers is often extremely arduous, except for very specific cases which have little or nothing to do with antitrust actions, for instance, where the defendant sued by the *Revenue and Customs Commissioners* pleads that the sums claimed are decreased in proportion to the overpaid taxes that the claimant then transferred to the defendant's customers.[178] Consequently, it is submitted that indirect victims suffer damage too unimportant and harsh to prove to be worth suing over, at least individually. Courts may prefer avoiding highly sophisticated litigation, the costs of which usually exceed the damages that indirect purchasers would plausibly receive.[179] Furthermore, a broader standing and the passing-on defence can demoralise direct purchasers from suing at all, infringements ending up under-deterred.[180] Coincidently, the CAT limits standing to direct purchasers.[181] Therefore, it seems that the passing-on defence would be workable if indirect purchasers could bring class actions or, as Petrucci argues, if they were allowed to recover overcharges in the same proceedings commenced (and using the evidence gathered) by direct purchasers.[182]

[174] D. Crane, "Optimizing Private Antitrust Enforcement" (2010) 63 Vand.L.Rev. 675, p. 686.
[175] *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.* 392 U.S. 481 (1968).
[176] W. Landes and R. Posner, "Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws – An Economic Analysis of the Rule of Illinois Brick" (1979) 46 U.Chi.L.Rev. 602.
[177] F. Ceniz, "Antitrust Damages Actions: Lessons for American Indirect Purchasers' Litigation" (2010) 59 I.C.L.Q. 39.
[178] As suggested in *Kleinwort Benson Ltd.* v. *Birmingham CC* [1997] Q.B. 380 and resolved in *Marks &Spencer Plc* v. *Commissioners of Customs and Excise* [1999] 1 C.M.L.R. 1152.
[179] R. Epstein, *Cases and Materials on Torts*, 9th ed (New York 2008), p. 1255.
[180] D. Beard, "Damages in Competition Law Litigation" in T. Ward and K. Smith (eds.), *Competition Litigation in the UK* (London 2005), ch. 7, pp. 274 ff.
[181] *BCL Old* v. *Aventis* [2005] CAT 2.
[182] C. Petrucci, "The Issues of the Passing-on Defence and Indirect Purchasers' Standing in European Competition Law" (2008) 29 E.C.L.R. 96.

Thirdly, proof of causation and damage is amongst the hardest technical and policy issues. Tort disputes entangle a complex evaluation of positive versus negative externalities of antitrust conduct and the hypothetical inquiry whether the claimant would have made a profit had she not been wronged. This is not mere speculation. It has to be based on facts.[183] Still, the cumbersome proof of causation and actionable damage is not peculiar to the competition torts. To a great extent pure economic loss (*i.e.*, the sort of injury competitors inflict to one another) is unrecoverable because it derives from the harm suffered by a person other than the claimant out of interconnected relations that generate chain reactions spreading widely.[184] This is why standing is limited to direct victims.[185] Similarly, antitrust tort claimants must show that they were directly affected by the infringement. Moreover, as American case law elucidates, the causal link between breach and harm must be established with a high degree of precision. In contrast, the quantification of damages consists of a reasonable estimation as compared against the profit that the claimant would otherwise have gained. Defendants should not be given the opportunity to capitalise on their wrongs on the pretext that claimants failed to show their losses with accuracy.[186] Indeed, the CAT recently dismissed the first follow-on action for anticompetitive damage because the claimant could not demonstrate that its alleged loss of chance was caused by the defendant's abuse of dominant position (previously established by the competition authority) under the "but for" test.[187] This inaugural judgment confirms that the greatest adversity that claimants will need to overcome is to prove that their economic harm resulted from the antitrust infringement. Yet, this decision also corroborates two significant facts. First, the intention to exclude a competitor from the relevant market must be shown as a cardinal element of the antitrust conduct. Secondly, the intention to injure a particular rival need not be proved again in the ensuing tort trial because it is implicit in the anticompetitive practice irrefutably found by the competition authority. That is to say, the intention to harm the claimant, which is inherent to the competition torts, can plainly be equated to and inferred from the mental ingredient of anticompetitive infringement.[188]

C. Beyond Compensation

Tort law fulfils corrective justice as between victim and wrongdoer via compensation. Thus, victims are left not better off but as if they had

