

NEVER SAY ‘NEVER’ FOR THE TRUTH CAN HURT: DEFAMATORY BUT TRUE STATEMENTS IN THE TORT OF SIMPLE CONSPIRACY

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[This article examines the remedies arising from the publication of defamatory but true statements under the tort of simple conspiracy. The English Court of Appeal in Lonrho plc v Fayed [No 5] held that, in such a case, loss of reputation is not recoverable in the tort of simple conspiracy, but only in a defamation action. However, pecuniary losses may be recovered if proved. This raises questions as to the determination of the proper limits for the losses recoverable from the publication of defamatory but true statements in the tort of conspiracy. It is argued that the categorical denial of recovery for loss of reputation in Lonrho should be re-examined. It should be possible to allow recovery, albeit in restricted circumstances, for loss of reputation in simple conspiracy.]

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I INTRODUCTION

Suppose that a group of persons conspire to publish defamatory statements concerning an individual. Assume that this individual is unlikely to succeed in a defamation action due to the fact that the statements are true. In such a scenario,

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can the defamed person nevertheless recover under the tort of simple conspiracy for loss of reputation arising from the defamatory but true statements published by the defendants? Or is the publication of the defamatory but true statements justifiable in the circumstances? To sustain an action in simple conspiracy, the plaintiff must show that (1) there is an agreement between two or more persons to do acts with the intention to injure the plaintiff; and (2) the plaintiff suffers injury. Now, for the purposes of this article, assume that the defamed person can establish the above elements of simple conspiracy.

The question then arises — can the defamed person recover loss of reputation under the tort of simple conspiracy? In *Lonrho plc v Fayed [No 5]* (*'Lonrho'*),¹ the English Court of Appeal answered the question with an emphatic 'never', holding that such loss of reputation is: (1) only recoverable in the tort of defamation; and (2) *not* recoverable in conspiracy actions.

This article questions the validity and appropriateness of the current *blanket* prohibition in *Lonrho* on recovery for loss of reputation in simple conspiracy. It is suggested that the underlying reasons in *Lonrho* for the blanket prohibition are not persuasive. In addition, it is submitted that allowing claims for loss of reputation in such instances will not lead to the opening of the proverbial floodgates by exposing potential defendants to indeterminate liability. This article does not attempt to argue that a defamed person should be free to recover loss of reputation under the tort of conspiracy should they fail in a defamation action. Rather, it is suggested that any recovery for loss of reputation in simple conspiracy should be restricted to specific and exceptional circumstances.

II LOSS OF REPUTATION DENIED: *LONRHO*

In *Lonrho*, the plaintiffs (two individuals and a company) sued the defendants in the tort of simple conspiracy for damages and an injunction. The plaintiffs alleged, inter alia, that the defendants had 'sponsored and encouraged' a third party to disseminate defamatory letters concerning the plaintiffs with the purpose of injuring them.² There was no allegation that the statements were false nor any claim in defamation. Upon the application of the defendants, Macpherson J struck out the action as an abuse of the process of the court, observing that the purpose of the claim and proceedings was to use the court as a platform to continue a 'disreputable vendetta'³ between the feuding parties. No particulars of damage were pleaded at this stage.

The plaintiffs appealed against the order of Macpherson J. During the appeal, they applied for leave to amend the pleadings to allege injury to the individual plaintiffs' feelings and reputation, as well as injury to the corporate plaintiff's proprietary right to the goodwill of the business.⁴

¹ [1994] 1 All ER 188.

² Ibid 192 (Dillon LJ). It was also alleged that the defendants financed an action brought against the plaintiffs by a third party.

³ Ibid 200 (Stuart-Smith LJ). These alleged acts of conspiracy by the defendants were a 'counter-attack' against the plaintiffs' prior 'extensive public denunciation' of the defendants: at 192 (Dillon LJ).

⁴ Ibid 194 (Dillon LJ).

The crux of the issue, for the purposes of this article, is the English Court of Appeal's twin holding that damages for injured feelings and loss of reputation are: (1) only recoverable in a defamation action; and (2) *not* recoverable in an action for conspiracy.⁵ Indeed, two of the judges expressly took the view that under the tort of simple conspiracy, loss of reputation cannot even be recovered as damages 'parasitic' to pecuniary damages.⁶ The appeal by the individual plaintiffs was thus dismissed.

The Court of Appeal cited two main reasons. First, loss of reputation falls (almost exclusively) within the province of the tort of defamation⁷ and consequently, 'a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action'.⁸ This article shall refer to this broad ground as the 'exclusive domain argument'. Secondly, since justification would be a valid and complete defence to a defamation action, there should be no recovery for loss of reputation against defendants who conspire to tell the truth.⁹ This article shall refer to this narrower ground as the 'truth argument'.

The following statements of Dillon LJ succinctly summarise the judicial approach in *Lonrho*:

if the plaintiffs want to claim damages for injury to reputation or injury to feelings, they must do so in an action for defamation — not in this very *different form of action*. *Injury to reputation and to feelings is, with very limited exceptions, a field of its own* and the established principles in that field are not to be side-stepped by alleging a *different cause of action*. Justification — truth — is an absolute defence to an action for defamation and it would, in my judgment, be lamentable if a plaintiff could recover damages against defendants who had combined to tell the truth about the plaintiff and so had destroyed his unwarranted reputation. But that would be the consequence if damages for injury to reputation and injury to feelings could be claimed in a 'lawful means' conspiracy action. *To tell the truth would be wrongful*.¹⁰

Stuart-Smith LJ in *Lonrho* outlined the 'truth argument' in similar fashion:

An individual can sue for injury to reputation and a trading company can sue for injury to its business reputation, but in my judgment to do so it must sue in defamation. I think this follows as a matter of principle and also on authority. *The reason in principle is that no one has a right to a reputation which is unmerited. Accordingly one can only suffer an injury to reputation if what is said is false*. In defamation the falsity of the libel or slander is presumed; but justification is a complete defence. In malicious falsehood, the plaintiff has to prove that the statement is false.¹¹

⁵ Ibid 195–6 (Dillon LJ), 202–3 (Stuart-Smith LJ), 210–11 (Evans LJ).

⁶ Ibid 203 (Stuart-Smith LJ), 210 (Evans LJ).

⁷ Ibid 195–6 (Dillon LJ), 202 (Stuart-Smith LJ), 211 (Evans LJ).

⁸ See *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393, 399 (Hallett J).

⁹ *Lonrho* [1994] 1 All ER 188, 195 (Dillon LJ), 202 (Stuart-Smith LJ), 211 (Evans LJ).

¹⁰ Ibid 195 (emphasis added). On the point concerning the defence of justification in defamation: see also at 202–3 (Stuart-Smith LJ).

¹¹ Ibid 202 (emphasis added).

Stuart-Smith LJ then proceeded to examine some case precedents, including the statement by Cooke P of the New Zealand Court of Appeal in *Bell-Booth Group Ltd v Attorney-General (NZ)* (*Bell-Booth*) that ‘the law as to injury to reputation and freedom of speech is a field of its own.’¹²

The remaining judge in *Lonrho*, Evans LJ, similarly to Dillon LJ, framed the ‘exclusive domain argument’ by reference to the cause of action, that is, ‘damage of that kind [injury to reputation] is part of the factual situation which establishes a cause of action in defamation, but not in other torts’.¹³

Whilst the English Court of Appeal in *Lonrho* struck out the individuals’ claims for loss of reputation and injury to feelings, the corporate plaintiff’s application to amend the pleadings to allege particulars of actual pecuniary loss was granted.¹⁴ Thus, recovery for non-pecuniary losses (injury to feelings and reputation) was denied in *Lonrho*; yet, pecuniary losses were held to be recoverable. Such pecuniary losses need not, however, be precisely quantified.¹⁵ Proof of pecuniary loss could include loss of orders or trade.¹⁶ Dillon LJ added that ‘[s]uch loss of orders, for example, would involve injury to the goodwill of a business which may be one of the most important assets of the business.’¹⁷ However, Dillon LJ clarified that ‘goodwill’ is not concerned with ‘some airy-fairy general reputation in the business or commercial community’,¹⁸ but rather something related to ‘the buying and selling or dealing with customers’.¹⁹ Similarly, Evans LJ referred to ‘pecuniary loss’ as

loss that is capable of being measured in money terms, and not merely capable of being assessed as financial compensation for some other kind of injury, as general damages for personal injury or for loss of reputation in defamation actions are.²⁰

It is clear that the pecuniary loss pleaded in this case was ‘loss of reputation’. Evans LJ categorised the concept of loss of reputation into (1) loss of reputation in the defamation sense; and (2) loss of reputation synonymous with a loss of customer goodwill resulting in a loss of business that can be measured in monetary terms.²¹ It is also pertinent to note that the claims for loss of reputation sought by both the individual and corporate plaintiffs arose from the alleged defamatory statements of the third party ‘sponsored and encouraged’ by the defendants.²²

¹² [1989] 3 NZLR 148, 156.

