

## CIVIL LIABILITY FOR INDUSTRIAL ACTION: UPDATING THE ECONOMIC TORTS

The advantages of an action based upon one of the "economic" or "industrial" torts for an employer faced with employee industrial action have long been apparent. The particular potency of civil liability as a strike-breaking technique lies with the use of the interlocutory or interim injunction. If the employer can successfully present a prima facie case<sup>1</sup> that the strike in question does or will amount to a tortious interference with the employer's business relations, then in almost all cases the "balance of convenience" will be seen by the court to lie in favour of maintaining the "status quo", that is, of restraining the strike until its legality can be tested.<sup>2</sup> It is unusual, once such an injunction is granted, for the action to proceed to a full trial and a possible award of damages,<sup>3</sup> for from the employer's point of view the battle has already been won. In most cases successful industrial action relies on swiftly mounting overwhelming economic pressure and on maintaining reasonable solidarity: the granting of an injunction presents strikers with a frustrating choice between losing the momentum of their campaign and being in contempt of court. The ultimate sanction for the latter, sequestration of union funds to pay fines,<sup>4</sup> is one which would scarcely appeal to most workers.

The purpose of this article is to examine several recent developments in the relevant economic torts, notably two important decisions of the House of Lords which may have a considerable bearing on the scope of these actions. There will also be a discussion of the recent amendment of the South Australian Industrial Conciliation and Arbitration Act 1972 to place substantial restrictions on the right to bring tort actions against unions involved in industrial action. This provision, the only one of its type currently operating in Australia, may, against the background of the ALP's accession to power federally and in four states, prove to be more than significant in terms of the future role of the common law.

### (1) THE ECONOMIC TORTS<sup>5</sup>

The various nominate economic or industrial torts have traditionally been set out as follows:

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1 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618. The test adopted by the House of Lords in *American Cyanamid Co Ltd v Ethicon Ltd* [1975] AC 396 is whether there is a "serious question" to be tried.

2 *NWL Ltd v Woods* [1979] 1 WLR 1294, 1305-1307 per Lord Diplock, 1308 per Lord Fraser.

3 In industrial relations terms it will only rarely be practical or desirable for an employer to drag out ill-feeling by engaging in a prolonged legal battle over liability. The cases which do go to a full trial usually involve actions brought by employees allegedly "victimized" by strike action: see eg *Williams v Hursey* (1959) 103 CLR 30; *Rookes v Barnard* [1964] AC 1129; *Latham v Singleton* [1981] 2 NSWLR 843.

4 See eg *Keogh v The Australian Workers' Union* (1902) 2 SR (NSW) Eq 265.

5 See generally *Clerk & Lindsell on Torts* (15th edn 1982) ch 15; Sykes *Strike Law in Australia* (2nd edn 1982) ch 8; Elias and Ewing, "Economic Torts and Labour Law: Old Principles and New Liabilities" [1982] Camb LJ 321.

## (a) Interference with contractual relations

This may be taken one of two forms: (i) direct interference, viz direct persuasion or inducement of a person not to perform a contract with the plaintiff;<sup>6</sup> or (ii) indirect interference, viz indirect interference with or prevention of contractual performance without any direct approach, provided that the means used consist of or include an illegal act.<sup>7</sup>

## (b) Intimidation

This occurs when A threatens B that an illegal act will be committed unless B does something which inflicts economic loss on C;<sup>8</sup> or, probably, where A threatens B with an illegal act to the damage of B.<sup>9</sup>

## (c) Conspiracy

Again there are two forms: (i) conspiracy to injure, where two or more combine to do an act which, though lawful in itself, is intended to inflict loss on the plaintiff;<sup>10</sup> or (ii) conspiracy by illegal means, where the act done in combination is itself illegal.<sup>11</sup>

There may also be an innominate tort of "unlawful interference", that is, of intentional (or even merely foreseeable) infliction of economic loss by unlawful means.<sup>12</sup>

The more logical division is between those torts which require the use of independent illegal means, ie indirect contractual interference, intimidation, conspiracy by illegal means and of course the innominate tort; and those which do not, ie direct contractual interference and conspiracy to injure. In the case of the latter two, the unlawful element is said to flow, respectively, from the direct inducement of the plaintiff's contractual partner and the element of combination. In the following discussion the traditional division will be observed, although it will become evident that with the recognition of the innominate tort a simpler pattern of liability, based on the presence or absence of illegal means, is in the process of emerging.

**(2) CONTRACTUAL INTERFERENCE**

In *Torquay Hotel Co Ltd v Cousins*<sup>13</sup> Lord Denning MR declared that

"The principle of *Lumley v Gye* ((1853) 2 E. & B. 216) is that each of the parties to a contract has a 'right to the performance' of it: and it is wrong for another to procure one of the parties to break it or not to perform it . . . The time has come when the principle should be further extended to cover 'deliberate and direct interference with the execution of a contract without that causing any breach'."<sup>14</sup>

He went on to explain,

"The interference is not confined to the procurement of a *breach*

6 See eg *South Wales Miners Federation v Glamorgan Coal Co Ltd* [1905] AC 239.

7 See eg *DC Thomson & Co Ltd v Deakin* [1952] Ch 646; *Woolley v Dunford* (1972) 3 SASR 243.

8 *Rookes v Barnard* [1964] AC 1129.

9 *Ibid* 1205, 1209 per Lord Devlin — so called "two party intimidation".

10 See eg *Sorrell v Smith* [1925] AC 700; *McKernan v Fraser* (1931) 46 CLR 343; *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435.

11 See eg *Williams v Hursey* (1959) 103 CLR 30.

12 See *infra* at n 61ff.

13 [1969] 2 Ch 106.

14 This was the question left open by Lord Reid in *JT Stratford & Son Ltd v Lindley* [1965] AC 269, 324.

of contract. It extends to a case where a third person *prevents* or *hinders* one party from performing his contract, even though it be not a breach."<sup>15</sup>

In that case the defendants had induced an oil company not to perform its contract with the plaintiff. However the contract excused failure to perform where due, inter alia, to labour disputes. This was construed by the majority of the Court of Appeal (Russell and Winn LJ) not as modifying the primary obligation to perform but as excluding the secondary obligation to pay damages for non-performance:<sup>16</sup> hence on this view the defendants had induced a breach, albeit one not actionable by the plaintiff. Lord Denning on the other hand assumed that there was no breach at all, but found liability on the basis of the principle set out above.<sup>17</sup>

It is important to note that Lord Denning was dealing with direct interference, that is, where liability may attach without the means used being unlawful per se.<sup>18</sup> The suggestion that liability may attach for persuading a contracting party to do something that is perfectly lawful has attracted a great deal of criticism,<sup>19</sup> particularly as it has frequently been accepted without comment by judges as now representing the law.<sup>20</sup> For example in *Woolley v Dunford*<sup>21</sup> Wells J apparently adopted the Denning reformulation in his analysis of the tort.<sup>22</sup>

In *Merkur Island Shipping Corp v Laughton*<sup>23</sup> the House of Lords appears to have confirmed, in a somewhat unsatisfactory way, the

15 Supra n 13 at 138.

16 Ibid 143, 146-147. For the language of "primary" and "secondary" obligations, see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848-851 per Lord Diplock.

17 Ibid 137, 140.

18 Lord Denning makes this absolutely clear: ibid 138. However note that the example he gives (at 137) of unlawful interference short of breach (defendant poisoning singer to prevent performance, presumably thus producing frustration of the singer's contract) is obviously explicable as an example of (indirect) interference by unlawful means: as to which see infra at n 28ff. Moreover in his *Casebook on Torts* (4th edn 1979) 531-532, Weir points out that *Torquay Hotel* itself should have been treated as a case of indirect interference: when the defendants communicated with the oil company they were not "persuading" at all, for they had already prevented performance by calling out the tanker drivers. The case was therefore one of indirect prevention by unlawful means. Indeed, if it had been that the company were persuaded not to perform when it would otherwise have done so, then the exemption clause, which required a "circumstance . . . not within [its] immediate control", would not have protected it from being in breach, making the defendants liable for (orthodox) direct inducement.

19 See eg Weir, ibid; Clerk & Lindsell, supra n 5 at §15-05; *Winfield & Jolowicz on Tort* (11th edn 1979) 480-481; Elias and Ewing, supra n 5 at 328-329; Richardson, "Interference with Contractual Relations: Is *Torquay Hotel* the Law in Canada?" (1983) 41 U Tor Fac L Rev 1. Cf Sykes, supra n 5 at 217-218.

20 See particularly the Canadian cases discussed by Richardson, supra n 19.

21 (1972) 3 SASR 243.

22 Ibid 267. However Wells J also states as a separate proposition that it is sufficient for a non-actionable breach to be induced (ibid): this of course is the (majority) ratio of *Torquay Hotel* and one would have thought it to be a fortiori if Denning's view is accepted. The suspicion that Wells J may have confused the two, intending only to support the more restricted view, is strengthened by his reference (ibid 280) to "conduct that brings about an interference with due performance of a contract but falls short of a technical breach". Emphasis supplied. However of the terms of his conclusion (ibid 292) as to the possibility of a force majeure clause preventing the relevant non-performance amounting to a breach.