[183] Jacobs, note 155 above, pp. 1368, 1374; P. Areeda and L. Kaplow, *Antitrust Analysis: Problems, Text, Cases*, 5th ed (New York 1997), p. 74.
[184] P. Atiyah, "Negligence and Economic Loss" (1967) 83 L.Q.R. 248, p. 270.
[185] M. Rizzo, "A Theory of Economic Loss in the Law of Torts" (1982) 11 J.L.S. 281.
[186] *Bigelow* v. *RKO Radio Pictures, Inc.* 327 U.S. 251 (1946), 264–265, Stone, C.J.
[187] *Enron Coal Services Ltd (In Liquidation)* v. *English Welsh & Scottish Railway Ltd* [2009] CAT 36.
[188] *Ibid*, particularly at [41]–[42], [45], [47], [165].

not been injured.[189] However, it is this writer's belief that economic-competition tort liability ought also to perform preventive and punitive roles via exemplary damages. In effect, through the economic torts (and not less through the competition torts) the defendant unambiguously aims to profit illicitly at her victims' expense.[190] Moreover, for this author such mental element neatly matches "the intention to harm the claimant as a means to another end" so firmly embedded in the leading case law.[191] Here only a concise explanation can be offered.

Legal scholarship asks both what the law does and what it should do.[192] Tort law is conventionally portrayed as a mechanism of personal redress that establishes standards of right and wrongful conduct.[193] It governs the relationship tortfeasor-victim by imposing liability for harm.[194] It purports to achieve corrective justice, whether this means a formal notion,[195] a social practice that attributes the duty to compensate damage flowing from the unjustifiable invasion of rights or legitimate interests,[196] or the restoration of distributive justice by shifting wrongful losses from victims to defendants.[197] The economic torts themselves have recently been conceptualised as wrongful interferences with another's primary right. On this analysis, a tort action vindicates such a right and provides compensation based on corrective justice.[198]

It is persuasively claimed that tort law does or should attain distributional aims, like increasing safety or maximising welfare, whereas reparation of individual injury might better be covered through insurance.[199] Nonetheless, the identification of private law with corrective justice and the monopolisation of deterrence and retribution by public law are robustly defended.[200] Punitive damages are polemical across tort law and the introduction of this remedy in antitrust tort proceedings is firmly resisted in the EU.[201] Moreover, punitive damages can undermine public prosecution and private competition enforcement. Punitive damages too might instigate irresponsible litigants or

[189] Lord Blackburn, *Livingstone* v. *Rawyards Coal Co.* (1880) 5 App.Cas 25, 39; T. Weir, "Complex Liabilities" in A. Tunc (chief ed.), *International Encyclopedia of Comparative Law* (Tübingen 1976), vol. 11, ch. 12, p. 5.
[190] P. Cane, "Mens Rea in Tort Law" (2000) 20 O.J.L.S. 533, p. 548.
[191] [2008] 1 A.C. 1, at [60]–[62], Lord Hoffmann.
[192] G. Williams, "The Aims of the Law of Tort" (1951) C.L.P. 137, p. 138.
[193] J. Goldberg, "Twentieth-century Tort Theory" (2003) 91 Geo.L.J. 513.
[194] G. Postema, "Introduction: Search for an Explanatory Theory of Torts" in G. Postema (ed.), *Philosophy and the Law of Torts* (Cambridge 2001), ch. 1.
[195] Weinrib, note 38 above.
[196] J. Coleman, *Risks and Wrongs* (New York 1992).
[197] G. Fletcher, "Corrective Justice for Moderns" (1993) 106 H.L.R. 1658.
[198] J. Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts L.J. 1.
[199] Shavell, note 37 above, p. 297.
[200] Coleman, note 196 above, pp. 198, 371; A. Beever, "Justice and Punishment in Tort: A Comparative Theoretical Analysis" in Ch. Rickett (ed.), *Justifying Private Law Remedies* (Portland 2008), ch. 11.
[201] N. Reich, "The 'Courage' Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries" (2005) 42 C.M.L. Rev. 35.

discourage infringers from denouncing infringements.[202] Victims of antitrust conduct could also be dissuaded from avoiding or mitigating harm given the prospect of recovering treble damages.[203]