¹³ *Lonrho* [1994] 1 All ER 188, 211.

¹⁴ *Ibid* 198 (Dillon LJ), 205–8 (Stuart-Smith LJ), 212 (Evans LJ). The Court of Appeal was of the view that the pleadings on the issue of damages were inadequate and allowed the plaintiffs to amend the statement of claim to allege particulars of the actual pecuniary loss: at 194 (Dillon LJ), 201 (Stuart-Smith LJ), 210 (Evans LJ).

¹⁵ *Ibid* 201 (Stuart-Smith LJ).

¹⁶ *Ibid* 196 (Dillon LJ).

¹⁷ *Ibid*.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

²⁰ *Ibid* 210.

²¹ *Ibid* 211.

²² *Ibid* 192 (Dillon LJ).

The *Lonrho* principle has been applied by English and Commonwealth courts in subsequent cases (albeit without extensive analysis).²³ Some academic commentators appear to have also accepted this principle on grounds akin to the exclusive domain²⁴ and truth arguments.²⁵ On the other hand, Andrew Burrows has argued for the lifting of the ‘unjustified’²⁶ general blanket prohibition, operating in some existing torts such as conspiracy, on recovery for non-pecuniary loss of reputation in and of itself.²⁷

This article will examine in detail the counterpoints to the underlying exclusive domain and truth arguments advanced in *Lonrho*. In addition, this article will address the potential concerns regarding the opening of floodgates and uncertainties of damage arising from claims for loss of reputation. These concerns may be met by: (1) the existing ‘controlling’ mechanisms that determine liability within the tort of conspiracy itself; and (2) requiring proof of such loss of reputation in the tort of conspiracy, assuming that liability has been established.

III THE TRUTH CAN HURT

A *The Meaning of Truth and Reputation*

First, it is clear that a true statement can harm one’s reputation. Whether a true statement does in fact harm a person’s reputation in a particular case depends on the knowledge and understanding of the person(s) to whom the statement was communicated. Telling the truth about person A to person B harms the reputation of A if the facts were not previously known to B and the statement renders A’s standing poorer in the eyes of B.

However, the real question is whether the publication of such true statements that harms a person’s reputation can be justified. In this regard, it is important to stress from the outset that ‘truth’ is not an absolute value which outweighs all other values and interests. Nevertheless, the ‘truth argument’ is underpinned by the significant value of free speech in a democratic society. The significant value of defamatory but true publications may lie in their educative, democratic and public citizenry functions. Accordingly, the dissemination of true statements

²³ See, eg, *Teodoro Obiang Nguema Mbasogo v Logo Ltd* [2005] EWHC 2034 (Unreported, Davis J, 21 September 2005) [50]; *Stergiou v Citibank Savings Ltd* [1999] FCA 1321 (Unreported, Higgins, Madgwick and Dowsett JJ, 24 September 1999) [29] (Higgins, Madgwick and Dowsett JJ), concerning a claim for ‘damage to credit and social rating’ which, to the Court, ‘appear[ed] to be an alternative way of prescribing damage to reputation’; *Gregory v Portsmouth City Council* [2000] 1 AC 419, 432 (Lord Steyn).

²⁴ See, eg, Peter Cane, *Tort Law and Economic Interests* (2nd ed, 1996) 103, describing *Lonrho* [1994] 1 All ER 188 as ‘sound because it rests on a specification of the interests which the different torts are designed to protect’; Harvey McGregor, *McGregor on Damages* (17th ed, 2003) 55, 1255.

²⁵ See, eg, Hazel Carty, *An Analysis of the Economic Torts* (2001) 33: ‘The tort [of simple conspiracy] could place the courts in a dilemma if it allowed plaintiffs too easily to circumvent the requirements of a defamation action and gain damages for injury to reputation where the basis of the action was that the defendants had conspired to tell the truth’; McGregor, above n 24, 1255.

²⁶ Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd ed, 2004) 317.

²⁷ *Ibid* 317–19.

should, as far as possible, be protected by the law. However, the right of free speech should be balanced against the individual right to, and societal interests in, the protection of individual reputation. The value of truth, though significant, is not absolute — it does not always triumph over the protection of other interests such as individual reputations based on human dignity and self-esteem.²⁸ In disallowing recovery for non-pecuniary loss of reputation as a blanket rule, the ‘truth argument’ advanced by the Court in *Lonrho* appears to focus on the value of truth (and free speech) without due consideration of the other side of the coin, namely, the reputational interests of the plaintiffs. This article will discuss in greater detail, in Part V below, how this balance may be struck in the context of the tort of conspiracy, as well as analyse the other public interests involved and the controlling mechanisms available within the tort itself.

Secondly, the Court in *Lonrho* appeared to intertwine ‘truth’ and ‘reputation’ in an inconsistent manner. The Court reasoned that because the statements in question were not false, the alleged reputation of the plaintiffs was ‘unmerited’²⁹ and ‘unwarranted’³⁰ and thus, there should not be any recovery for non-pecuniary loss of reputation. However, the Court in *Lonrho* also decided that pecuniary loss would, if proved, be recoverable. In this regard, it allowed the corporate plaintiff to amend the statement of claim to allege particulars of actual pecuniary loss. The question which needs to be raised is: if the corporate plaintiff’s reputation was indeed ‘unmerited’ and ‘unwarranted’, why should it be allowed to amend the pleadings to claim for loss of reputation, whether pecuniary or non-pecuniary? The claims for both non-pecuniary and pecuniary loss of reputation in *Lonrho* flowed from the allegedly defamatory statements published by the defendants. It is thus argued that the outcome in *Lonrho* with respect to recovery for pecuniary loss of reputation appears to run contrary to the ‘truth argument’ propounded by the Court as a basis for disallowing non-pecuniary loss of reputation in simple conspiracy. In short, if the statements were, by virtue of their truth, not defamatory in nature, then there could be no basis for pecuniary loss of reputation.

B *Injunction Granted in Gulf Oil (Great Britain) Ltd v Page*

Six years before *Lonrho* was decided, the English Court of Appeal in *Gulf Oil (Great Britain) Ltd v Page* (‘*Gulf Oil*’)³¹ granted an interlocutory injunction to restrain the publication of defamatory but true statements. More significantly, the Court explicitly stated that, in contrast to the position adopted in *Lonrho*, a civil

²⁸ See, eg, James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (2006) 221: the Roman action of *iniuria* did not recognise a defence based on the truth of a defendant’s statement and considered that an undeserved reputation was still of value. For discussion of whether a statement’s truth should be admissible as evidence: see generally Select Committee of the House of Lords, Parliament of the United Kingdom, *Law of Defamation and Libel* (1843). Until recently, some Australian jurisdictions have adopted the position that the defence is available only where the publication is for the ‘public benefit’ or ‘public interest’: see, eg, *Defamation Act 1974* (NSW) s 16, repealed and replaced by *Defamation Act 2005* (NSW).

²⁹ *Lonrho* [1994] 1 All ER 188, 202 (Stuart-Smith LJ).

³⁰ *Ibid* 195 (Dillon LJ).

³¹ [1987] Ch 327.

wrong can arise from the publication of defamatory but true statements in the tort of conspiracy.³² Unfortunately, this case was not cited in *Lonrho*.