23 [1983] 2 WLR 778.

extension from inducing breach to "mere" interference. It was alleged that the defendant unionists had, in order to further a dispute with the plaintiff shipowners, induced tugmen and lockmen at a British port to break their contracts of service and refuse to enable the ship to leave port, thereby interfering with the performance of the agreement whereby the ship was chartered from the plaintiffs. The charter provided that the charterers were not liable for loss of time due to the vessel being boycotted and indeed gave them the right to cancel the contract if more than ten days were lost. Lord Diplock (who gave the leading judgment) nonetheless considered that the tort of contractual interference was *prima facie*<sup>24</sup> made out. He said that tortious interference included "all prevention of due performance of a primary obligation" even where "no secondary obligation to make monetary compensation thereupon came into existence", and referred to the "judgments" of the Court of Appeal in *Torquay Hotel*.<sup>25</sup> This might have been construed as an approval of the more restricted proposition embodied in the majority judgments in that case. However Lord Diplock went on to quote Lord Denning's amended definition of "interference" with apparent approval.<sup>26</sup>

It is arguable that Lord Diplock's acceptance of the Denning reformulation was unnecessary to the decision in the case before him.<sup>27</sup> *Merkur* was clearly a case of indirect interference by unlawful means. Now it makes perfect sense to recognise that the doing of an illegal act which indirectly hinders or prevents performance should be actionable even where no suggestion of breach arises.<sup>28</sup> If there is indeed a generalised tort of interference with business relations (contractual or not) by unlawful means,<sup>29</sup> then clearly it can and will be argued that indirect contractual interference is only a sub-category of that tort. If it is tortious to interfere with business generally, then it becomes completely unnecessary to decide whether any breach has been induced, or indeed whether there is a contract at all. On the facts in *Merkur* the defendants had clearly interfered with the plaintiff's business and contractual relations and were thus liable by reason of their use of illegal means. It must be emphasised again that Lord Denning was contemplating liability for direct persuasion of a contracting party. In that situation there is clearly room for the argument that

"if you persuade a man not to do something he would otherwise have done, you are liable only if he was bound to do it; if he was not bound to do it, he must be free not to do it and you must be free to persuade him not to do it by all lawful means."<sup>30</sup>

Nevertheless if the concept of direct interference has indeed been extended, and if that extension is accepted by an Australian court, what

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24 The case eventually turned on whether the defendants could claim statutory immunity from this liability, a point decided against them: *ibid* 788-790.

25 *Ibid* 786.

26 *Ibid*.

27 See Wedderburn, "Lawmakers and Craftsmen" (1983) 46 MLR 632, 634.

28 See eg *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 WLR 67 where the interference was indirect, consisting of attempts to "hinder" the plaintiff's supply of newspaper copy for printing to another company by inducing the plaintiff's journalists to refuse to work. The Court of Appeal accepted that an injunction should be granted against such interference, even though the attempts to stop performance had not yet been successful: *ibid* 74 per Griffiths LJ, 78 per Sir John Donaldson MR.

29 See *infra* at n 61ff.

30 Weir, *supra* n 18 at 532.

sort of conduct short of breach need the plaintiff show has been induced? There appear to be a number of possibilities:

(a) Non-performance which, for some "technical" reason, does not amount to breach.<sup>31</sup> The problem is one of definition. Could it be said for instance that non-performance excused by a force majeure clause modifying the primary obligation to perform, a modification negotiated by parties of roughly equal bargaining power and agreed to by the plaintiff, would only "technically" not be a breach?

(b) Non-performance, in circumstances which would amount to frustration of the contract. This may well have been the situation Lord Denning originally envisaged.<sup>32</sup> But again it must be remembered that we are dealing with direct inducement: it is difficult to envisage a situation where a contract could be said to be frustrated by one party's being persuaded into non-performance, rather than being prevented by indirect interference.<sup>33</sup>

(c) Performance other than that normally expected by the plaintiff. In *Torquay Hotel Winn LJ*, while not committing himself to Lord Denning's view, commented:

"I think it can at least be said, with confidence, that where a contract between two persons exists which gives one of them an optional extension of time or an optional mode for his performance of it, or of part of it, but from the normal course of dealing between them, the other person does not anticipate such postponement, or has come to expect a particular mode of performance, a procuring of the exercise of such option should, in principle, be held actionable if it produces material damage to the other contracting party."<sup>34</sup>

This appears to be the most extreme version, suggesting as it does that contractual expectations derived merely from previous conduct or dealings can be equated with binding obligations for the purpose of protection. The epithet "legitimate", occasionally suggested to denote those expectations worthy of protection, is of little help. The bottom line is that on this view it must surely be tortious to persuade a contracting party lawfully to terminate a contract which might have been expected by the plaintiff to continue. The obvious case is that of an employee who is induced to leave one firm's service by a better offer from a competitor:<sup>35</sup> if the first employer's expectation is not "legitimate" in that situation, then what expectation could ever be? Yet to impose liability would be absurd.

31 See eg *Woolley v Dunford* supra n 21 at 280 per Wells J; Sykes, supra n 5 at 218.

32 As for instance in the example he gave: supra n 18.

33 The "frustration" would of course be self-induced: see *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524.

Clerk & Lindsell, supra n 5 at §15-05, n 87, suggests that the "new tort . . . goes no further than cases in which the defendant has deliberately *brought about an event* which would terminate the contract by reason of frustration". Emphasis supplied. The author (Lord Wedderburn) apparently thus fell into exactly the same mistake of which he was later to accuse Lord Diplock, that is, of confusing direct and indirect interference (supra n 27). The language used clearly suggests a situation of indirect prevention rather than direct persuasion.

34 Supra n 13 at 147.

35 See Weir, supra n 18 at 531.

This latter suggestion, that it is unlawful to persuade an employee to terminate their employment by proper notice, has fundamental implications when the defendant is a union taking industrial action. As will be seen, from the point of view of civil liability almost all strikes are illegal, since each employee's withdrawal of labour almost inevitably, without more, amounts to a breach of contract:<sup>36</sup> a strike instruction thus becomes a direct inducement of breach actionable by the employer, which in turn may found the illegal means for indirect interference with the employer's commercial relations (contractual or otherwise). However one situation where strikers are not in breach is where they give concerted notice of their intention to leave their employer's service altogether.<sup>37</sup> While this is a drastic step (and somewhat futile if a practical alternative source of labour is available), it did at least, before *Torquay Hotel* and *Merkur*, appear to be the one way of ensuring that no civil liability was incurred, at least if breach of contract was an essential part of the plaintiff's case.<sup>38</sup> If the new development is carried to its logical but undesirable conclusion then the possibility of lawful strike action will, in the absence of statutory intervention, have completely disappeared.

### (3) INTIMIDATION

The landmark decision in *Rookes v Barnard*,<sup>39</sup> in which the House of Lords "rediscovered" the tort of intimidation, has been further confirmed as good law in Australia. In *Latham v Singleton*<sup>40</sup> Nagle CJ, in finding that most of the defendant unionists had conspired to intimidate the Broken Hill City Council into dismissing the plaintiff, supplied what had previously been lacking, an extensive analysis of the tort.<sup>41</sup> The judgment raises two particular issues which require comment. The first is the question of whether a strike amounts to a breach of the workers' contracts of employment, and if so whether such breach may supply the illegal means necessary for this tort. The second issue surrounds the availability of a defence of justification to those engaged in industrial action. Since both these problems are relevant not only to intimidation but to the other "illegal means" torts, they will be examined later in some detail.<sup>42</sup>

### (4) CONSPIRACY

In *Lonrho Ltd v Shell Petroleum Co Ltd*<sup>43</sup> the plaintiff owned a pipeline used by the defendant oil companies to supply oil to what was then Southern Rhodesia. After the government of that country made its "unilateral declaration of independence" in 1965 the British Parliament legislated to apply sanctions — in particular an Order-in-Council prohibited the supply of oil to the illegal regime. In compliance with this Lonrho closed its pipeline. Lonrho alleged that Shell, BP and the other major companies had broken the order by continuing to supply oil by

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36 See *infra* at n 103ff.

37 See *infra* at n 108ff.

38 But see *infra* at nn 138-139.

39 [1964] AC 1129.

40 [1981] 2 NSWLR 843.

41 For earlier Australian cases approving *Rookes* see *Sid Ross Agency Pty Ltd v Actors & Announcers Equity Association of Australia (No 2)* [1971] 1 NSWLR 760; *Pierce v Annis-Brown*, unreported, NSW District Court, Newton J (1971).

42 See *infra* at n 103 ff and at n 140 ff.

43 [1981] 2 All ER 456.

other means, thus weakening the sanctions and prolonging the period of the pipeline's disuse, to the detriment of its owner. The dispute went to arbitration and eventually reached the House of Lords, which held that the allegation disclosed no cause of action. Lonrho's first argument, that the defendants had unlawfully caused loss to its business, was dismissed on the ground that no illegal means had been employed: this is discussed later.<sup>44</sup> The House also rejected the claim that the defendants had conspired to cause loss to Lonrho.

The leading judgment of Lord Diplock on this latter head of claim has important ramifications for the tort of conspiracy by illegal means. It had always been trite law that a clear distinction should be drawn between this form of conspiracy and "simple" conspiracy to injure. In the case of the latter everything turns on proof of a specific intent to injure the plaintiff on the part of those combining: "if the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie".<sup>45</sup> This is not just a defence, with the onus lying on the defendants to prove "just cause and excuse": rather the necessary intent to injure the plaintiff as the predominant motive of the conspiracy, as opposed to "legitimate" self-interest, is an element of the tort itself, so that the burden falls on the plaintiff to establish it.<sup>46</sup> However it has always been assumed that no such specific or predominating intent need be shown where the conspiracy involves the use of illegal means: where that is the case proof of intent to injure is sufficient and the defendant's ultimate objective of self-interest becomes irrelevant. Thus Viscount Cave's proposition, quoted above, was said to assume "the absence of means which are in themselves unlawful".<sup>47</sup> The practical consequences of the distinction are clear from *Williams v Hursey*.<sup>48</sup> There Taylor and Menzies JJ stressed that the trial judge's finding, that "the predominating purpose of the conspiracy was not malevolent but to assert a claim of majority rule in union affairs", negated the possibility of liability on a conspiracy to injure.<sup>49</sup> Nevertheless they proceeded to base liability on conspiracy by illegal means, Menzies J stating that

"if there was an actionable conspiracy, it was because the agreement which formed the conspiracy was an agreement to do something that was positively unlawful, whether as a means or as an end. If this was the case *it cannot be justified* as being in defence of the federation's rights or interests."<sup>50</sup>

In *Lonrho* it was argued that there had been a conspiracy to injure the plaintiff by means of an illegal act, viz, contravention of the sanctions

44 See *infra* at n 123ff.

45 *Sorrell v Smith* [1925] AC 700, 712 per Viscount Cave LC. See also *McKernan v Fraser* (1931) 46 CLR 343; *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435.