Not only punitive damages can generate inefficiencies but the simultaneous realisation of so often contradictory targets as compensation, deterrence and retribution can be impracticable.[204] Punitive damages are an imperfect means of attaining these goals. They serve to prevent antitrust conduct where the awards are commensurate with the litigants' wealth or with the magnitude of the harm.[205] But if this remedy is to be really retributive, as the US Supreme Court has proclaimed,[206] the awards should be grounded exclusively in the reprehensibility of the infringement.[207] In particular, the continuous debate about the real impact of punitive damages on the prevention and punishment of antitrust conduct illustrates the trouble of using tort remedies to achieve public goals as those which infuse competition law. Ultimately, it is for the regulator to determine the level of optimal punishment, not for courts in tort proceedings.[208] The basic premise is that the lower the chance of detecting and punishing misbehaviour the higher the penalty must be, if the offence is to be prevented and sanctioned effectively.[209] In principle, optimal deterrence can be attained if the wrongdoer internalises *ex ante* the social costs of the infringement less the likelihood of being punished.[210] But the problem is with determining an adequate amount of punitive damages to deter antitrust practices without repressing efficient activities.[211] For the American authors Landes and Posner, treble damages increase private enforcement and the probability of antitrust conduct being detected above the optimal level.[212] In turn, according to Polinsky and Shavell, optimal deterrence of anticompetitive infringement requires that the award represents the claimant's loss as well as the likelihood of the defendant escaping liability.[213] However, Hylton recommends a fix minimum award proportional to the chance of liability being imposed.

[202] Snyder and Kauper, note 165 above.
[203] R. Robin, "Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts" in S. Madden (ed.), *Exploring Tort Law* (Cambridge 2005), ch. 2.
[204] B. Chapman and M. Trebilcock, "Punitive Damages: Divergence in Search of a Rationale" (1989) 40 Ala.L.Rev. 742.
[205] C. Sharkey, "Punitive Damages as Societal Damages" (2003) 113 Y.L.J. 347, pp. 358, p. 364.
[206] *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003).
[207] D. Ellis, "Fairness and Efficiency in the Law of Punitive Damages" (1982) 56 S.Cal.L.Rev. 1.
[208] W. Breit and K. Elzinga, "Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages" (1974) 17 J.L.E. 329.
[209] C. Beccaria, *Of Crimes and Punishments* (1764), trans. by J. Grigson (New York 1996), pp. 49–50; Bentham, note 103 above, ch. 14, §8, p. 166; Sharkey, note 205 above.
[210] G. Becker, "Crime and Punishment: An Economic Approach" (1968) 76 J.Pol.Econ. 169.
[211] R. Cooter, "Economic Analysis of Punitive Damages" (1982) 56 S.Cal.L.Rev. 79.
[212] W. Landes and R. Posner, "The Private Enforcement of the Law" (1975) 4 J.Leg.Stud. 1.
[213] M. Polinsky and S. Shavell, "Punitive Damages: An Economic Analysis" (1998) H.L.R. 869, pp. 954–955.

Exemplary damages would perform a punitive function where the defendant's profit exceeded the claimant's loss and the defendant has to internalise such loss. But exemplary damages can inhibit wrongdoers from acting if their illicit gain is equal or smaller than the victim's harm.[214]