In *Gulf Oil*, the plaintiff, Gulf Oil (Great Britain) Ltd, an oil company and the defendants, the owner-operators of several petrol stations, were involved in pending litigation arising from a contractual dispute. Scott J held that there was a breach of contract by the plaintiff.³³ Subsequently, whilst the plaintiff was entertaining customers at a race meeting, the defendants flew a light aircraft over the racecourse, displaying a banner with the words 'Gulf exposed in fundamental breach'.³⁴ The plaintiff sought an injunction restraining the defendants from displaying the airborne sign.³⁵ The plaintiff did not sue in defamation but in conspiracy to injure.³⁶ The interlocutory injunction³⁷ was granted by the Court of Appeal on the basis of clear evidence indicating a combination between the defendants to display the airborne sign in order to inflict the maximum possible damage to the plaintiffs' business by way of revenge.³⁸ Parker LJ observed that the defendants had, at the relevant time, no interest to protect or further against the plaintiff.³⁹ Thus, there was a strong prima facie case of conspiracy to injure.⁴⁰ Significantly, Parker LJ said:

When a plaintiff sues in conspiracy there is, therefore, a potential wrong even if it is admitted, as it is in the present case, that *the publication is true and thus that there is no question of a cause of action in defamation*. In such a case the court can, and in my view should, proceed on the same principles as it would in the case of any other tort.⁴¹

This runs contrary to the 'truth argument' expounded in *Lonrho*. Moreover, Parker LJ dismissed 'the prospect that this would open the floodgates [to litigation]' as 'unreal',⁴² because 'it would only be in the rarest case that sufficient evidence of a dominant purpose to injure could be made out to warrant the grant of interlocutory relief'.⁴³ Similarly, 'the principle applicable in libel actions'⁴⁴ (whereby truth is a complete defence) would not be reversed because

the court would scrutinise with the greatest care any case where a cause of action in conspiracy was joined to a cause of action in defamation and would require to be satisfied that such joinder was not merely an attempt to circumvent the rule in defamation.⁴⁵

³² Ibid 333 (Parker LJ).

³³ Ibid 330 (Parker LJ).

³⁴ Ibid.

³⁵ Ibid 331–2 (Parker LJ).

³⁶ Ibid 332–3 (Parker LJ).

³⁷ The injunction was limited to exhibition by airborne sign and to the duration of the particular race meeting: *ibid* 332, 334 (Parker LJ).

³⁸ Ibid 333 (Parker LJ), 334 (Ralph-Gibson LJ).

³⁹ Ibid 332–4 (Parker LJ).

⁴⁰ Ibid.

⁴¹ Ibid 333 (emphasis added).

⁴² Ibid.

⁴³ Ibid 334.

⁴⁴ Ibid 333 (Parker LJ).

⁴⁵ Ibid 334 (Parker LJ).

Parker LJ also referred to the ‘occasion, scale and manner of publication of the true statement’⁴⁶ in determining that there was a strong prima facie case of a dominant purpose to injure.⁴⁷

Thus, *Gulf Oil* clearly demonstrates that defamatory but true statements can, albeit in exceptional circumstances, amount to a wrong in the tort of conspiracy. This is contrary to the proposition for which *Lonrho* stands — that telling the truth cannot be wrongful.⁴⁸

C The Case of Breach of Confidence/Privacy

Publishing or disclosing the truth can also constitute a civil wrong in the context of a breach of confidence or an invasion of privacy rights. There is no tort of privacy in England⁴⁹ but the right to privacy is enforced via developments in the law of confidence⁵⁰ in tandem with the *Human Rights Act 1998* (UK) c 42 (*‘HRA’*). Thus, private and true facts disclosed by the defendants concerning the plaintiff’s reputation may attract legal liability as a breach of the right to informational privacy based on the law of confidence. In England, even prior to the enactment of the *HRA*, the law of confidence had developed to protect privacy rights without requiring proof of a prior confidential relationship between the plaintiff and the defendant(s).⁵¹

In Australia, judicial statements emanating from the High Court decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (*‘Lenah Game Meats’*)⁵² suggested that the protection of privacy rights via tort law might be further developed by the common law, though they are by no means conclusive.⁵³ One of the main legal issues in that case was whether Lenah Game Meats Pty Ltd (*‘LGM’*) could restrain the Australian Broadcasting Corporation (*‘ABC’*) via an interlocutory injunction from broadcasting a film on the basis of an unjustified invasion of privacy.⁵⁴ The film, which was obtained by the ABC from unidentified and unauthorised persons, contained footage of possums in LGM’s abattoir being stunned and having their throats cut. With respect to the privacy issue, doubts were cast by the High Court in *Lenah Game Meats* as to the precedential value of the old case of *Victoria Park Racing & Recreation Grounds*

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ [1994] 1 All ER 188, 195 (Dillon LJ).

⁴⁹ *Wainwright v Home Office* [2004] 2 AC 406. Cf the free-standing tort of privacy in New Zealand: see *Hosking v Runting* [2005] 1 NZLR 1, although the majority judges appeared to be of the view that the stand-alone tort is similar to the English developments in respect of the action for breach of confidence: at 26 (Gault P and Blanchard J), 60 (Tipping J). For South African developments: see Jonathan Lewis, ‘Privacy: A Missed Opportunity’ (2005) 13 *Tort Law Review* 166.

⁵⁰ See, eg, *Campbell v MGN Ltd* [2004] 2 AC 457 (*‘Campbell’*).

⁵¹ See *A-G (UK) v Observer Ltd* [1990] 1 AC 109.

⁵² (2001) 208 CLR 199.

⁵³ See Des Butler, ‘A Tort of Invasion of Privacy in Australia?’ (2005) 29 *Melbourne University Law Review* 339, 341, citing *Lenah Game Meats* (2001) 208 CLR 199, 248 (Gummow and Hayne JJ), 277 (Kirby J), 321–4, 328 (Callinan J).

⁵⁴ The majority (Callinan J dissenting) in *Lenah Game Meats* (2001) 208 CLR 199 held that the injunction should not be granted.

Ltd v Taylor,⁵⁵ insofar as it was interpreted as ‘closing the door’⁵⁶ to the concept of a right to personal privacy in Australia. Further, Callinan J in *Lenah Game Meats* advanced ‘tentative views’⁵⁷ that ‘the time is ripe for consideration whether a tort of invasion of privacy should be recognised’⁵⁸ in Australia.

Since the law of confidence (and possibly, a tort of invasion of privacy) protects the victim from the disclosure of private and true facts concerning the victim, the natural temptation is to argue that, with respect to claims for loss of reputation, the tort of conspiracy should be supplanted by the law of confidence.⁵⁹ There is, admittedly, an overlap between a conspiracy to publish defamatory but true statements (such as that seen in *Lonrho*) and an action based on breach of confidence. Both actions protect the dignity of plaintiffs.⁶⁰ Yet there are important divergences, which means that in a particular case, a conspiracy action may succeed whilst a breach of confidence action might not, and vice versa.

First, in an action for breach of confidence, it is not necessary to show that the statement in question is defamatory and that the loss is one of damage to reputation.

Secondly, the concept of ‘confidential’ or ‘private’ information in an action for breach of confidence appears to be based on several possible tests:

- 1 whether the plaintiff had a ‘reasonable expectation of privacy’;⁶¹
- 2 whether the plaintiff has a ‘reasonable belief’⁶² that disclosure would be injurious; or
- 3 whether the disclosure or misuse of information is likely to be highly offensive to a reasonable person.⁶³

⁵⁵ (1937) 58 CLR 479.

⁵⁶ G H L Fridman, ‘A Scandal in Tasmania: The Tort That Never Was’ (2003) 22 *University of Tasmania Law Review* 84, 89.

⁵⁷ (2001) 208 CLR 199, 320.

⁵⁸ *Ibid* 328. Some commentators have taken the view that *Lenah Game Meats* (2001) 208 CLR 199 is still unclear insofar as the issue of a new tort of privacy is concerned: see, eg, Greg Taylor and David Wright, ‘Privacy, Injunctions and Possums: An Analysis of the High Court’s Decision’ (2002) *Melbourne University Law Review* 713; Daniel Stewart, ‘Protecting Privacy, Property, and Possums: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*’ (2002) 30 *Federal Law Review* 177.

⁵⁹ See, eg, *Bell-Booth* [1989] 3 NZLR 148, 157 (Cooke P for Cooke P, McMullin, Somers and Casey JJ), albeit in a slightly different context.