46 *Ibid* 726 per Lord Dunedin, 748 per Lord Buckmaster; *Crofter* *supra* n 45 at 459 per Lord Thankerton, 471-472 per Lord Wright, 495 per Lord Porter. This was confirmed by Lord Diplock in *Lonrho* *supra* n 43 at 463-464.

47 *Ibid* 714. The same is evidently true in the judgments in the leading cases on the legitimate trade interest "defence": *Crofter* and *McKernan v Fraser* *supra* n 45.

48 (1959) 103 CLR 30.

49 *Ibid* 105, 123-124.

50 *Ibid* 124. Emphasis supplied. Whether or not that statement can now be considered accurate to the extent that there is no possibility of a true defence of justification being pleaded is considered later: see *infra* at n 140ff.

order. It was assumed that the defendants had acted in furtherance of their own commercial interests, so that a simple conspiracy to injure obviously could not be proved. Lord Diplock took the opportunity, in finding for the defendants, to attack the notion that there is any magic in the fact of combination, that is, that "a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise".<sup>51</sup>

"To suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or BP does not exercise greater economic power than any combination of small businesses is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of the 1939-45 war."<sup>52</sup>

That view obviously has considerable force: and the placing of the onus on the plaintiff to prove lack of legitimate self-interest has "made conspiracy to cause damage by lawful means a tort which is very hard to commit".<sup>53</sup> However Lord Diplock, conceding that the tort was "too well-established to be discarded, however anomalous it may seem today", went on to conclude that all forms of conspiracy should be confined within "those narrow limits that are all that common sense and the application of legal logic of the decided cases require", that is, to cases where acts are "done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff".<sup>54</sup> Thus specific intent must also be proved even where illegal means are used: and Lonrho, if they could not prove as conspiracy to injure, could not establish a conspiracy by illegal means either.

It is suggested that this conclusion is unnecessary and wrong. On the facts before Lord Diplock the only question that arose was whether the defendants could be liable for conspiracy to break the sanctions order. There seemed to be two clear reasons against liability. The first was that any intent to injure the plaintiff was lacking, let alone a specific or predominant intent. The defendants, on the facts assumed, did not "aim" their acts at Lonrho at all — they merely caused loss as an incidental effect of their own dealings.<sup>55</sup> Secondly, they could not be liable as the breach of the sanctions order did not constitute unlawful means. This, rightly or wrongly, was the reason for denying that unlawful interference was made out,<sup>56</sup> and assuming that there is no distinction between

51 *Mogul Steamship Co v McGregor, Gow & Co* (1889) 23 QB D 598, 616 per Bowen LJ.

52 *Supra* n 43 at 464. And see Elias and Ewing, *supra* n 5 at 324-325.

53 Heydon, "The Defence of Justification in Cases of Intentionally caused Economic Loss" (1970) 20 U Tor LJ 139, 151. This was recognised by Evatt J in *McKernan v Fraser* *supra* n 45 at 410.

54 *Supra* n 43 at 464.

55 See Wedderburn, "Rocking the Torts" (1983) 46 MLR 224, 227-228; Elias and Ewing, *supra* n 5 at 337. For the question of "intention" in the economic torts see *infra* at n 69ff.

56 See *infra* at n 123ff.



conspiracy and the innominate tort as to the concept of illegal means,<sup>57</sup> then surely the conclusion must be the same in each case.

What is more, Lord Diplock apparently missed the obvious point that conspiracy by illegal means is not, unlike simple conspiracy, used to make illegal an act done by two persons which would be legal if done by one of them alone. As long as the innominate tort of unlawful interference is recognised in some form, as seems now clearly to be the case,<sup>58</sup> then the doing of any act amounting to illegal means with the requisite intention will ground liability: thus there is no need to rely on the fact of combination. The function of conspiracy by illegal means is effectively to ensure that all persons involved in bringing about the interference with the plaintiff's economic interests are "roped in" and made liable, especially those not directly responsible for the illegal means used.<sup>59</sup> This avoids the necessity of proving that all the defendants are joint tortfeasors, a difficult problem where, for instance, mixed motives are involved. There seems nothing particularly objectionable in using conspiracy in that way, once the innominate tort is recognised. It is therefore submitted that Lord Diplock's view should be rejected and the distinction between the two forms of conspiracy maintained.<sup>60</sup>

#### (5) UNLAWFUL INTERFERENCE

It has been apparent since *Rookes v Barnard*<sup>61</sup> that there ought to exist a tort of unlawful interference with economic interests. If the threat of an illegal act to the damage of the plaintiff is a tort, then so must in all logic be its commission. There seems to be no good reason why actionable unlawful interference should be confined to the situations covered by the three relevant nominate torts, that is, either (a) where threats are issued but not carried into effect (intimidation); (b) where the defendants combine to inflict loss (conspiracy); or (c) where it is the plaintiff's purely contractual relationships which are affected (indirect contractual interference). The rationalisation of these torts into an innominate tort of causing economic loss by unlawful means has received considerable academic support.<sup>62</sup>

However judicial acceptance has been slow, possibly because in many situations where the new tort might apply courts have preferred to find one of the nominate torts established. Nevertheless there has been a steady stream of dicta supporting the tort, albeit more often than not from the crusading Lord Denning.<sup>63</sup> Moreover three recent House of

57 Cf *Rookes v Barnard* supra n 39 at 1210, where Lord Devlin rather curiously refused to commit himself to saying that a breach of contract constitutes illegal means in conspiracy, even though it was held to be such an intimidation.

58 See infra at n 61ff.

59 As for example in *Rookes v Barnard* supra n 39 and *Latham v Singleton* supra n 40, both cases of conspiracy to intimidate.

60 Of course it may be that a defence of justification should be available even in cases of illegal means, as to which see infra at n 140ff.

61 Supra n 39.

62 See eg Clerk & Lindsell, supra n 5 at §15-19; Heydon, supra n 53 at 171ff, Mitchell, "Liability in Tort For Causing Economic Loss by the Use of Unlawful Means and its Application to Australian Industrial Disputes" (1973-1976) 5 Adel LR 428; Elias and Ewing, supra n 5 at 332-351; Carty, "Unlawful Interference With Trade" (1983) J Leg Studies 193.

63 *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762, 783; *Torquay Hotel v Cousins* supra n 13 at 139; *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 1

Lords decisions lend support to the argument in its favour. In *Lonrho v Shell* Lord Diplock, while deprecating the wide definition of illegal means implicit in Lord Denning's formulation in *Ex p Island Records Ltd*,<sup>64</sup> did not disagree with the proposition that the tort does exist.<sup>65</sup> Similarly in *Merkur Shipping v Laughton* Lord Diplock stated that the evidence established a "prima facie case of the common law tort . . . of interfering with the trade or business of another person by doing unlawful acts".<sup>66</sup>

The third case is *Hadmor Productions Ltd v Hamilton*.<sup>67</sup> There the defendants were officials of a union whose members included technicians working for a television company, Thames. Concerned at Thames' increasing tendency to contract out programmes to "facility companies", to the detriment of the already poor job prospects of their members working in Thames' studios, they threatened industrial action if the station did not withdraw a series of films made by one such company, Hadmor. Thames did so, as they were entitled to do in the absence of any firm contract with Hadmor. Hadmor took the defendants to court, eventually losing on a statutory immunities point. Once again however Lord Diplock discussed the tort of unlawful interference with apparent approval, although it would seem from the terms of his judgment that he conflated the innominate tort with that of intimidation, which was clearly made out on the facts.<sup>68</sup>

One vital question left unresolved is the extent to which the defendant must be proved to have intended that harm result to the plaintiff from the unlawful act committed or threatened. One view is that it is enough if the defendants intend to commit (or presumably threaten) the act and it is foreseeable that harm will result: in other words the illegal means need not in any sense be "aimed" at the plaintiff. This seems to be the import of the notorious decision of the High Court in *Beaudesert Shire Council v Smith*<sup>69</sup> to resurrect the "action upon the case" and allow "a person who suffers harm or loss as the inevitable consequence of the unlawful intentional and positive acts of another" to recover damages in respect of that loss.<sup>70</sup> Despite stringent academic criticism<sup>71</sup> and obvious

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63 *Cont.*

WLR 1676, 1683; *Ex p Island Records Ltd* [1978] Ch 122, 136; *Hadmor Productions Ltd v Hamilton* [1981] 2 All ER 724, 732. See also *JT Stratford & Son Ltd v Lindley* [1965] AC 269, 324 per Lord Reid, 328-329 per Viscount Radcliffe; *Marina Shipping Ltd v Laughton* [1982] 1 All ER 481, 485-486 per Lawton LJ; *Sid Ross Agency Pty Ltd v Actors & Announcers Equity Association of Australia* [1970] 2 NSW 47, 52 per Else-Mitchell J. Cf *Williams v Metropolitan & Export Abattoirs Board* (1953) 89 CLR 66, 77 per Kitto J.

64 *Supra* n 63.

65 *Supra* n 43 at 462-463.

66 *Supra* n 23 at 788. Note however that the existence of the tort had been conceded by the defendants, primarily owing to their confidence of gaining immunity through s13(2) of the Trade Union and Labour Relations Act 1974 (UK). This confidence was justified: *ibid* 788. But s13(2) has now been repealed by s19 of the Employment Act 1982 (UK) and it may be that future defendants will choose to argue the point.

67 [1982] 1 All ER 1042.

68 *Ibid* 1052-1053.

69 (1966) 120 CLR 145.

70 *Ibid* 156 per Taylor, Menzies and Owen JJ.