Nevertheless, there is a limited place for exemplary damages being awarded as a means of preventing and also punishing the economic and competition torts, at least from a policy viewpoint. In effect, compensation is the typical, neither the exclusive nor the necessary aim of tort law. Prevention, retribution, rights-vindication, distribution, extra-compensation and restitution too are within tort law's remit.[215] Specifically, exemplary damages discourage and castigate the commission or repetition of outrageous conduct aimed at injuring others, either maliciously or by exploiting victims as a means to making illicit profits.[216] This form of retribution belongs to private law; hence, for instance, punitive damages are insurable risks.[217] Further, insofar as exemplary damages are not awarded as a means of punishing egregious acts on behalf of the state, there is no need for according tortfeasors the sort of safeguards which protect the accused in criminal procedure.[218] Nor is corrective justice impaired if, as is customary in England, punitive damages are rarely granted, to teach wrongdoers that tort does not pay and to affirm the strength of the law.[219] In *Rookes* v. *Barnard*[220] Lord Devlin restricted exemplary damages to three narrow categories, their awards being subject to several conditions. First, compensatory damages must be inadequate to deter and punish misconduct. Secondly, the claimant has to prove that she is the indistinguishable victim of the defendant's act, which prevents windfalls. Thirdly, the award should not exceed the amount of criminal penalties nor outweigh litigants' resources. Fourthly, when alleging exemplary damages under the second category, the claimant must show that the defendant calculated to profit from his act, i.e., that he actually compared the risk of injuring the claimant with the probability of escaping liability.[221] An eminent a proponent of corrective justice, Weinrib, has applauded the fact that, so tightened, the second category helps to neutralise unjust enrichment.[222] In contrast, American juries have made unlimited use of punitive damages to protect a wide range of

[214] K. Hylton, "Punitive Damages and the Economic Theory of Penalties" (1998) 87 Geo.L.J. 421.
[215] C. Morris, "Punitive Damages in Tort Cases" (1931) 44 H.L.R. 1173; Birks, note 82 above, p. 37; J. Edelman, "In Defence of Exemplary Damages" in Rickett, note 200 above, ch. 10.
[216] D. Owen, "Philosophical Foundations of Tort Law" in Owen, note 82 above, ch. 9, pp. 205, 219 ff.
[217] *Lancashire CC* v. *Municipal Mutual Insurance Ltd.* [1997] Q.B. 897.
[218] B. Zipursky, "A Theory of Punitive Damages" (2005) 84 Tex.L.Rev. 105.
[219] *Cassell & Co. Ltd.* v. *Broome* [1972] A.C. 1027, 1039, Lord Hailsham L.C.
[220] [1964] A.C. 1129.
[221] *Ibid*, 1221, 1226–8.
[222] Weinrib, note 38 above, pp. 114, 134–135.

interests,[223] for example, granting huge sums against who merely frustrated the claimant's prospective agreement to merge with a third party after offering the latter a better deal.[224] But, in this author's view, even assuming that exemplary damages are awarded for reasonable amounts in particular cases, it is at any rate arguable that they might enrich already fully compensated victims, exacerbate vindictiveness, obstruct meritorious behaviour or undermine punitive goals.[225]

Currently, English courts reject exemplary damages if the defendant has been penalised for anticompetitive acts, which is the most likely scenario as tort litigation normally follows the public antitrust enforcement. In *Devenish Nutrition* v. *Sanofi-Aventis*[226] the claimant was denied punitive damages despite the fact that the defendants' cartel clearly fitted Lord Devlin's second category. Lewison J. avoided the difficulty of assessing punitive damages and sought to prevent double jeopardy. He reasoned that the EC Commission had already punished the cartel and that exemplary damages discouraged infringers from denouncing serious anticompetitive acts. In fact, the defendants had been released from the fine under the leniency program (as whistleblowers). Furthermore, Lewison J. noted that, since the cartel had impact on the whole EC market, punitive damages posed the risk of multiple claims being brought.[227] The Court of Appeal affirmed this decision but too rejected disgorgement damages as compensatory damages imparted sufficient relief.[228] However, some scholars have argued that private competition enforcement can be strengthened if infringers are deprived of their illicit profits. Compensatory damages are hard to calculate and inadequate where the defendant's gains surpassed the claimant's loss or the claimant has transferred to her customers the overcharges flowing from the infringement.[229] Conversely, as Lewison J. said, restitutionary damages do not entail the harsh proof of lost profits that often precludes compensation altogether.[230] Yet, after the Court of Appeal's ruling, restitution will probably have to be claimed through an action for unjust enrichment, as in *Kleinwort*.[231]

Although punitive damages are "a very blunt instrument of disgorgement",[232] as Weinrib argued, the second category is entirely