⁶⁰ See George Wei, ‘Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression’ (2006) 18 *Singapore Academy of Law Journal* 1, 15.

⁶¹ See *Campbell* [2004] 2 AC 457, 466 (Nicholls LJ). More recently, the test was applied in *HRH Prince of Wales v Associated Newspapers Ltd* [2007] 2 All ER 139.

⁶² *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227. See also Wei, above n 60, 41.

⁶³ *Lenah Game Meats* (2001) 208 CLR 199, 226 (Gleeson CJ): ‘The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.’ This last test appears to be less persuasive in England in light of *Campbell* [2004] 2 AC 457, 482 (Lord Hope), 496 (Baroness Hale), 504 (Lord Carswell), and also, on the ground that it unduly pre-empts, in the context of the *HRA*, the issue of the appropriate balance between the plaintiff’s right to privacy and the defendants’ countervailing interest to publish information.

All these tests are plaintiff-centric, quite unlike a tort of conspiracy action which is more defendant-centric insofar as the requirement of intention to injure is concerned.

Thirdly, the mental element in a conspiracy action is more stringent than in an action based on breach of confidence. The requirement of an intention to injure in the tort of conspiracy is discussed in Part V below.

Fourthly, the action for breach of confidence is premised on the existence of some misuse or ‘unauthorised use’⁶⁴ of information, which may not be present in a conspiracy action such as that in *Lonrho*. The evidence in *Lonrho* did not appear to suggest that there was any ‘unauthorised use’ of the information in the published statements.

Thus, whilst an action for breach of confidence remains a possible legal avenue for plaintiffs aggrieved by the publication of defamatory but true statements, it does not mean that conspiracy actions should be precluded. Plaintiffs’ rights with respect to defamatory but true statements may not always be vindicated in an action based on breach of confidence — in such circumstances, a conspiracy action offers an alternative avenue of relief.

The law of confidence and the law regarding the protection of privacy rights are in a state of flux. Apart from ambiguities in the concept of privacy itself, it is unclear, for instance, whether a right to privacy can be asserted by a corporation. The question was answered in the negative by Gaudron, Gummow and Hayne JJ in *Lenah Game Meats* on the basis that an artificial legal person has no sensitivity or personal autonomy.⁶⁵ Similarly, Gleeson CJ and Kirby J were uncertain as to whether a corporation could avail itself of a right to privacy.⁶⁶ However, the question appeared to be answered, at least tentatively, in the affirmative by Callinan J who was prepared to accept the possibility that ‘a corporation might be able to enjoy the same or similar rights to privacy as a natural person’.⁶⁷ Until such ambiguities are clarified, it might be advisable to leave the two doors of ‘conspiracy’ and ‘confidence’ ajar, rather than to completely shut the door to the former.

⁶⁴ *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415, 419, 421, 425 (Megarry J).

⁶⁵ *Lenah Game Meats* (2001) 208 CLR 199, 231 (Gaudron J), 256 (Gummow and Hayne JJ). Cf *R v British Broadcasting Standards Commission; Ex parte British Broadcasting Corporation* [2001] QB 885, for the different position under English law, although it is suggested that the English courts’ decision to grant corporate privacy rights may have been based on a strict interpretation of the *Broadcasting Act 1996* (UK) c 55. In the context of defamation, Australia’s recently enacted uniform defamation acts provide that corporations generally cannot sue in defamation: see, eg, *Defamation Act 2005* (NSW) s 9; *Defamation Act 2005* (Qld) s 9; *Defamation Act 2005* (SA) s 9; *Defamation Act 2005* (Tas) s 9; *Defamation Act 2005* (Vic) s 9; *Defamation Act 2005* (WA) s 9; *Civil Law (Wrongs) Act 2002* (ACT) s 121; *Defamation Act 2006* (NT) s 8. Cf the English position which permits defamation actions by corporate persons in respect of their trading or governing reputation: *Jameel v Wall Street Journal Europe SPRL* [2007] 1 AC 359. However, an exception arises where free speech may be inhibited by the defamation action and the action runs counter to the public interest: *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

⁶⁶ *Lenah Game Meats* (2001) 208 CLR 199, 226 (Gleeson CJ), 279 (Kirby J).

⁶⁷ *Ibid* 326. This position is supported by Taylor and Wright, above n 58, 719–25.

IV LOSS OF REPUTATION SHOULD NOT BE THE EXCLUSIVE
DOMAIN OF THE TORT OF DEFAMATION

The tort of defamation has traditionally been the mainstay for the protection of an individual's reputation. The main purpose of the tort of defamation is to achieve an appropriate balance between the value of free speech and the need to protect one's reputation. Whilst it is admitted that the protection of reputation is a significant component in the tort of defamation, the author is of the view that a claim for loss of reputation should not be exclusive to a defamation action.

The Court in *Lonrho* relied on the English Court of Appeal decision in *Spring v Guardian Assurance plc* ('*Spring*')⁶⁸ and the New Zealand decision of *Bell-Booth*,⁶⁹ amongst others,⁷⁰ to support its decision to deny recovery for non-pecuniary loss of reputation. *Spring* and *Bell-Booth* were both negligence cases which sought to employ the 'exclusive domain argument'. However, it is argued that they do not effectively demonstrate the logic and utility of the 'exclusive domain argument' as expounded by the Court in *Lonrho*. From the outset, it should be noted that the elements of the tort of negligence are materially different from those of the tort of conspiracy. Thus, as a matter of logic, the outcome of negligence cases cannot be used as a yardstick or analogy for determining liability for defamatory but true statements in conspiracy.⁷¹

The English Court of Appeal in *Spring*⁷² held that loss of reputation, arising from a reference negligently prepared by a former employer, cannot be recovered in negligence by an employee. The reliance by the Court in *Lonrho* on *Spring* was largely premised on the 'exclusive domain argument'.⁷³ However, the decision in *Spring* has been criticised by commentators.⁷⁴ For example, S C Smith argued⁷⁵ that *Spring*, in endorsing a blanket principle that there is no liability for truthful statements which are carelessly made, is inconsistent with established precedents such as *Hedley Byrne & Co Ltd v Heller & Partners Ltd* ('*Hedley Byrne*').⁷⁶ Smith argued that *Hedley Byrne* is based primarily on the criteria of the assumption of responsibility and reasonable reliance, not the truth

⁶⁸ [1993] 2 All ER 273; rev'd [1995] 2 AC 296 ('*Guardian Assurance*').

⁶⁹ [1989] 3 NZLR 148. See also Andrew Demopoulos, 'Attacking the Plaintiff's Wares' (1990) 106 *Law Quarterly Review* 13, 15.

⁷⁰ See, eg. *Joyce v Sengupta* [1993] 1 All ER 897 (malicious falsehood); *Dixon v Calcraft* [1892] 1 QB 458.

⁷¹ The elements of the tort of negligence are: (1) the existence of a duty of care owed by the defendant to the plaintiff; (2) the breach of duty by the defendant; and (3) damages resulting from the breach. On the other hand, in the tort of conspiracy, the plaintiff has to show: (1) the existence of an agreement between two or more persons to do acts with the intention to injure the plaintiff; and (2) that the plaintiff suffers the injury. The material differences between the two torts lie in the different mental states of the tortfeasor(s) with respect to the commission of the tort, the policy considerations underlying liability for each tort, and the need for the existence of an agreement in the case of conspiracy, unlike for negligence.

⁷² [1993] 2 All ER 273.

⁷³ *Lonrho* [1994] 1 All ER 188, 195 (Dillon LJ), 202–3 (Stuart-Smith LJ), 210–11 (Evans LJ). All the learned judges were cognisant of the fact that the Court of Appeal in *Spring* [1993] 2 All ER 273, followed *Bell-Booth* [1989] 3 NZLR 148. See also A M Tettenborn, 'Negligence v Defamation — A Little Awkwardness?' (1987) 46 *Cambridge Law Journal* 390, 392.

⁷⁴ See, eg. Tony Weir, 'The Case of the Careless Referee' (1993) 52 *Cambridge Law Journal* 376.

⁷⁵ S C Smith, 'When the Truth Hurts' [1998] *Scots Law Times* 1.