71 See especially Dworkin and Harari, "The *Beaudesert* Decision — Raising the Ghost of the Action Upon the Case" (1967) 40 ALJ 296, 347; Dworkin, "Intentionally Causing Economic Loss — *Beaudesert Shire Council v Smith* Revisited" (1974) 1 Monash LR 4. Cf Sadler, "Whither *Beaudesert Shire Council v Smith*?" (1984) 58 ALJ 38 where it is argued that the High Court was not attempting to develop a generalised economic

judicial perplexity,<sup>72</sup> it apparently remains good authority: although it is notable that it has invariably been distinguished by later courts.<sup>73</sup> There also appears to be no English authority which directly rejects the *Beauesert* reasoning.<sup>74</sup> It is interesting however that in *Copyright Agency Ltd v Haines* McLelland J, having discussed the English cases, concluded that "if there is such a general principle of tortious liability, it seems to me that one essential criterion of its application must be the existence in the mind of the wrongdoer of a purpose or intention of inflicting injury on the plaintiff".<sup>75</sup> For this reason he doubted whether the English cases should be applied in Australia, as on that reading they conflicted with *Beauesert*.

It is clear that *Beauesert*, in so far as it represents a generalised principle of economic tort liability,<sup>76</sup> is wrong and that intention to harm the plaintiff must be established. The reason is simply that it "would create an unreasonably wide class of plaintiffs",<sup>77</sup> for anyone incidentally (but foreseeably) affected by an unlawful act could bring an action. This seems to be one instance where the "floodgates" argument is not misplaced.

However acceptance of the proposition that intention to harm must be proved does not completely solve the problem. A distinction must be drawn between the two categories typically covered by the economic torts, that is, "commercial" and "industrial" cases. In the commercial competition cases the line is drawn between

"the defendant [who] seeks unlawfully to reap a benefit directly at the expense of the plaintiff, not by coercing the plaintiff as such, but by rendering less advantageous the plaintiff's rights, eg by passing off the plaintiff's products as his own, or by knowingly entering into a contract which is inconsistent with the plaintiff's contractual rights"

and the defendant who

"has committed an unlawful act, is in competition with the plaintiff, and has by his act indirectly damaged the plaintiff's interests":<sup>78</sup>

the former is liable, the latter is not.

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71 *Cont.*

tort liability, but was merely clarifying the old conception of an action upon the case in trespass, for which naturally the unlawful act involved must be "trespassory" in nature, ie "an infringement analogous to trespass to the person, goods or land". On this basis the academic criticism directed at the decision and the suspicion displayed by courts in cases (infra n 73) where clearly *Beauesert* was irrelevant, given the lack of a "trespassory" act, is misplaced.

72 See especially *Dunlop v Woollahra Municipal Council* [1981] 1 NSWLR 76, 82.

73 *Dunlop v Woollahra* *ibid*; *Kitano v Commonwealth* (1973) 129 CLR 151; *Grand Central Car Park Pty Ltd v Tivoli Freeholders* [1969] VR 62; *Copyright Agency Ltd v Haines* (1982) 40 ALR 264. These cases are discussed infra at n 133ff.

74 In *Lonrho v Shell* supra n 43 at 463 Lord Diplock rejected *Beauesert*, but only in so far as it implied a wider formulation of "illegal means" than that accepted by the House: infra at n 125.

75 Supra n 73 at 275. See also *Latham v Singleton* supra n 40 at 872 per Nagle CJ: "[I]ntent to harm the plaintiff . . . must be the predominant object of the actor. A certain result foreseen but not aimed at is not enough."

76 Cf *Sadler*, supra n 71.

77 *Elias and Ewing*, supra n 5 at 328; *Dworkin and Harari*, supra n 71 at 348-350.

78 *Ibid* 327.

However in the industrial conflict cases, which are of primary concern, it is suggested that two situations require consideration. In the first the defendants, who are in dispute with the plaintiff, use illegal means to disrupt the plaintiff's economic interests: that is the typical case and clearly the requisite intention is established. The second situation involves the defendants, who are in dispute with X, deliberately disrupting X's business to the damage of the plaintiff, who has some business or economic link with X. At first sight that appears to be a case of loss to the plaintiff being merely foreseeable and thus not recoverable unless *Beaudesert* is accepted. The traditional example given by critics who reject a foreseeability formula is a strike in a "public utility" such as an electricity or railway company which "incidentally" causes loss to consumers or commuters: liability in such a case is (rightly) seen as unthinkable.<sup>79</sup> But on closer examination this second category does not necessarily involve (merely) foreseeable loss at all, especially in the public utility example. It can plausibly be argued that striking electricity or rail employees do actually intend that harm is caused to the public, not merely as an incidental consequence of their action but as central to their campaign. In such a case public pressure for the dispute to be settled is at least as important in coercing the employer as the direct infliction of financial loss. Again, suppose that a union in dispute with the maker of spare parts prevents supplies going out to the major car manufacturers, the intention being to disrupt the latter's business and force them to pressure the employer into a quick settlement: could not the manufacturers sue in respect of that intentional infliction of loss? It might perhaps be objected that in these cases the ultimate purpose is to strike at the employer-disputant. But that is surely to confuse intention with motive, and it is clear that in cases where illegal means are used it is the former, not the latter, that matters<sup>80</sup> — although of course the question of motivation may go to justification.<sup>81</sup>

*Hadmor Productions v Hamilton*,<sup>82</sup> the facts of which appear above, appears to be a case in point. There the dispute was with Thames, yet the action was brought by the facility company whose business was deliberately disrupted in order to further that dispute. Although the question of intention was not discussed by Lord Diplock, there is nothing to indicate that he thought it odd that Hadmor should bring the action. It might be said that the defendants were in fact in dispute with Hadmor as much as with Thames, but the facts do not bear this out. The union's objection was not to facility companies as such — indeed these companies employed union members — but rather to Thames' preference for using them in situations where the work might just as well be done by its own employees. Certainly Hadmor's business relations with Thames were tied up with the subject-matter of the dispute: but that can also be the case in the public utility example, as where the strike is over the scope or nature of the service being provided to the public.<sup>83</sup>

79 *Ibid*; Dworkin and Harari, *supra* n 71 at 349.

80 *Cf Lonrho v Shell*, *supra* n 43.

81 See *Latham v Singleton* *supra* n 40 at 872 per Nagle CJ; *infra* at n 140 ff.

82 *Supra* n 67.

83 Suppose for example that rail unions mounted industrial action to prevent rail authorities cutting fares, being concerned that increased unprofitability could put their members out of work: is not the position of a rail commuter, deliberately economically disadvantaged both by the action taken and (if successful) the terms of the demand, identical to that of Hadmor?

*Hadmor* thus represents some extension of the notion of intention to harm into this second category, where deliberate infliction of loss to the plaintiff is intended to further a dispute with someone else. There are two possibilities. Either *Hadmor* is wrong and it can correctly be concluded that "it is only the target of the industrial action, the employer<sup>84</sup> whom it is designed to coerce, who can sue";<sup>85</sup> or it is conceded that all cases of deliberate interference to further a dispute are covered by the intentional torts. Of these the first seems preferable from the point of view of policy. Given the difficulty however of distinguishing the two categories purely in terms of intention (rather than motivation), it would be preferable to recognise explicitly that the restriction is in reality concerned with standing to bring economic tort actions and thus inevitably dependent on considerations of policy.

In this connection one further class of cases requires attention. Aside from the trend towards the development of an innominate tort, it seems that there is also a nebulous equitable principle which allows injunctive relief to be given against an unlawful interference with "private" or "property" rights. The jurisdiction was invoked in two nineteenth century picketing cases<sup>86</sup> and was approved in passing by the House of Lords in *Gouriet v Union of Post Office Workers*.<sup>87</sup> Its significance was revealed in *Ex p Island Records Ltd*,<sup>88</sup> where the Court of Appeal held by a majority that recording companies and musical performers contracted to them could invoke the principle to obtain an Anton Piller order restraining "bootleggers" from making and trading in unlawful recordings of live performances.<sup>89</sup> Bootlegging is made illegal by s1 of the Dramatic and Musical Performers Protection Act 1958 (UK): but Shaw and Waller LJJ held that the section only contemplated criminal proceedings, creating on its "true construction" no civil duty enforceable by record companies or performers.<sup>90</sup> However Lord Denning MR and Waller LJ agreed that the plaintiffs had suffered special damage to their "property" right in the performances and thus an injunction should lie. Waller LJ identified as "property" the value to the parties of their contract to exploit the material: while not breaking that right as such the bootleggers' actions would naturally interfere with it by reducing potential profits.<sup>91</sup> Lord Denning, while clearly also taking that line, went further and stated the general principle that "a man who is carrying on a lawful

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84 Or a victimised employee: n 3 supra.

85 Elias and Ewing, supra n 5 at 327. The authors admit that they can find "no authority which unequivocally establishes this proposition": and *Hadmore* is not mentioned.

86 *Springhead Spinning Co v Riley* (1868) LR 6 Eq 551, 558-559 per Malins V-C; *J Lyons & Sons v Wilkins* [1896] 1 Ch 811, 826 per Lindley LJ. See also *Emperor of Austria v Day and Kossuth* (1861) 3 De G F & J 217; *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph* [1908] 1 Ch 335.

87 [1978] AC 435, 492 per Viscount Dilhorne, 506 per Lord Edmund-Davies.

88 [1978] Ch 122.

89 See Carty, "Reaping What You Have Not Sown: Bootlegging and the Record Industry" [1983] Conv 451.

90 Ibid 139 per Shaw LJ, 142 per Waller LJ. Lord Denning MR declined to "indulge in such a game of chance" and ignored the question: ibid 134-135. Despite Lord Diplock's comments in *Lonrho v Shell* that he thought that a civil action ought to be available at least to the performers, the Act being passed for their protection as a class of persons (supra n 43 at 462-463), the Court of Appeal in *RCA Corporation v Pollard* [1982] 3 All ER 771 unanimously followed *Island Records* in this regard and dismissed the comments as obiter dicta.