[223] *E.g.*, *Grimshaw* v. *Ford Motor Company* 119 Cal.App.3d 757 (4th Dist., 1981).
[224] *Texaco Inc.* v. *Pennzoil Co* 729 S.W.2d 768 Tex.Ct.App. (1987).
[225] See, for example, G. Schwartz, "Deterrence and Punishment in the Common Law of Punitive Damages: A Comment" (1982) 56 S.Cal.L.Rev. 133; A. Burrows, "Judicial Remedies" in A. Burrows (ed.), *English Private Law*, 2nd ed (Oxford 2007), ch. 21, pp. 1677–8.
[226] [2008] 2 All E.R. 249, [2009] 3 All E.R. 27.
[227] [2008] 2 All E.R. 249, at [43]–[69].
[228] [2009] 3 All E.R. 27.
[229] O. Odudu and G. Virgo, "Remedies for Breach of Statutory Duty" (2009) 68 C.L.J. 32; D. Sheehan, "Competition Law Meets Restitution for Wrongs" (2009) 125 L.Q.R. 222.
[230] [2008] 2 All E.R. 249, at [19].
[231] See note 178 above.
[232] Cane, note 77 above, p. 115.

germane to the economic and the competition torts by which the defendant seeks to profit unlawfully at her rival's expense. Exemplary damages do serve to counteract the abuse of market-power[233] and undo the unjust enrichment pursued through antitrust conduct.[234] It is proposed, therefore, that exemplary damages are awarded whenever the defendant attempts to profit from her wrong, as a means of discouraging such behaviour. If the defendant was successful, punitive damages can also divest her of the gains intentionally and unlawfully obtained. Although this is not the place to measure empirically the effectiveness of exemplary damages as a deterrent, it is worth insisting that they differ from the penalties imposed by the competition authorities. Exemplary damages help to repress intentionally caused harm, especially as a means of self-enrichment. As Galanter and Luban have shown,[235] this remedy threatens the pocket, not the liberty, of economically powerful wrongdoers who have not been sufficiently punished by public law.

III. Conclusions

This article has proposed to redefine tort liability for damage arising from anticompetitive practices around the mental element. It demonstrated that the statutory competition torts should be categorised as intentional wrongs, just like the common-law economic torts. As seen, the competition torts involve deliberate conduct, whose object or effect is to impair countless and unknown consumers, yet they too incorporate the agent's intention to injure identifiable rivals. However, in practice this intention is inferred from the fact that antitrust infringement affected a particular rival, as distinguished from consumers who are protected by competition law. The article argued that proof of causation and damage provides the basis to presume the intention underpinning anticompetitive conduct. Crucially, the article highlighted what is often ignored, namely, that the competition torts entail strict liability (as the tort of breach of statutory duty) but (unlike this tort) they are rooted in intentionally caused pecuniary harm.

Although "the law and morality are inextricably interwoven" and "to a large extent the law is simply formulated and declared morality",[236] this article showed that tort liability between competitors should be understood as overlapping with morals in a finite zone.

[233] *Kuddus* v. *Chief Constable of Leicestershire* [2002] 2 A.C. 122, at [66], Lord Nicholls.
[234] B. Rodger, "Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages" (2003) 24 E.C.L.R. 103, pp. 109 ff.
[235] M. Galanter and D. Luban, "Poetic Justice: Punitive Damages and Legal Pluralism" 42 (1993) Am.U.L.Rev. 1393.
[236] *Smith New Court Securities Ltd.* v. *Scrimgeour (Asset Management) Ltd. Vickers* [1997] A.C. 254, 280, Lord Steyn.

The article confirmed that the economic and competition torts embody specific obligations not to harm contenders intentionally and wrongfully, which reveal abusive misconduct. Outside these clusters, commercial adversaries act legitimately despite the fact they injure one another, carelessly or even deliberately. The article made it clear that the exploitation of competitors, as an end or as a means to another end, is an expected and unavoidable side-effect of boosting economic self-interest within a just, hence allowed strife. Thus, tort law will continue playing a modest role in business rivalry and English courts will administer antitrust tort liability with their usual reluctance to hinder commercial battle. This is arguably a sensible approach. Further, the article ascertained that tort law is a secondary instrument of antitrust enforcement. The success in tort depends on the declaration of anti-competitive breach, so tort disputes will confine to the most serious offences which drew the competition authority's attention. Tort litigation will centre on damage and causation, whose proof is evidence of the intention underlying the competition torts and practically restricts the span of claimants to trade rivals and direct purchasers.