⁷⁶ [1964] AC 465.

or falsehood of the statement.⁷⁷ It should be noted that the landmark decision of *Hedley Byrne* was not even cited by the Court in *Spring*.⁷⁸

More importantly, after *Lonrho* was handed down, the English Court of Appeal's decision in *Spring* was reversed by the House of Lords in *Guardian Assurance*.⁷⁹ The House of Lords held that an employer who negligently provided a reference in respect of a former employee would be liable to the latter in negligence, notwithstanding that the employer would have a defence of qualified privilege if sued in defamation.⁸⁰ Accordingly, the House of Lords permitted recovery for pecuniary loss in respect of the employee's deprivation of livelihood and employment. However, it is admitted that the House of Lords' decision in *Guardian Assurance* does not fully open the way for the recovery of non-pecuniary loss of reputation. Nevertheless, in contrast to the Court of Appeal's decision in *Spring*, it demonstrates that legal liability in negligence can arise even where the factual matrix also raises a cause of action in defamation. Thus, it is argued that *Guardian Assurance* provides implicit support for the proposition that loss of reputation is not the exclusive domain of the tort of defamation.

The recent Canadian case of *Young v Bella*⁸¹ reinforces the position adopted by the House of Lords in *Guardian Assurance*.⁸² The Supreme Court of Canada appeared to cast doubt on a strict demarcation between negligence and defamation when it stated that '[f]reedom of expression and the policies underlying qualified privilege can be taken into account in determining the appropriate standard of care in negligence.'⁸³ This alleviates the unfounded concern that a court will necessarily be jettisoning the value of free speech whenever it allows recovery for loss of reputation in negligence. The value of free speech remains important and needs to be weighed with the other requirements of negligence. Hence, the author agrees with the general thrust of the Supreme Court of Canada's approach, which allows recovery for loss of reputation⁸⁴ in negligence

⁷⁷ Smith, above n 75, 3.

⁷⁸ Ibid 4.

⁷⁹ [1995] 2 AC 296. The case was remitted to the Court of Appeal to ascertain the extent to which the damage suffered by the plaintiff was caused by the breach of the defendants: at 324–5 (Lord Goff), 339 (Lord Slynn), 354 (Lord Woolf).

⁸⁰ The House of Lords also determined that there was a breach of the implied term in the contract to take reasonable care in providing the reference: ibid 320 (Lord Goff), 340 (Lord Slynn), 354 (Lord Woolf).

⁸¹ [2006] 1 SCR 108.

⁸² [1995] 2 AC 296. See also *Haskett v Equifax Canada Inc* (2003) 63 OR (3d) 577, 591–2 (Feldman JA); *Clark v Scotiabank* (2004) 25 CCLT (3d) 109, 117 (Day J), albeit by way of dicta.

⁸³ *Young v Bella* [2006] 1 SCR 108, 134 (McLachlin CJC and Binnie J). See also *Wade v Victoria* [1999] 1 VR 121, 139 (Harmer J).

⁸⁴ The Supreme Court of Canada also stated in *Young v Bella* [2006] SCR 108, 134 (McLachlin CJC and Binnie J) (emphasis added):

There is no reason in principle why negligence actions should not be allowed to proceed where (a) proximity and foreseeability have been established, and (b) *the damages cover more than just harm to the plaintiff's reputation* (ie where these are further damages arising from the defendants' negligence) ...

so long as policy considerations of the value of free speech are not unduly compromised.⁸⁵

In adopting its position based on the ‘exclusive domain argument’, the Court in *Lonrho* also relied (incorrectly) on *Bell-Booth* which, not coincidentally, had also been (erroneously) followed by the English Court of Appeal in *Spring*. Fortunately, as noted above, these errors were subsequently corrected by the House of Lords on appeal in *Guardian Assurance*.

In *Bell-Booth*, the plaintiffs’ (manufacturers and distributors of agricultural products) claims in, inter alia, defamation and negligence were commenced in respect of defamatory but true remarks made by the defendant (the NZ Ministry of Agriculture and Fisheries) concerning the plaintiffs’ product.⁸⁶ The claim in defamation failed as the defendant raised the defence of justification. The trial judge had awarded general damages for negligence. As a result of the defendant’s public airing of the remarks, the plaintiffs lost some ‘economic advantage’ in being unable to organise a ‘commercially sensitive’ withdrawal from the market.⁸⁷ Instead, the plaintiffs were ‘dragged’ into the public arena.⁸⁸ It is pertinent to note that the NZ Court of Appeal regarded this claim as one for ‘injury to reputation’ (albeit of an economic nature) and ‘an attempt to impose a new fetter on free speech’.⁸⁹ Cooke P, in disallowing the claim for loss of reputation in negligence said:

the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element.⁹⁰

The above statement implies that if recovery were permitted, the law of defamation would be ‘imposed’ upon by the tort of negligence. Yet, one can respond that the converse could also be correct, that is, by denying recovery for loss of reputation in negligence, could it not be said that the law of defamation is ‘encroaching’ upon the domain occupied by the tort of negligence?

Cooke P in *Bell-Booth* added that ‘where remedies are needed they are already available in the form of actions for defamation, injurious falsehood, breach of

⁸⁵ The standard of care in negligence is concerned with utilitarian factors such as the risks or probability of harm, costs of avoiding harm and seriousness of the harm resulting from the allegedly negligent act or omission: *Wyong Shire Council v Shirt* (1980) 146 CLR 40. The duty of care in negligence — in particular under the limb of ‘just, fair and reasonable’ in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618 (Lord Bridge) or policy considerations in *Anns v Merton Borough Council* [1978] AC 728 — would, it is submitted, be a more appropriate forum for considering issues relating to freedom of speech and privilege. Although the *Anns* and *Caparo* policy considerations are no longer relevant in Australia, *Sullivan v Moody* (2001) 207 CLR 562 does adopt as a salient feature ‘intersection with the law of defamation’: at 579, 581. This may be equivalent to a policy consideration militating against liability.

⁸⁶ It was assumed by the Court that the statements were defamatory of the plaintiff: *Bell-Booth* [1989] 3 NZLR 148, 150 (Cooke P for Cooke P, McMullin, Somers and Casey JJ).

⁸⁷ *Ibid* 152 (Cooke P for Cooke P, McMullin, Somers and Casey JJ).

⁸⁸ *Ibid*.

⁸⁹ *Ibid* 155 (Cooke P for Cooke P, McMullin, Somers and Casey JJ).

⁹⁰ *Ibid* 156. See also *Balfour v A-G (NZ)* [1991] 1 NZLR 519; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (both cases involving the defence of qualified privilege).

contract or breach of confidence.⁹¹ However, this rationale appears to contradict the exclusive domain position adopted earlier. If indeed the law as to injury to reputation and freedom of speech is in ‘a field of its own’, it would then be inappropriate to make reference to the availability of other forms of action such as injurious falsehood, breach of contract or breach of confidence.

In the High Court of Australia decision of *Sullivan v Moody*,⁹² the ‘exclusive domain argument’ was again utilised to exclude the tort of negligence, albeit without any sustained exploration of the underlying rationale. The plaintiffs alleged that their children were examined for evidence of sexual abuse by medical practitioners and social workers employed by the South Australian Department of Community Welfare, and that the negligent conduct of those examinations led to reports that the children were sexually abused. The plaintiffs sued the medical practitioners, social workers and the state of South Australia in negligence for shock, distress, psychiatric injury and consequential personal and financial loss. The High Court unanimously recognised that there is an ‘intersection with the law of defamation which resolves the competing interests of the parties through well-developed principles about privilege and the like.’⁹³ Unfortunately, the Court suggested, without providing clear reasons, that the law of negligence should not be applied in such a case. Reminiscent of the ‘exclusive domain argument’, the Court took the view that ‘the law of negligence in the present case would resolve that competition on an altogether different basis’.⁹⁴ This view has been adopted in the subsequent case of *Cornwall v Rowan*⁹⁵ without further elaboration.

Apart from the inconsistencies and weaknesses in the ‘truth’ and ‘exclusive domain’ arguments in *Lonrho*, this article will address, in Parts V–VI below, the specific concerns that lifting the blanket prohibition on recovery for loss of reputation in the tort of conspiracy will: (1) open the floodgates to litigation; and (2) create uncertainties in assessing damage for loss of reputation.