91 Ibid 144.

trade or calling has a right to be protected from any unlawful interference with it".<sup>92</sup>

However the existence of this independent head of relief has been placed in doubt by the comments of Lord Diplock in *Lonrho v Shell*<sup>93</sup> and their subsequent interpretation by the Court of Appeal in *RCA Corporation v Pollard*.<sup>94</sup> Apart from querying the statutory duty point,<sup>95</sup> Lord Diplock's only reference to *Island Records* was to Lord Denning's general principle, which he criticised for embodying too wide a definition of illegal means, in that it might be supplied (as in that case) by a breach of a statutory prohibition which on construction gave no civil action for damages.<sup>96</sup> What is interesting is that he referred to the Denning principle as giving an action for damages: that of course was not the case in *Island Records*, and clearly is not the import of the "property" cases generally, which are confined to injunctive relief. That confusion is in fact reflected in Denning's judgment — he cited to support his proposition not just the injunction cases but also his own dicta on the innominate tort discussed above.<sup>97</sup> It is arguable then that in *Lonrho*, an action in tort for damages, Lord Diplock was criticising the Denning formulation in so far as it purported to set out the new tort, while saying nothing of the equitable principle which also underlay the judgment and which was the only point referred to by Waller LJ.

In *RCA v Pollard* record companies again sought injunctions restraining bootleggers from contravening the 1958 Act. This time however relief was refused. It was held that the House of Lords had, through Lord Diplock's comments, overruled *Island Records*. It was inferred that Lord Diplock did not merely disapprove of the width of the Denning principle, but also intended to overrule the narrower ground relied on by Waller LJ (and of course Denning himself). Confusion prevailed at a number of levels. Lawton LJ, while correctly identifying that Waller at least was referring to a jurisdiction based upon property interests, that being different from Denning's "wide principle", concluded that Lord Diplock had also rejected an argument by Lonrho based upon the equitable jurisdiction.<sup>98</sup> Slade LJ also took this view.<sup>99</sup> It is far from evident that any such argument was raised (especially as Lonrho was seeking damages) and certainly it seems reasonable, as explained above, to assume that Lord Diplock was solely dealing with the innominate tort. Oliver LJ came to the same conclusion as his colleagues, but by different reasoning. The difficulty he saw was that if the notion of "property" was given the width implicit in Waller and Denning's judgments, so that protection was granted in cases of "merely economic damage as an incidental result of the breach of a prohibition in a statute not designed to protect the interests of a class to which the plaintiff belongs", then he saw no logical reason why Lord Denning's wide principle should be

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92 Ibid 136. Shaw LJ dissented, considering that the interest in the performances was "too nebulous and amorphous to carry the aspect of a right susceptible of legal protection": *ibid* 141.

93 *Supra* n 43 at 463.

94 [1982] 3 All ER 771: criticised by Carty, *supra* n 62 at 205; Wedderburn, *supra* n 55.

95 *Supra* n 90.

96 See *infra* at n 124.

97 *Supra* n 88 at 136: see cases cited *supra* n 63.

98 *Supra* n 94 at 778.

99 *Ibid* 785.

wrong. However he concluded that "Lord Diplock's remarks with regard to the innominate tort suggested by Lord Denning MR must . . . equally apply to the innominate tort [sic] referred to in the judgment of Waller LJ".<sup>100</sup> The confusion of the two jurisdictions is obvious. Nevertheless the key to the *Pollard* decision lies in Oliver LJ's judgment.

The problem for the Court was that they obviously disagreed with the wide definition accorded to "property" in *Island Records*, that is, as covering economic benefits expected to flow from unimpeded business relations. That seems a valid attitude, though the earlier cases discussed in *Island Records* certainly seemed to justify a broad interpretation. However what they seized on was the concept of an "unlawful act". *Lonrho* clearly holds that a breach of a penal statute only constitutes illegal means, for the purposes of the tort of unlawful interference, when a statutory duty is created. If that is also the case with the distinct equitable jurisdiction, then obviously *Island Records* must be wrong: and that is what in effect the court held, although their reading of Lord Diplock's judgment certainly stretched the point. It seems inevitable that the only solution lies in the House embarking on a thorough reconsideration of the cases relating to both jurisdictions and deciding whether or not they are to remain separate — and, if so, whether or not the same concept of illegal means should apply in each case.

There seems to be at least one good reason for emphasising the distinction between the innominate tort and the equitable jurisdiction. It has been argued that intention to harm must be a key element in the tort of unlawful interference. However it is arguable that the causing or contemplation of foreseeable (but not intended) damage as the result of an illegal act is sufficient for an injunction to be obtained. This appears to follow from *Gouriet's case*,<sup>101</sup> where the House of Lords indicated that the plaintiff might have been able to restrain the defendant union from contravening a penal statute if special damage could be shown. But it is obvious that on the facts of the case no question of the union "aiming" its action at the plaintiff arose — the damage would clearly have been incidental. Hence it seems foreseeability may be enough where the equitable principle is invoked.<sup>102</sup>

## (6) ILLEGAL MEANS

The concept of illegal means is obviously central to the torts discussed in this article. While it has long been obvious that commission of a tort or a crime will satisfy the requirement, considerable uncertainty has existed with respect to other "unlawful" acts. Recent cases have focussed on two particular areas of difficulty.

The first concerns an issue central to the use of the economic torts in the industrial sphere. The most controversial aspect of *Rookes v Barnard*<sup>103</sup> was not in fact the resuscitation or rediscovery of intimidation, but rather the decision that breach of contract could amount to an illegal act for the purposes of that tort, and presumably for others as well.<sup>104</sup> This has attracted considerable criticism, not least

100 Ibid 782.

101 Supra n 87.

102 Cf *RCA v Pollard* supra n 94 at 781 per Oliver LJ.

103 Supra n 39.

104 Cf Lord Devlin, supra n 57.

from "purists" who view with horror the possibility of effectively being able to sue for breach of a contract to which one is not a party, or indeed of intentional breach of contract becoming tortious.<sup>105</sup> However the major practical problem created by *Rookes* lies in its potential to make almost all strikes illegal. It is generally accepted that there should be some freedom to strike, within the bounds set by the law: *Rookes* appears to allow no bounds at all. However the conclusion presupposes (a) that a strike<sup>106</sup> necessarily amounts to a breach of contract, and (b) that all breaches amount to illegal means.

In *Morgan v Fry*<sup>107</sup> the Court of Appeal used both these escape routes to avoid concluding that a strike was illegal and that a threat thereof to secure the dismissal of a non-unionist was actionable as intimidation. The defendants had issued a strike notice of two and a half weeks length, common practice where the strike is "official". All three judges made it clear that they had no desire to do away with the right to strike by holding such strike notices of "proper" length illegal. But a strike notice appears to be nothing more than notification of an intention to break the contract of employment by not working. At first sight the only way out is to construe it as a collective intimation by the strikers of an intention to terminate their contracts by the lawful period of notice (here one week).<sup>108</sup> But termination of the employment relationship is usually "the last thing that either side would desire".<sup>109</sup> Davies LJ nevertheless considered this the only possible solution, construing the notice as a discharge of the existing contract and an offer to continue on different terms.<sup>110</sup>

Lord Denning MR tried to have the best of both worlds, using the fact of common acceptance of strike notices to justify an implication into contracts of employment generally that a striker's contract is suspended during a strike, "reviving" when it is over.<sup>111</sup> However in *Simmons v Hoover Ltd*<sup>112</sup> the Employment Appeal Tribunal rejected this suggestion, referring particularly to the Report of the Donovan Royal Commission,<sup>113</sup> where the theoretical and practical objections to any doctrine of suspension are set out. On the other hand Russell LJ challenged the assumption that *Rookes* required a conclusion that all breaches of contract amount to illegal means. He distinguished *Rookes* on the ground that there was a "flagrant" breach of a no-strike pledge and considered it not to be a precedent binding upon him in the instant

105 See eg Wedderburn, "Intimidation and the Right to Strike" (1964) 27 MLR 257; Sykes, supra n 5 at 231-232. Cf Elias and Ewing, supra n 5 at 334; Weir, "Chaos or Cosmos? *Rookes*, *Stratford* and the Economic Torts" [1964] Camb LJ 225.

106 There is of course also the problem of whether industrial action short of a total stoppage amounts to a breach of contract. The answer will inevitably turn on the facts of each case; but note *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 All ER 949 where a "work to rule" was held to breach an implied term of "co-operation" owed by the employees under their contracts of service: see Napier, "Judicial Attitudes Towards the Employment Relationship" (1977) 6 ILJ 1, 7-11.

107 [1968] 2 QB 710.

108 See eg *White v Riley* [1921] 1 Ch 1; *Nimmo v Diversi* (1926) 20 QJPR 141. Cf *Coffey v Geraldton Lumpers' Union* (1928) 31 WALR 33.

109 Supra n 107 at 731 per Davies LJ.

110 Ibid 731-732.

111 Ibid 727-728.

112 [1977] QB 284.

113 UK, Royal Commission on Trade Unions and Employers' Associations (Donovan, Chairman), *Report Cmnd 3623* (1968) §943.



case.<sup>114</sup> He thus felt free to hold that, if there was a breach here, it would not amount to illegal means. He reasoned that a threat of lawful termination would impose the same or even greater pressure than the threat of breach, the latter in fact being preferable to the employer: thus if one were not illegal, then neither should be the other.<sup>115</sup> However this analysis has not subsequently been adopted, despite there being frequent occasions when clearly it could have been used.

In *Latham v Singleton* Nagle CJ considered *Morgan v Fry* and decided to apply it to the extent that it held that a strike notice is not to be taken as a breach of contract, provided it would be sufficient notice of termination: this is obviously a synthesis of the views of Lord Denning and Davies LJ.<sup>116</sup> However he held that there was a breach of contract in the case before him. One of the reasons given, and the obvious one, was that no notice of any sort was given by the strikers, let alone one of correct length: they had simply refused to start work when they should have done.<sup>117</sup> But the principal reason given is extremely curious. It was held that the defendants were really in dispute with their fellow employee, Latham, rather than their employer, and that they had never "spelled out" any demand as to what action they wished to be taken: accordingly their actions could not properly be described as "withdrawal of labour in furtherance of a trade dispute" and hence did not constitute a "strike"! <sup>118</sup> The words quoted are Lord Devlin's definition of a strike in *Rookes v Barnard*,<sup>119</sup> and reference was also made to legal dictionaries and to s5 of the Industrial Arbitration Act 1940 (NSW). Now it is strange enough that the judge was unable to find a demand implicit in a concerted refusal to work with a particular individual; but what is even more unsatisfactory is the importance attached to definitions which are totally irrelevant. The term "strike" has no legal significance at common law; and if it is given any by a State industrial code for the purposes of that State's arbitration system, that is still irrelevant to the question of breach of contract. It can only be assumed that that part of the judgment in *Latham* is per incuriam.

The second area of recent attention with respect to the definition of illegal means concerns the contravention of penal statutes. If, in "aiming" economic harm at the plaintiff, the defendants act in breach of a statutory duty, may that fact be relied on to establish tortious liability? The question has peculiar significance in Australia, for in each State (except now South Australia) penal provisions exist which impose liability on unions for various forms of "illegal" strikes.<sup>120</sup>

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114 Cf Lord Denning MR, supra n 107 at 724.

115 Ibid 735-738.

116 Supra n 40 at 861-863. It is not clear which view was preferred, although there is a reference to the practical difficulties with the concept of suspension (supra n 113); ibid 862. One consequence of the adoption of the majority view in *Morgan* is obviously the acceptance of the proposition that any breach of contract may amount to illegal means, a question left open by Mason JA in *Sid Ross Agency Pty Ltd v Actors & Announcers Equity Association of Australia (No 2)* [1971] 1 NSWLR 760, 768.

117 Ibid 865-866.

118 Ibid 864-865.

119 Supra n 39 at 1204.

120 NSW: Industrial Arbitration Act 1940, Pt X; Vic: Essential Services Act 1958, s11; Qld: Industrial Conciliation and Arbitration Act 1961, s36A, Essential Services Act 1979; WA: Industrial Arbitration Act 1979, s97; Tas: Industrial Relations Act 1975, s49. Equivalent provisions in South Australia have now been repealed by s55 of the Industrial Conciliation and Arbitration Act Amendment Act 1984: infra at n 162.

The difficulty arises when the statute in question is not interpreted, on its "true construction", as impliedly creating any enforceable rights or duties: that is, where no action lies for the defendant's breach of duty, because the plaintiff is not a member of a particular class for the benefit of whom the prohibition was imposed and has suffered no special damage as a result of the infringement of a "public right".<sup>121</sup> In *Ex p Island Records Ltd*, as has been seen, a remedy was granted by Lord Denning MR and Waller LJ, relying on the breach of s1 of the Dramatic and Musical Performers' Protection Act 1958 (UK) as illegal means: this was despite the decision that the Act created or was assumed to create no private rights.<sup>122</sup> However in *Lonrho v Shell* the House of Lords, having held that the sanctions order there at issue did not, on the orthodox text, impose any duty for the benefit of a particular class or create any public right, concluded that the oil companies' (assumed) breach could not constitute illegal means.<sup>123</sup> Lord Diplock specifically rejected both Lord Denning's "general principle" in *Island Records*<sup>124</sup> and the High Court's *Beaudesert* formulation,<sup>125</sup> in so far as they incorporated a definition of illegal means which included any breach of statute not considered on its construction to fall within either of the stated categories. Thus the construction test has been unequivocally adopted in England.<sup>126</sup>

The position is less clear in Australia. On the one hand there are several cases suggesting that a strike outlawed by State industrial legislation constitutes illegal means, even though it would appear unlikely that those statutes would, on the construction test, be held to create duties enforceable by employers or victimised employees. Thus in *McKernan v Fraser*<sup>127</sup> it was assumed that, had the action taken fallen within the definition of a "strike" in the South Australian Industrial Code 1920, so as to render it illegal within s100, then the defendants would have been liable on a conspiracy by illegal means. And in *Coal Miners Industrial Union of Workers of Western Australia v True*<sup>128</sup> the High Court had no doubt in holding that the defendants had combined to do an unlawful act, viz a strike illegal under Western Australian

121 *Cutler v Wandsworth Stadium* [1949] AC 398; *Gouriet's case* supra n 87.

122 Supra at nn 88-90. See also *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762; *Brekkes v Cattel* [1972] Ch 105. Cf *Cory Lighterage Ltd v TGWU* [1973] 1 WLR 792.

123 Supra n 43 at 462-463.

124 Supra at n 92.

125 Supra at n 70.

126 It might be argued that *Lonrho* does not have this effect, because the House was only dealing with foreseeable, rather than intended, loss: see eg Carty, supra n 62 at 205. But there is nothing in the judgment to suggest this — vide the rejection of Lord Denning's principle as distinct from the *Beaudesert* proposition.

For criticism of the view that the absence of a "statutory tort" necessarily means that the breach of statute cannot constitute illegal means, see Mitchell, supra n 62 at 432; Heffey, "The Survival of Civil Conspiracy: A Question of Magic or Logic" (1975) 1 Monash ULR 136, 175; Sykes, supra n 5 at 202-203. And see Clerk & Lindsell, supra n 5 at p 742, where it is pointed out, in critically examining the decision in *Rookes v Barnard* that breach of contract may constitute illegal means, that "[I]t is perhaps less difficult to defend the conclusion that A can sue B when B causes him intentional loss by a threat to commit a breach of the criminal law (for which A could not sue B in tort) than to decide that A can sue B for loss caused by a threat to break a contractual duty (for breach of which — on orthodox principles — A cannot sue B)". According to *Rookes* and *Lonrho* the true position is exactly the opposite.

127 Supra n 45.

128 (1959) 33 ALJR 224.

law.<sup>129</sup> On the other hand the picture is rather confused by *Williams v Hursey*,<sup>130</sup> decided six days before *True*. Although the High Court found a variety of illegal acts committed in the course of picketing directed against the plaintiffs, it also appeared that the defendants were in breach of various sections of the Stevedoring Industry Act 1956 (Cth). Taylor and Menzies JJ held that these breaches constituted illegal means, the former adding that it was unnecessary to decide whether the relevant sections created any statutory tort.<sup>131</sup> However Fullagar J, with whom Dixon CJ and Kitto J agreed, expressly held that no enforceable civil duty was created.<sup>132</sup> Although the judgment is not entirely clear, it seems that Fullagar J was concluding that these breaches were not, unlike the "clear infringement" of common law rights, available as unlawful means: otherwise there would have been no need to consider the question of enforceability.

To this must be added the line of cases in which the *Beauesert* decision has been discussed. In the original decision it was stated that it was not "possible to adopt a principle wide enough to afford protection in all circumstances of loss to one person flowing from a breach of the law by another, for regard must be had to the limitations which the law has placed upon the right of a person injured by reason of another's breach of a statutory duty to recover damages".<sup>133</sup> This has been seized upon by later courts clearly wary of the High Court's new principle. Thus in *Grand Central Car Park Pty Ltd v Tivoli Freeholders*<sup>134</sup> McInerney J rejected the argument that the carrying on of a car-parking business without a permit as required by the Town and Country Planning Act 1961 (Vic) amounted to an unlawful act for this purpose. He held expressly that no civilly enforceable duty was created by the Act in favour of objectors to the grant of a permit. The point was also adverted to by Mason J in *Kitano v The Commonwealth*.<sup>135</sup> Having held that the plaintiff's loss was not the "inevitable" consequence of the defendants' contravention of s122 of the Customs Act 1906 (Cth), and having noted counsel's concession that the section created no civilly enforceable duty, he said that to succeed with an action on the case the plaintiff "must show something more than a mere breach of the statute as consequential damage; he must show something over and above what would ground liability for breach of statutory duty if the action were available".<sup>136</sup>

Evidently the construction test has been adopted as far as the *Beauesert* version of unlawful interference is concerned.<sup>137</sup> While of course that can be explained on the basis of judicial enthusiasm for distinguishing that decision, nevertheless these cases, and the majority

129 See also *Southan v Grounds* (1916) 16 SR (NSW) 274; *Blackmore v Gas Employees' Union* (1916) 16 SR (NSW) 323.

130 *Supra* n 48.

131 *Ibid* 108-109, 125.

132 *Ibid* 79-80.

133 *Supra* n 69 at 155-156.

134 [1969] VR 62.

135 (1974) 129 CLR 151. On appeal the Full High Court adopted Mason J's reasons without comment: *ibid* 176.

136 *Ibid* 174-175. It is not clear what that "something" more might be: but obviously the plaintiff must at least show that a statutory tort is created.

137 In that light it is odd that Lord Diplock in *Lonrho* should have felt the need to reject *Beauesert* to the extent that it did not adopt a construction approach.

decision in *Hursey*, make it impossible to conclude that *Lonrho* would not be followed by an Australian court. Since *Rookes v Barnard* the focus has, quite naturally, been on breach of contract as supplying the necessary illegal means. However breach of State industrial legislation may be relevant in the situation, referred to earlier, where employees strike by giving notice of termination of their contracts, thus avoiding being in breach. It appears that such action may nevertheless constitute a "strike" within the definition typically adopted by State legislatures.<sup>138</sup> If that is the case, and the construction test is adopted, then even that avenue of lawful industrial action will (assuming that it escapes the implications of the *Merkur* decision<sup>139</sup>) be closed.