V ALLEVIATING THE FLOODGATES PROBLEM: BALANCING INTERESTS AND THE CONTROLLING FUNCTIONS OF THE TORT OF SIMPLE CONSPIRACY

As mentioned in Part III(A), truth is a significant, though not absolute value. Whether true statements that harm one’s reputation can be justified in a particular instance would depend on the value of the freedom of speech and the reputational interests of the victim, as well as a host of other factors. It is suggested that in the context of the tort of conspiracy, the significant value of truth must be weighed together with any contrary evidence of an adverse impact on the public interest arising from the defamatory statements, as well as the manner and the circumstances relating to the disclosure or publication of the defamatory statements.

⁹¹ [1989] 3 NZLR 148, 157.

⁹² (2001) 207 CLR 562.

⁹³ *Ibid* 581 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

⁹⁴ *Ibid*.

⁹⁵ (2004) SASR 269, 427 (Bleby, Besanko and Sulan JJ).

In this regard, can one not enquire, for instance, as to whether there is any public interest in the defendants' act of 'exposing' the plaintiff?⁹⁶ Conversely, is there evidence to suggest that non-disclosure of the truth would cause harm to others?⁹⁷ How and in what circumstances did the defendants publish the defamatory but true statements concerning the plaintiff? The means used to 'attack' the plaintiff may be a relevant factor even if they are lawful, where they are not 'normal trade weapons.'⁹⁸ Heydon J suggested, for example, that the abnormality of the conduct may provide evidence of malice.⁹⁹ One other pertinent question is whether the defendants were acting out of self-defence and were provoked to act due to the prior offensive statements or actions of the plaintiff. In this regard, telling the truth about an attacker may be necessary in order to defend oneself from such attacks on one's own reputation. This self-defence may take place in the context of an ongoing feud or vendetta as in *Lonrho*¹⁰⁰ where defamatory remarks are made by both the plaintiffs and the defendants against each other. In such a situation, the maker of those true statements should not be held liable in the tort of conspiracy.

What if the facts were substantially altered so that the plaintiff did not make any defamatory statements concerning the defendants, but the defendants were solely bent on hurting the plaintiff with the publication of the defamatory statements? If the publication of the statements does not serve any significant interests (for example, in alerting the public to the unsavoury reputation of the plaintiff), there is no good reason to shield the defendants from conspiratorial wrongdoing. The judicial task of assessing the underlying public interests, and the manner and circumstances of publication may be difficult in particular cases, but the difficulty of the task is in itself not a good reason to take an easier route by imposing a blanket prohibition.

The exercise of balancing free speech interests and other interests is not new and has already been undertaken by the courts. In a tort of conspiracy case, *Femis-Bank (Anguilla) Ltd v Lazar* ('*Femis-Bank*'),¹⁰¹ an injunction to restrain the publication of allegedly defamatory statements concerning the conduct of the business of the plaintiffs (investors and bankers) was refused. Sir Nicolas Browne-Wilkinson V-C observed that the defendants proposed to justify the statements made against the plaintiffs;¹⁰² hence, the statements were defamatory but true. Browne-Wilkinson V-C exercised his discretion to refuse an injunction

⁹⁶ See, eg, *Roberts v Bass* (2002) 212 CLR 1, 12 (Gleeson CJ), on the public interest of electors in receiving information about a candidate for election (in the context of qualified privilege and the requirement of malice).

⁹⁷ Gordley, above n 28, 236.

⁹⁸ J D Heydon, *Economic Torts* (2nd ed, 1978) 18.

⁹⁹ *Ibid* 18: 'If the defendants state true but discreditable facts about the plaintiff, or seek assignments of debts due from him and demand simultaneous payment so as to bankrupt him, the unusualness of the conduct suggests that its purpose is something other than trading self-interest.' Heydon is, however, of the view that stating true and discreditable facts about the plaintiff may be evidence of malice: at 18.

¹⁰⁰ [1994] 1 All ER 188, 198 (Stuart-Smith J), 208 (Evans J).

¹⁰¹ [1991] Ch 391, 396–7 (Browne-Wilkinson V-C). See also *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747.

¹⁰² *Femis-Bank* [1991] Ch 391, 396–7.

on the grounds of the public interest in the defendants' right of free speech¹⁰³ and in alerting investors and regulatory authorities of possible malfeasance by financial institutions,¹⁰⁴ and that the case against the defendants was, 'on balance, ... not a very strong one'.¹⁰⁵ In the same vein, the English Court of Appeal in *Fraser v Evans* relied on the rationale of the public interest in disclosing truths.¹⁰⁶ It was said that where the statement in question is confidential, the courts are more prepared to grant to the person to whom the duty of confidentiality (or 'good faith')¹⁰⁷ is owed, an injunction to restrain publication.¹⁰⁸ Significantly, the Court added that there may be 'some cases of breach of confidence which are defamatory, where the court might intervene, even though the defendant says he intends to justify.'¹⁰⁹

Hence, whilst the judicial discretion to grant the equitable remedy of an injunction will be exercised only in clear cases, this also aptly demonstrates that there is no blanket rule against injunctions to restrain defendants from making allegedly defamatory statements in the tort of conspiracy. Thus, in appropriate cases, such as *Gulf Oil*,¹¹⁰ an injunction to restrain a conspiracy to publish defamatory statements may be granted. In this regard, bearing in mind that the granting of injunctions is discretionary in nature (as compared with awarding common law damages which is as of right), the blanket rule against recovery for non-pecuniary loss of reputation in the tort of conspiracy appears anomalous.

With respect to the functions and elements of the tort of conspiracy, it is noted that there are two potential objections to recovery for loss of reputation which would need to be overcome: (1) the perceived circumvention of the defence of justification in the law of defamation; and (2) the anomalies inherent within the tort of conspiracy itself.

The first objection argues that allowing recovery for loss of reputation in simple conspiracy is tantamount to improperly circumventing the complete defence of justification in defamation law. A few points may be made in response. First, as discussed in Part III(A) above, truth and reputation are not coterminous concepts. Further, it has already been argued in Parts III(B)–(C) that the publication of a truth may amount to a civil wrong in conspiracy and the law of confidence, even if the publication is completely protected under defamation law. Secondly, the elements of a conspiracy action are materially different from those of a defamation action. Defamation is generally a strict liability tort where

¹⁰³ Ibid 400.

¹⁰⁴ Ibid 401.

¹⁰⁵ Ibid

¹⁰⁶ [1969] 1 QB 349, 360 (Lord Denning MR).

¹⁰⁷ Ibid 361 (Lord Denning MR).

¹⁰⁸ Ibid. See *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408: limited injunction restraining the publication of information concerning breaches of racing rules obtained in breach of confidence to only police and jockey club, not to general public, notwithstanding that the defendants were prepared to justify the information; *Cream Holdings Ltd v Banarjee* [2005] 1 AC 253: on the higher threshold for the grant of interlocutory injunctions in the context of *HRA* s 12(3).

¹⁰⁹ *Fraser v Evans* [1969] 1 QB 349, 362 (Lord Denning MR).

¹¹⁰ [1987] Ch 327, 334 (Parker LJ), 334 (Ralph Gibson LJ), 334 (Browne-Wilkinson V-C).

the intention of the defamer is irrelevant.¹¹¹ In the tort of simple conspiracy, however, it must be proved that there was an agreement by two or more persons to do acts for the sole or predominant object of causing injury to another person. Where it is shown that the defendants, in acting in the manner they did, were merely protecting their self-interests or some legitimate interests, the cause of action in conspiracy cannot be sustained.¹¹²

Legitimate interests may consist of the defendants' aims to remove social injustices¹¹³ and protect the vulnerable from harm.¹¹⁴ As discussed above,¹¹⁵ these legitimate interests are not inconsistent with the notion of the public interest (such as in alerting members of the public to the unsavoury reputation of the plaintiff). Only where the defendant-conspirators have acted out of spite or ill-will, rather than any self-interest or other legitimate interests, is the requirement of intention in simple conspiracy satisfied.¹¹⁶ A conspiracy to harm the plaintiff out of personal vindictiveness on the part of the defendants, which involved conduct going beyond the latter's formal powers would, for instance, be unjustified.¹¹⁷ It should also be pointed out that even in cases of unlawful means conspiracy (where there is no necessity to show a predominant or sole motive to harm the plaintiff), the courts have held that, in order to satisfy the requisite intention to injure, the defendants must aim or direct the harm at the plaintiff.¹¹⁸ Hence, the requirement of intention to injure in simple conspiracy is relatively stringent compared with the tort of defamation, which does not require an intention to defame. The high-threshold requirement of 'intention' in the tort of conspiracy thus serves as a form of 'internal' control which prevents the opening of the floodgates to litigation and the creation of indeterminate liability in respect of recovery for non-pecuniary loss of reputation.

The second objection highlights the fact that the tort of conspiracy itself appears to be premised on the incongruous 'magic of plurality' concept. This concept refers to the anomalous situation whereby the commission of an act by two or more persons may attract liability whilst the same act, committed by a

¹¹¹ There are, however, limited exceptions to the general principle: see *Defamation Act 1996* (UK) c 31, s 2 provides a procedure whereby '[a] person who has published a statement alleged to be defamatory of another may offer to make amends'; *O'Shea v MGN Ltd* [2001] EMLR 40: strict liability doctrine did not apply in a case of a photograph published by the defendants which was a 'look-alike' of the plaintiff.

¹¹² See, eg, *Mogul Steamship Co Ltd v McGregor Gow* [1892] AC 25; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1945] AC 435.

¹¹³ For example, removing racial discrimination: *Scala Ballroom (Wolverhampton) Ltd v Ratcliffe* [1958] 3 All ER 220.

¹¹⁴ For example, protecting employees from prostitution: *Brimelow v Casson* [1924] 1 Ch 302.

¹¹⁵ See above nn 101–6 and accompanying text.

¹¹⁶ *Quinn v Leatham* [1901] AC 495. Heydon sets out the arguments for and against treating spiteful action as prima facie tortious: above n 98, 128–32.

¹¹⁷ See, eg, *Huntley v Thornton* [1957] 1 All ER 234, 249 (Harman J): defendants' conspiracy to expel the plaintiff from the union for not participating in a strike was regarded as inflicting 'punishment for personal reasons'.

¹¹⁸ See *Douglas v Hello! Ltd [No 3]* [2006] 1 QB 125, 174–5, 181–6 (Lord Phillips MR, Clarke and Neuberger LJJ); *Mainstream Properties Ltd v Young* [2005] EWCA Civ 861 (Unreported, Sedley, Arden LJJ and Aikens J, 13 July 2005) [218] (Arden LJ). The test of foresight by the defendants of harm to a plaintiff was insufficient to ground the intention to injure: *Lonrho plc v Fayed* [1990] 2 QB 479, 494 (Woolf LJ).

single person, does not.¹¹⁹ It is argued that the above objection should be tempered in light of the following viewpoints. First, the requirement of the intention to injure in the tort of conspiracy itself underlies the significance of the tort as a form of deterrence against the commission of intentional acts to injure another person without legitimate interests justifying that conduct, regardless of whether the intentional acts were committed singly or collectively. Secondly, from a practical perspective, the tort of simple conspiracy is ‘too well-established to be discarded’¹²⁰ despite its slightly anomalous nature. Indeed, the second objection, attacking, as it were, the very jurisprudential basis of the tort of conspiracy itself, clearly reaches beyond the narrow confines of this essay, which deals specifically with recovery for loss of reputation in the tort of conspiracy for defamatory but true statements. Finally, the aim of this article is a modest one as it merely seeks to argue for allowing recovery for loss of reputation in restricted circumstances within the tort of conspiracy. This aim does not, and will not, unduly widen the sphere of influence of the tort of conspiracy.

VI ALLEVIATING THE UNCERTAINTY OF LOSS PROBLEM: PROOF OF LOSS OF REPUTATION

Part V examined the issue of liability arising from defamatory but true statements in the tort of conspiracy. This Part will discuss whether the remedy for loss of reputation is uncertain in nature and scope, and the proposals for resolving this perceived uncertainty.

In a defamation action, the plaintiff must show that their standing has been diminished in the eyes of a reasonable third party or parties, that is, that the statement was defamatory.¹²¹ The test is whether ‘the words tend to lower the plaintiff in the estimation of right-thinking members of society generally’,¹²² whether it exposes them to hatred, contempt or ridicule,¹²³ or whether it would tend to cause others to shun or avoid them.¹²⁴ Once the above requirement of the defamatory nature of the statement is satisfied, and assuming that the statement is published of and concerning the plaintiff, liability then arises in a defamation action, unless there are viable defences. In cases of libel and certain categories of slander that are actionable per se, the remedy of loss of reputation is presumed in England. In such cases, there is no need for the plaintiff to prove that they have suffered special damage. In Australia, the position is different in that the publication of defamatory material, whether in the form of slander or libel, is actionable without proof of special damage.¹²⁵

¹¹⁹ Heydon, above n 98, 27.

¹²⁰ *Lonrho Ltd v Shell Petroleum Co Ltd [No 2]* [1982] AC 173, 189 (Diplock LJ).

¹²¹ See *McCarey v Associated Newspapers Ltd [No 2]* [1965] 2 QB 86, 105–6 (Pearson LJ) (*‘McCarey’*).

¹²² *Sim v Stretch* [1936] 2 All ER 1237, 1240 (Lord Atkin). See also *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86.

¹²³ *Parmiter v Coupland* (1840) 6 M & W 105, 108; 151 ER 340, 341–2 (Parke B).

¹²⁴ *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587 (Slesser LJ).

¹²⁵ See *Civil Law (Wrongs) Act 2002* (ACT) s 119; *Defamation Act 2005* (NSW) s 7; *Defamation Act 2006* (NT) s 6; *Defamation Act 2005* (Qld) s 7; *Defamation Act 2005* (SA) s 7; *Defamation Act 2005* (Tas) s 7; *Defamation Act 2005* (Vic) s 7; *Defamation Act 2005* (WA) s 7.

In the context of a claim for loss of reputation, Diplock LJ in *McCarey* explained that:

In an action for defamation, the wrongful act is damage to the plaintiff's reputation. The injuries that he sustains may be classified under two heads: (1) the consequences of the attitude adopted towards him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and (2) the grief or annoyance caused by the defamatory statement to the plaintiff himself.¹²⁶

With respect to non-pecuniary loss of reputation in particular, Diplock LJ continued:

Under head (1) — that is to say, the consequences of the attitude adopted towards the plaintiff by other persons — it may be possible to prove pecuniary loss, such as loss of practice or employment, or inability to obtain fresh appointments. No attempt has been made in this case to prove that. *But the major consequences under head (1) may be purely social and lie in the attitude adopted towards the plaintiff by persons with whom he comes into social or professional contact. Neither this kind of injury under head (1) nor the grief or annoyance caused to the plaintiff himself under head (2) involves pecuniary loss.*¹²⁷

Thus, with regard to the 'consequences of the attitude' adopted by third parties towards the plaintiff who has been allegedly defamed, such loss of reputation which ensues may be pecuniary or non-pecuniary (or social) in nature. Put in another way, both the pecuniary and non-pecuniary losses flow from the same source insofar as Diplock LJ's 'head (1)' of damages for loss of reputation is concerned. If recovery for pecuniary loss of reputation from head (1) is permitted, there is no good justification to disallow, as a blanket rule, the recovery of non-pecuniary losses in respect of the same head of damages.

The reluctance to allow recovery for non-pecuniary loss of reputation may lie in the uncertainties that damage had in fact occurred.¹²⁸ To alleviate any concerns about the uncertainties surrounding damage to reputation, it is suggested that such non-pecuniary loss of reputation should be proved as general damages in a conspiracy action even though these damages would normally be presumed under the law of defamation. The presumed damages rule in defamation law applies to libel and certain categories of slander which are actionable per se.¹²⁹ In order to prove non-pecuniary loss of reputation as general damages in a conspiracy action, the plaintiff would be required to adduce some evidence of adverse perceptions or attitudes of other persons towards the plaintiff arising from the defamatory statements published by the defendants, even if such perceptions and attitudes do not translate, or are not capable of being translated

¹²⁶ [1965] 2 QB 86, 107. On the purposes of damages for defamation: see also *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60 (Mason CJ, Deane, Dawson and Gaudron JJ): consolation for the plaintiff's personal distress and hurt, reparation for harm done to the plaintiff's reputation and vindication of the reputation; *John v MGN Ltd* [1997] QB 586, 607 (Bingham MR).