#### (7) JUSTIFICATION<sup>140</sup>

The possibility of pleading a defence of justification to a civil action brought in respect of prima facie unlawful industrial action has lain beneath the surface of several of the leading decisions of the past twenty years. That it did not see the light of day until the recent case of *Latham v Singleton*<sup>141</sup> can be ascribed to the fact that most of those decisions involved the use of illegal means. Even where liability has been founded on direct contractual interference, where of course no independent illegality need be shown, justification has rarely been pleaded with success.<sup>142</sup> In particular, unionists have not been allowed to plead that they acted in pursuance of their legitimate trade interests.<sup>143</sup> In that light the prospect of justifying industrial action involving the commission of illegality would have seemed remote. Nevertheless the possibility was left open in several dicta in the English cases,<sup>144</sup> and in *Davies v Nyland*<sup>145</sup> Zelling J went so far in his dissenting judgment in the South Australian Supreme Court to say that

"the defendants might well have had justification for what they were doing in that they were promoting their own interests and were not activated by a simple desire malevolently to injure the respondents".<sup>146</sup>

*Latham v Singleton* appears to be the first Australian (or English) case of recent times where the defendants even bothered to plead justification. Since on the facts Nagle CJ had concluded that they had conspired to intimidate the plaintiff, the issue of whether it is ever possible to justify the use of illegal means had to be squarely faced. The judge held that justification could in principle be pleaded,<sup>147</sup> citing the dicta referred to

138 See eg *Ex p Brennan* (1915) 15 SR (NSW) 173. See Sykes, supra n 5 at 85-87.

139 Supra at n 36ff.

140 See generally Heydon, supra n 53.

141 Supra n 40.

142 In the industrial sphere the notable exception is *Brimelow v Casson* [1924] 1 Ch 202.

143 See eg *South Wales Miners' Federation v Glamorgan Coal Co* [1905] AC 239. Cf conspiracy to injure, where of course that concept is not a defence but rather an element of the tort, it being necessary for the plaintiff to prove its absence: supra at n 46. For an explanation of the differing approaches adopted in the two torts, see Heydon, supra n 53 at 171.

144 See eg *Rookes v Barnard* supra n 39 at 1206 per Lord Devlin; *Morgan v Fry* supra n 107 at 729 per Lord Denning MR; *Cory Lighterage Ltd v TGWU* [1973] 1 WLR 792, 814-815 per Lord Denning MR.

145 (1975) 10 SASR 76.

146 Ibid 113. The majority judges did not consider the issue of justification, as it had not been argued on appeal: ibid 101 per Bray CJ.

147 Supra n 40 at 867-870.

above and also two decisions at first instance in Canada and New Zealand, *Posluns v Toronto Stock Exchange*<sup>148</sup> and *Pete's Towing Services Ltd v Northern Industrial Union of Workers*.<sup>149</sup>

These latter decisions hardly provide a sound basis for concluding that illegal means may be justified. As far as *Posluns* went Nagle CJ referred to a passage in the judgment clearly dealing with, and citing authorities on, justification of "intervention" unlawful in itself — that is, direct contractual interference;<sup>150</sup> and completely ignored the unequivocal statement that "where the *methods* of intervention are in themselves unlawful, *there can be no justification*".<sup>151</sup> Equally the New Zealand case was a case of direct inducement alone (intimidation being ruled out on the facts) and the authorities referred to in the judgment reflected that. What is more, considerable reliance was placed on the remark of Romer LJ in the Court of Appeal in *Glarorgan Coal Co v South Wales Miners' Federation*<sup>152</sup> that in considering a defence of justification,

"regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach".

What Nagle CJ did not mention was that in the same case the House of Lords expressly held that pursuit of trade union objectives per se will not found a defence, even where, as in that case, there is no independent illegality.<sup>153</sup>

To accept that justification is ever available in a case of illegal means is difficult enough, let alone to consider that it might be founded on a notion of promoting union interests. But to state, as Nagle CJ did, that "if what the defendant did was genuinely considered by him to be for proper union purposes it should normally be accepted as justification",<sup>154</sup> is breathtaking in the face of the authorities. In the result the judge found some, but not all, of the defendants justified in taking action against Latham, evidently where he was satisfied that there was a predominant, albeit mistaken, motive of serving the union's interests. Instances where the defence was rejected included cases where the predominant motive was spite and malice towards the plaintiff; where the fact that "official" union channels were not used indicated a desire to punish the plaintiff for his past behaviour (this "principle" being considered to bear too remote a connection with union purposes); and where a defendant claimed to act according to a principle that each person has the right to choose not to work with another individual.<sup>155</sup>

If *Latham* is accepted it will have revolutionary consequences for the industrial torts, for in most cases it would seem clear that a defence of

148 (1964) 46 DLR (2d) 210.

149 [1970] NZLR 32.

150 Supra n 148 at 270-271.

151 Ibid 286. Emphasis supplied.

152 [1903] 2 KB 545, 574.

153 Supra at n 143. The point is recognised even in the passage from *Posluns* cited by Nagle CJ.

154 Supra n 40 at 873.

155 Ibid 872-875.

legitimate union interests could be made out on the facts. However that can only rest on judicial acceptance that public policy demands the legality of most strike action. In the light of the willingness of courts to develop the common law in the past twenty years to a point where that is virtually never the case, justification apart, that might seem unlikely. It is true that in *McKernan v Fraser* and the *Crofter* case judges bit the bullet and recognised the promotion of union interests as being "legitimate":<sup>156</sup> but that was in the context of the "anomalous" tort of conspiracy to injure, and was in practical terms demanded to offset the favouritism previously shown to commercial, as opposed to industrial, combinations.<sup>157</sup> Nevertheless it may be that in Australia, where there is not merely tolerance of unions but rather institutionalised encouragement,<sup>158</sup> there is some prospect of further development of the defence of justification to counteract the ever-increasing encroachments on the elusive (and illusory) "right to strike".

### (8) LEGISLATIVE INTERVENTION

Since 1906 in the United Kingdom attention has been equally divided between a creative judiciary's development of the common law and successive Parliaments' resolve to negate that process by providing immunities to those committing economic torts while acting "in contemplation or furtherance of a trade dispute".<sup>159</sup> In Australia on the other hand the prevailing attitude of State and Federal governments alike has been one of non-intervention. The only exception has been Queensland, which enacted an immunity provision along the lines of that contained in the English Trade Disputes Act 1906: this was repealed in 1976, by which time its wording had in any event long been outflanked by judicial ingenuity. Attempts were made in South Australia in 1972 and by the Federal government in 1973 to introduce more wide-ranging protection, but both Bills foundered in the respective Upper Houses.<sup>160</sup>

The picture has however recently changed with the enactment in South Australia of the Industrial Conciliation and Arbitration Amendment Act 1984. Section 50 of that Act introduces s143a into the Industrial Conciliation and Arbitration Act 1972.<sup>161</sup> This provides that

"no action in tort lies in respect of an act or omission done or made in contemplation or furtherance of an industrial dispute",

except where death, personal injury or physical property damage has been occasioned, or where the action is for conversion, detinue or defamation. However the immunity will not apply either (a) where a dispute has been resolved by conciliation or arbitration under the State Act, or (b) where the Full Commission determines, on application, that all means available under the Act for resolving a dispute have failed and there is no immediate prospect of its resolution. Section 55 of the

<sup>156</sup> *Supra* n 45.

<sup>157</sup> See *Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25; *Quinn v Leatham* [1901] AC 495.

<sup>158</sup> See Conciliation and Arbitration Act 1904 (Cth), s2(e) and similar statements in State legislation.

<sup>159</sup> See now UK: Trade Union and Labour Relations Act 1974, s13; Employment Act 1980; Employment Act 1982.

<sup>160</sup> See Mitchell, *supra* n 62 at 454-455.

<sup>161</sup> See Cawthorne, *Review of the Industrial Conciliation and Arbitration Act: Report on the Requirements for Legislative Change* (1982) 9-10.

Amendment Act also repeals the penal provisions formerly contained in Division II of Part X of the principal Act.<sup>162</sup>

Although this new immunity will not remove the common law completely from the industrial scene,<sup>163</sup> it will inevitably reduce whatever likelihood currently exists of tort actions being initiated. In that light a number of questions arise as to the scope of s143a:

(a) "No action in tort . . ." This form of drafting avoids the problems faced by the UK Parliament in simultaneously covering each of the nominate torts (as well as the innominate tort of unlawful interference) and anticipating future developments in the common law.<sup>164</sup> However there are a number of relevant actions which might fall outside the definition. Most importantly there is the equitable jurisdiction to protect "property" rights discussed earlier: although in one sense an alternative version of the innominate tort, an action for an injunction on that basis would not seem to be an "action in tort", strictly speaking.<sup>165</sup> Another important example would be a restitution action to recover money paid by the employer under "economic duress", eg the threat of industrial action. This too is not an action in tort, as the House of Lords recently held.<sup>166</sup>

(b) "in contemplation or furtherance . . ." This phrase has since 1906 formed part of the "golden formula" conferring immunity on strikers in Britain.<sup>167</sup> One aspect of that formula which has received particular attention is whether or not it embodies a subjective or objective test. Is it enough that the defendant genuinely and honestly believed that the action taken would further a dispute? Or is there an objective element, so that the action must appear reasonably capable of achieving that object? The question is obviously important in the case of a union acting in the honest but misguided belief that a dispute exists or that it is assisting a party to a dispute. After several Court of Appeal decisions suggesting an objective test, the House of Lords firmly decided that an honest belief would suffice.<sup>168</sup> It is hoped that a similar interpretation would be adopted by Australian judges.

(c) "industrial dispute . . ." That phrase is of course defined very widely in the South Australian Act.<sup>169</sup> Obviously there is room for

162 These provisions have in recent years been a dead-letter in practice owing to the procedural restrictions placed on bringing an action in respect of an "illegal" strike — and of course the unwillingness of employers to seek the imposition of penal liability. In that light the recent proposal by the Queensland Government to introduce tough new penal legislation outlawing picketing, secondary boycotts and "harassment" of non-unionists (*Brisbane Courier-Mail* 30 Apr 1984) will no doubt seem strange to those more familiar with the realities of industrial relations. The point might also be made that the common law liabilities with which this article is primarily concerned are more than adequate, if left unchecked, to accommodate any employer desires to penalise strike action.