¹²⁷ *McCarey* [1965] 2 QB 86, 108 (emphasis added).

¹²⁸ See Burrows, above n 26, 312.

¹²⁹ See John Murphy, *Street on Torts* (2007) 534–6.

into, quantifiable monetary terms. Evidence of such loss of reputation in a conspiracy action may include evidence of a loss of social or professional contact, as well as a general loss of business reputation.

On the other hand, where the loss of reputation in question would have to be proved as special damages in a defamation action, it is suggested that such loss would have to be proved in a similar manner in a conspiracy action. The plaintiff would have to prove causation of damage and that the damage was not too remote.¹³⁰ Under English law, this applies to cases of slander that are not actionable per se. However, as mentioned above,¹³¹ in Australia, the distinction between slander which is not actionable per se, and libel (and specific categories of slander) which is actionable per se, is not applicable, meaning that the publication of defamatory material of any kind is actionable without proof of special damage.

In contrast to the proof of general damages suggested above, claims for special damages in conspiracy must be specifically pleaded. It is noted that in the context of defamation, actual damage which must be specifically proved may include non-financial (though material) losses.¹³² In addition to actual financial losses flowing from the loss of reputation, such non-financial loss of reputation should be proved in a conspiracy action.

One issue remains as to whether such non-pecuniary losses may, at the very least, be tagged onto pecuniary losses, assuming the latter is recoverable in the first place. The case of *Quinn v Leathem*,¹³³ which was cited by Dillon LJ in *Lonrho*¹³⁴ in the context of conspiracy, suggests this is feasible. However, Evans and Stuart-Smith LJ in *Lonrho* appear to have foreclosed such a possibility,¹³⁵ without providing any reasons for doing so. On the other hand, *Pratt v British Medical Association*¹³⁶ suggests that a plaintiff can recover from the defendants, damages for pecuniary as well as non-pecuniary losses for injured feelings, although the latter appears to be tagged onto the former. The Court stated that the plaintiffs are not limited to actual pecuniary damages and that once the actual financial losses are proved, the Court will award 'a sum appropriate to the whole circumstances of the tortious wrong inflicted.'¹³⁷ In this regard, McCardie J took into account the 'long period for which [the plaintiffs] respectively suffered humiliation and menace.'¹³⁸

¹³⁰ See *Slipper v British Broadcasting Corporation* [1991] 1 QB 283, 296 (Stocker LJ), relating this to the issue of 'natural and probable consequences or foreseeability'.

¹³¹ See above n 125 and accompanying text.

¹³² See, eg, *Davies v Solomon* (1871) LR 7 QB 112, where actual damage included loss of hospitality of friends; *Lynch v Knight* (1861) 9 HL Cas 577, where actual damage included loss of consortium. On the facts in *Lynch v Knight* (1861) 9 HL Cas 577, Lord Brougham found that the special damage was not 'the natural and probable' effect of the slander: at 591. Similarly, Lord Cranworth found that the special damage was not the 'natural result' of the slander: at 595. On the other hand, Lord Wensleydale took the view that there is no remedy for loss of consortium in defamation as it is non-pecuniary: at 598–9.

¹³³ [1901] AC 495.

¹³⁴ [1994] 1 All ER 188, 193.

¹³⁵ *Ibid* 203 (Stuart-Smith LJ), 210 (Evans LJ).

¹³⁶ [1919] 1 KB 244. This is a case on the tort of inducement of a breach of contract.

¹³⁷ *Ibid* 281 (McCardie J).

¹³⁸ *Ibid* 282.

VII TOWARDS RESTRICTED RECOVERY FOR LOSS OF REPUTATION:
TENTATIVE SUGGESTIONS AND CONCLUDING REMARKS

From the analysis and critique of *Lonrho* above, it is clear that there should not be a blanket prohibition on recovery for non-pecuniary loss of reputation in the tort of conspiracy. The underlying premises based on the exclusive domain and truth arguments cannot be sustained. It has also been argued that, in certain circumstances, the publication of defamatory but true statements cannot be justified. In addition, the stringent requirements under the tort of conspiracy (in particular, the requirement of an intention to injure) and the proposals for proving loss of reputation in simple conspiracy would serve to allay the concerns of indeterminacy of liability and losses flowing from the publication of the allegedly defamatory but true statements.

What should be the criteria for determining whether loss of reputation is recoverable in the tort of simple conspiracy? Apart from the legal elements of the tort of simple conspiracy, this article proposes that the following three criteria be used:

- 1 the statement must be defamatory;
- 2 there must not be any undue circumvention of the law of defamation; and
- 3 recovery for loss of reputation in simple conspiracy must be subject to proof.

A The Statement Must Be Defamatory

Loss of reputation is distinct from other non-pecuniary losses. In respect of the former, the plaintiff's standing in the eyes of a third party must be lowered as a result of the statement published by the defendants. If the statement is not defamatory, the plaintiff would have to explore suing for alternative non-pecuniary losses such as mere injury to feelings or mental distress. The presence of a defamatory statement should thus be one threshold requirement for considering whether loss of reputation is recoverable in the first place.

B There Must Not Be Any Undue Circumvention of the Law of Defamation

Where there is strong evidence that the plaintiff was unduly circumventing the substantive legal obstacles in the tort of defamation (such as the defence of justification), the court should not allow recovery for non-pecuniary loss of reputation via simple conspiracy. To ascertain whether there is 'undue circumvention' of the law of defamation, the court should take into account the following factors:

- The manner and circumstances in which the defamatory but true statements were published. In particular, the court may ask:
 - Was the defendants' conduct in procuring the publication of the defamatory statements unprovoked?
 - Was the plaintiff's conduct towards the defendants entirely 'innocent'?

- The value of free speech and whether it may be outweighed by contrary evidence of a strong adverse impact on the public interest, or harm to others, arising from the publication of the defamatory statement. In particular, the court may ask:
 - Would the ‘exposure’ of the plaintiff(s) by the defendants serve any particular public interest?
 - Would the withholding or non-disclosure of the defamatory but true statement cause harm to others?

In Part III(A) above, the article discussed the significance of the freedom of speech and the reputational interests of the victim, which are to be balanced with the factors relating to the parties’ conduct and the public interests referred to in Part V above. These factors are generally consistent with the concepts of ‘self-interest’ and ‘legitimate interests’ in the tort of conspiracy. Indeed, these concepts in the tort of conspiracy, together with the stringent requirement of an intention to injure, serve as ‘control mechanisms’ to address the concern of indeterminate liability. It has also been argued that, in a particular case, the court may have to undertake a balancing exercise of the factors and interests to determine whether a conspiracy action has been made out to allow recovery for loss of reputation where the statement concerned is defamatory. This is akin to, although not precisely the same as, the general approach adopted in *Femis-Bank*¹³⁹ and *Gulf Oil*.¹⁴⁰

C Recovery for Loss of Reputation in Simple Conspiracy Must Be Subject to Proof

The purpose of requiring proof is to alleviate any concerns regarding uncertainty of damage. Courts should require evidence of the alleged non-pecuniary loss of reputation in simple conspiracy, whether as general or special damages. Alternatively, courts should at least allow non-pecuniary loss of reputation to be tagged onto proven pecuniary losses.

As a final note, the ratio in *Lonrho* that non-pecuniary loss of reputation is not recoverable in the tort of conspiracy should be restricted to its particular facts. The case should not serve as a precedent to support a general blanket prohibition against loss of reputation claims in the tort of simple conspiracy. It must be pointed out that *Lonrho* is a case of simple conspiracy that involved an ongoing feud between plaintiffs and defendants who were both culpable of making defamatory statements against each other. Indeed, the campaign of one of the plaintiffs against the defendants was described by the Court as ‘ill-tempered, immoderate and obsessive’.¹⁴¹ In addition, the defendants’ defamatory remarks were true. It was also significant that there was no evidence that any adverse impact on the public interest or serious harm to others would result if the defendants withheld those facts about the plaintiffs.

¹³⁹ [1991] Ch 391.

¹⁴⁰ [1987] Ch 327.

¹⁴¹ *Lonrho* [1994] 1 All ER 188, 208 (Evans LJ).