163 Contrary to the government's original intention: *infra* at n 171.

164 See Mitchell, *supra* n 62 at 454-455.

165 Cf Clerk & Lindsell, *supra* n 5 at 781-782.

166 *Universe Tankships Inc v ITF* [1982] 2 WLR 803.

167 See Clerk & Lindsell, *supra* n 5 at §15-38.

168 *Express Newspapers Ltd v McShane* [1980] AC 672. The Thatcher Government was quick to react to the decision. Section 17 of the Employment Act 1980 removed immunity from certain types of "secondary action", though unions are given a defence if they take action which is (objectively) likely to disrupt a contract between the employer-disputant and its supplier or customer.

169 Industrial Conciliation and Arbitration Act, s6(1) (definitions of "industrial dispute"

controversy over whether strikes motivated by social or political concerns which have no more than incidental relevance to the employment relationship are covered. However one feature of the proposed immunity is that it does not require that a dispute exists with the plaintiff, so long as there is a dispute which the defendant is seeking to further.<sup>170</sup>

(d) The scope of the exceptions, where the immunity does not apply, is quite interesting. The final form of s143a(3) mirrors the proposal contained in the Cawthorne Report.<sup>171</sup> In its original form, however, the Bill introduced by the Government would have permitted an action to be brought only in "special" cases where the Commission was satisfied that "the action would not, in the circumstances of the case, unduly impair amicable industrial relations". Under this latter formula it could confidently have been predicted that common law actions would follow the old penal provisions onto the industrial scrap-heap. As it is the amended version of the exception (forced on the Government by an Opposition-controlled Legislative Council) may still only have limited effect. In the first situation it envisages, where a dispute has been settled, a tort action could only serve a compensatory rather than a tactical function; as noted earlier,<sup>172</sup> such examples of its use are rare, being usually confined to actions by employees. The second situation, total failure of resolution machinery, could easily be avoided by the union or workers involved taking care to leave open some negotiating position so as to ensure that attempts at conciliation are prolonged; and it would seem unlikely that the Commission would be prepared to accept that complete employer intransigence could produce a situation where all means of resolution had been exhausted, for to do otherwise would be to invite employers to avoid negotiation so as to reserve the possibility of an action.

## (9) CONCLUSION

After considerable use in the early part of the century<sup>173</sup> civil actions more or less fell out of favour until a revival of interest in the 1970s.<sup>174</sup> This coincided with the upsurge of judicial activity in England after *Rookes v Barnard* and with the demise of the bans clause as an effective legal sanction after the O'Shea incident.<sup>175</sup> Nevertheless the Swanson

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169 *Cont.*

and "industrial matter"). See *Building Trades — Carpenters (Question of Law) Case* (1975) 42 SAIR 737; *BHAS Industrial Agreement (Referral of Question of Law) Case* (1976) 43 SAIR 1; *R v Industrial Commission of SA; Ex p Master Builders' Association of SA Inc* [1981] AILR §185.

170 Cf *Duport Steels Ltd v Sirs* [1980] 1 WLR 142.

171 *Supra* n 161. However the further recommendation (*ibid* 8-9) that the Act's penal provisions be replaced by a power in the Commission "to make orders in respect of industrial action" has not been adopted.

172 *Supra* at n 3.

173 In addition to cases already cited in this article, see *Martell v Victorian Coal Miners' Association* (1903) 29 VLR 475; *Brisbane Shipwrights' Union v Heggie* (1906) 3 CLR 686; *Roscoe v Wells* (1909) 11 WALR 184; *Nolan v SA Laborers Union* [1910] SALR 85.

174 See the *Actors Equity* cases, *supra* nn 41 and 63; *Woolley v Dunford* *supra* n 21; *Davies v Nyland* *supra* n 145. There have also been many unreported cases: see eg the *Adriatic Terrazzo* case and others referred to in Portus, "Civil Law and the Settlement of Disputes" (1973) 15 JIR 281, esp n 1; and the *Rolph* cases in Tasmania, noted by Davidson, "Left Turn at Main Junction Leads to Dead End" (1975-1977) 5 U Tas LR 80.

175 See Sykes, *supra* n 5 at 293.



Committee, concerned at the use of industrial action to uphold retail price-maintenance arrangements for commodities such as bread and petrol (where unions were attempting to protect the long-term job security of their members), concluded in 1976 that the common law liabilities available to employers were a "dead-letter in practice" and recommended legislative action.<sup>176</sup> The newly-installed coalition Government used this as an excuse to introduce s45D (and, later s45E) into the Trade Practices Act 1974 (Cth). These sections, far from being restricted to anti-competitive conduct, enable employers to seek injunctions<sup>177</sup> against all use of that common industrial tactic, the "secondary boycott" — where employees take action disrupting the commercial relations between their employer and a "target", against whom the action is primarily being directed, either because they wish to take sympathetic action to further a dispute carried on by the target's employees, or for industrial or social ends of their own, but in either case not directly related to their own conditions of employment.<sup>178</sup>

The Hawke Government has now announced its intention to repeal ss45D and 45E, and a Bill to that effect will be introduced into Parliament in the 1984 Budget session.<sup>179</sup> However it is likely that the Conciliation and Arbitration Commission's jurisdiction to conciliate disputes over secondary boycotts<sup>180</sup> will be left in place and perhaps in certain circumstances extended to include a power of arbitration.<sup>181</sup> If all this were to happen, several interesting questions would be posed as to the future of the industrial torts.

There is no doubt that s45D did very little that could not be accomplished by common law proceedings.<sup>182</sup> If workers take industrial action, it will almost always involve illegal means, and the "aiming" of the action at the target will certainly then be enough to ground liability in one of the economic torts. If the common law was in 1976 a "dead-letter" in practice, because employers were not keen on applying legal sanctions to the detriment of their industrial relations, then it was hard to see why the statutory liability should fare any better. Nevertheless

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176 Aust, Trade Practices Act Review Committee (Swanson, Chairman), *Report* (1976), §10.11-10.20.

177 The provisions for the imposition of penalties and/or the recovery of damages are in practice rarely used, for the same reason as is given supra at n 3.

178 Section 45D(1A) also penalises certain primary boycotts, where directed at overseas, interstate or territory trade. A fuller account of s45D (and also the complementary s45E) is outside the scope of this article. See Sykes, supra n 5 at ch 9; Creighton, "Secondary Boycotts Under Attack — The Australian Experience" (1981) 44 MLR 489.

179 The proposal is contained in an exposure draft of a Trade Practices Amendment Bill 1984, issued by three Government Ministers as part of a document, *Trade Practices Act — Proposals For Change* (Feb 1984). Also attached is a Discussion Paper on "The Trade Practices Act and Trade Unions".

180 Conciliation and Arbitration Act 1904 (Cth), Pt III, Div 5A. And see Trade Practices Act 1974 (Cth), s 80AA (Federal Court may stay operation of injunction if conciliation proceedings pending before Commission).

181 See Discussion Paper, supra n 179 at §3.24-3.31. This would, as is recognised, be subject to constitutional considerations: but it is suggested that various powers other than the conciliation and arbitration power (Constitution, s51(xxxv)) be used, eg over corporations, trade and commerce, Territories etc.

182 With the notable exception of the draconian provisions of sub-s (5), which placed a heavy burden on unions to absolve themselves of responsibility for unofficial action by their members (cf *GAS (UK) Ltd v TGWU* [1975] ICR 276). The subsection was ruled invalid by the High Court in *Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 40 ALR 609.

s45D has been used to a considerable and surprising degree.<sup>183</sup> The willingness in some business quarters to employ it against strikers would logically lead to the conclusion that, should the Government leave the economic torts intact, there will be an upsurge in their use following the demise of the penal legislation. And of course there remains the potential of the common law as an avenue for relief for employees who, as in *Rookes v Barnard* and *Latham v Singleton*, have been the target of union pressure.

It is possible however that the Government will turn its attention to the industrial torts—

“There would appear to be some basis in practice for the view that resort to common law remedies can upset conciliation proceedings before the Conciliation and Arbitration Commission and make it extremely difficult to resolve a dispute. Consideration could be given, therefore, to the Conciliation and Arbitration Act containing a prohibition, subject to constitutional considerations, on the taking of common law proceedings while a dispute involving secondary boycott activity was before the Commission.”<sup>184</sup>

There seems no reason indeed why secondary boycotts should be singled out (that of course being one of the major criticisms of s45D), and it may be that a wide-ranging prohibition of that kind could be instituted — indeed, it can to some extent already claim to have the backing of unofficial practice.<sup>185</sup> However it seems that, unless powers other than s51(xxxv) of the Constitution are employed,<sup>186</sup> any such provision (or indeed any legislative immunity from civil proceedings) would necessarily be restricted to cases involving “industrial disputes”, within the constitutional meaning of that term. The High Court has in the past adopted a very narrow interpretation of the phrase:<sup>187</sup> but even if the landmark decision in the *Social Welfare* case<sup>188</sup> presages a reversal of that trend, certain disputes (perhaps of a “political” nature, and certainly intra-State disputes) will inevitably still be excluded. Thus it seems likely that, somewhere in Australia at least, the common law liabilities will continue to demand attention.

183 Thus despite the change of government the Trade Practices Commission reported three cases of injunctions being granted against unions in the last quarter of 1983 alone: see *Trade Practices Developments October-December 1983* (Bulletin no 17).

184 Discussion paper, supra n 179 at §3.38.

185 See eg *Dartim Shipping Co Ltd v McGuinness* (1958) 2 FLR 216; *Harry M Miller Attractions Pty Ltd v Actors & Equity Association of Australia* [1970] 1 NSWLR 614 where judges refused to hear economic tort proceedings brought in connection with industrial disputes over which the Federal Commission had jurisdiction.

186 Supra n 181.

187 See Lane, *The Australian Federal System* (2nd edn 1979) 287-337.

188 *R v Coldham; Ex p Australian Social Welfare Union* (1983) 47 ALR 225.